

The regulatory framework for public procurement in Nigeria

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1. Introduction

Nigeria is a federal republic in West Africa. It occupies a total area of 923,768 square kilometres, of which 909,890 square kilometres is land mass and 13,878 square kilometres is under water. With a population of 158 million people, Nigeria is the largest country in Africa and accounts for 47 per cent of West Africa's population.¹ It is also the biggest oil exporter in Africa, with the largest natural gas reserves in the continent. Nonetheless, Nigeria is still a recipient of international aid, in the form of grants and loans, among others. With a total investment of US\$13,157 billion in the country, the World Bank is one of Nigeria's most important international development partners.² There are currently twenty-eight active and seven proposed Bank projects in Nigeria. The World Bank has also influenced the emergence of Nigeria's current public procurement regime; it funded the production of Nigeria's 'Country Procurement Assessment Report' (CPAR) 2000. The CPAR laid the groundwork for the enactment of Nigeria's Public Procurement Act 2007, which is based on the 1994 UNCITRAL Model Law,³ as recommended by the CPAR.⁴

- 1 According to the World Bank's estimate as at September 2011. These figures are available on the World Bank's website, <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/NIGERIAEXTN/0,,menuPK:368906~pagePK:141132~piPK:141107~theSitePK:368896,00.html> (accessed 13 March 2012). The 2006 national population census put Nigeria's population at 140 million persons.
- 2 See <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/NIGERIAEXTN/0,,menuPK:368902~pagePK:141159~piPK:141110~theSitePK:368896,00.html> (accessed 28 March 2012); see particularly, 'Country Portfolio' on the webpage. The World Bank began a partnership with Nigeria in 1958, and after Nigeria's independence (October 1960) resumed the partnership in November 1961.
- 3 UNCITRAL Model Law on Procurement of Goods, Construction and Services with Guide to Enactment (1994) ('1994 UNCITRAL Model Law').
- 4 World Bank, *Nigeria Country Procurement Assessment Report*, vol. 1 (2000), p. 6; Nigeria is listed on the UNCITRAL website as one of the countries whose public procurement

Nigeria's administrative capital is Abuja. Nigeria is a member of the Economic Community of West African States (ECOWAS), which is a regional group of fifteen countries founded in 1975, with the mission to promote economic integration among member states. The ECOWAS Treaty 1993⁵ could be regarded as a trade agreement between the member states, especially as it indicates the eventual establishment of a common market and an economic union as part of the aims of ECOWAS.⁶ There have been progressive efforts by ECOWAS towards promoting trade among member states, to achieve the aforementioned aims.⁷ However, it does not appear that ECOWAS presently has any rule or project relating to member states' public procurement regimes.⁸ Abuja hosts the headquarters of ECOWAS – an indication of the economic and political importance of Nigeria in West Africa, and indeed in the whole of Africa.

Nigeria has thirty-six politically and fiscally autonomous federating states. Both the federal and state governments run democratically elected governments. The elected President is the executive head of the federal government; while each state has an elected governor. The federal and state governments have separate legislatures, composed of elected members from various constituencies/districts delineated in the states. There is a bicameral legislature at the federal level, called the National Assembly, comprising the Senate and House of Representatives; while each of the states has a unicameral legislature, called the State House of Assembly. Most of the laws made by the National Assembly apply to the whole federation.⁹ Both the federal and states legislatures have oversight powers, which entail investigating the affairs of relevant authorities, government ministries, departments and agencies (MDAs) that are within their legislative competencies.¹⁰ This is intended to enable the legislatures to make laws with respect to any matter within their legislative competences and correct any defects in existing laws. This power is also meant to expose

legislative texts are based on or largely inspired by the UNCITRAL Model Law: www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/1994Model_status.html (accessed 25 March 2012).

5 The Treaty establishing the ECOWAS was signed in Lagos, Nigeria, on 28 May 1975.

6 ECOWAS Treaty, Art. 3(2)(d) and (e).

7 To a large extent, there has been a free movement of citizens of member states within the ECOWAS territory.

8 Also, Nigeria is a member of the World Trade Organization (WTO), but not a party to the WTO's Agreement on Government Procurement.

9 The Constitution of the Federal Republic of Nigeria, 1999 (amended), s. 4(1)–(5) (the 'Constitution').

10 *Ibid.*, ss. 88 and 128.

corruption, inefficiency or waste in the execution or administration of laws within the legislative competences of the respective legislatures and in the disbursement or administration of funds appropriated by them. The states, Abuja and the federation have separate High Courts. Appeals from these High Courts go to the Court of Appeal, and then to the Supreme Court of Nigeria.¹¹ The Nigerian judiciary is an offshoot of the English common law, which is part of Nigeria's colonial heritage.

The Nigerian Constitution vests the federal and the state governments with power and control over public funds accruing to them.¹² Expenditures from public funds by the governments of the federation and states are provided for in their separate annual budgets, authorised by means of an Appropriation Act or Law. Consequently, there are separate public procurement regimes for the federal government and the states. However, the public procurement regime at the federal level overshadows the procurement regimes in the states, owing to the larger size of the federal revenue and the existence of federal agencies in all the states. Moreover, the procurement legal frameworks in practically all the states are largely an adaptation of the past or present federal procurement regimes. This is as a result of a deliberate national policy to harmonise public expenditure management in Nigeria and also because all the states depend for their sustenance on the Federation Account,¹³ funded mainly by oil revenues controlled by the federal government.

This chapter will focus on the public procurement regime of Nigeria's federal government, but will also make reference to the procurement regimes in the states where appropriate.

2. Introduction to the public procurement system

2.1. *The objectives of public procurement policy*

The public procurement policy objectives of Nigeria can be gleaned from the Public Procurement Act 2007 (PPA). The Act does not expressly state what its objectives are, but section 16 (entitled 'Fundamental Principles for Procurements') contains what could reasonably be assumed to be the policy objectives. It states that 'all public procurement shall be conducted . . . in a manner which is transparent, timely, equitable for ensuring accountability and conformity with this Act and regulations

11 There are other courts in Nigeria apart from those mentioned herein.

12 Constitution, ss. 80–83 and 120–123. 13 *Ibid.*, s. 162.

deriving therefrom; with the aim of achieving value for money and fitness for purpose; in a manner which promotes competition, economy and efficiency.¹⁴ These largely correspond with the procurement objectives suggested by the 1994 UNCITRAL Model Law, which are adopted by most national procurement systems.

At present, transparency has become a weighty matter in Nigeria's public procurement policy. This is owing to the government's drive to achieve value for money and stem corrupt practices in public procurement – perceived to be high and debilitating to the Nigerian economy.¹⁵ President Goodluck Jonathan succinctly captured the situation thus:

We must look at our procurement process if we must move fast, because whenever I travel out of this country to another and I happen to see some infrastructural development, I always ask about the cost of execution. And sometimes the cost I am told is three times less of what we are charged in this country . . . [M]oney that will give us three times the price of something, but ended up giving us only one. For instance, money that will give us three vehicles, we end up getting one; money that will give us three dams, we are getting one. Money that will give us 30 kilometres of road we are getting 10. Then our visioning will not materialize.¹⁶

In furtherance of the policy of stemming corruption and enhancing value for money in public procurement through transparency, civil society organisations (CSOs) have been vested with the right to participate in procurement proceedings as observers to monitor compliance with procurement rules.¹⁷ The role of CSOs as procurement observers in Nigeria entails having access to and analysing solicitation and bidding documents; being present to observe procurement proceedings; and gaining access to procurement records and information.¹⁸ The CSOs do not have the right to interfere directly with the procurement proceedings, but they can send a report of their observations to the relevant regulatory or anti-corruption agencies for further action.¹⁹ To the credit of the CSO observers, some

14 *Ibid.*, s. 16(1)(d)–(f).

15 Transparency International, *Country Study Report on Nigeria* (2004), pp. 20 and 53–6.

16 President G. Jonathan, speaking at the first Presidential Retreat on the Implementation Plan for Vision 20:2020 and Public Private Partnership Framework for Infrastructure Development in Nigeria at the Banquet Hall, Presidential Villa, Abuja, 14 June 2010, as reported by *ThisDay Newspaper*, 15 June 2010, p. 1 (captioned 'Corruption – Jonathan Warns Contractors, Public Servants').

17 PPA, s. 19(b).

18 This right, created by the PPA, has been further strengthened by the Freedom of Information Act 2011.

19 PPA, s. 19(b)(ii).

cases of breach of public procurement rules have been identified and reported to appropriate quarters and corrective actions initiated. Nevertheless, it has been identified that procuring entities in practice invite or permit CSO observers only during the opening of bids and exclude them from other stages of the procurement processes. This is despite the fact that the Act expressly states that CSO observers shall be invited in 'every procurement process', not just bid opening. In fact, the marginal note and title of section 19 of the Act, where the role of observers is provided for, is entitled 'Procurement Implementation', whereas it is section 30 that deals with 'Bid Opening'. Indeed, these observers have the right to monitor and access information on all aspects of public procurement. The only lawful restriction to this right is the restriction on the time for accessing information provided by section 32(8) of the Act, which states that after the opening of bids, information relating to the examination, clarification and evaluation of bids and recommendations concerning award shall not be disclosed to bidders or to persons not officially concerned with the evaluation process until the successful bidder is notified of the award. Another formal involvement of CSOs in Nigeria's public procurement is their inclusion in the membership of the National Council on Public Procurement (discussed below). Other measures introduced by the PPA to enhance integrity and transparency in public procurement include: granting interested members of the public access to unclassified procurement records;²⁰ providing for supplier remedies; conferring procurement oversight power to the Bureau of Public Procurement (BPP); and providing for offences and punishment for contravention of procurement rules. These are further discussed below. It should be noted that, before the adoption of the Act, regulations on public procurement in Nigeria did not provide for any of the integrity and transparency measures above.

To protect Nigerian local industries, margins of preferences during evaluation of tender are provided in favour of local bidders and locally manufactured goods competing with foreign bidders or goods.²¹ However, it is interesting that the domestic preferences are hardly ever applied in practice. In fact, the limits and formulae for the computation of margins of preference and determination of eligibility are yet to be prescribed by the BPP. It could therefore be concluded that the government is not yet keen on pursuing the policy of promoting local industries through the application of domestic preferences. Preferential procurement is further

20 *Ibid.*, s. 38(2)(a). 21 *Ibid.*, s. 34(1).

discussed in Chapter 15 of this volume, dealing with social policy in public procurement.

2.2. *The nature and organisation of public procurement*

Nigeria's government procurement market, in the context of Africa, is comparatively large. There are separate public procurement markets for the federal government and the thirty-six states, since the states purchase for themselves. Both local and foreign contractors participate actively in the states and federal procurement markets. In particular, foreign companies have a significant presence in Nigeria's huge oil and gas subsector. The procurement systems at the federal and state levels are largely decentralised; that is, the respective governments' MDAs, including government corporations, are vested with power to procure goods, works and services for their own use. However, in the states, procurements of works contracts are mostly awarded or supervised by the Ministry of Works. In the last five years, the largest federal capital expenditures have been by MDAs responsible for transport, energy, agriculture and water resources, education, and health. It is noteworthy that the legislature and the judiciary in both the federal and state levels receive direct budgetary allocations for their expenditure (largely for administration purposes) and they conduct their own procurement through their respective administrative structures. For example, at the federal level, the National Assembly conducts its procurement through the National Assembly Management, composed of civil servants headed by the Clerk of the National Assembly.

Apart from the procurement funded by Nigeria government revenues, aid-funded projects at the federal and state levels also form part of the Nigerian procurement market. International development agencies that have developmental projects in Nigeria include the United Nations Development Programme, the United Nations Children's Fund (UNICEF) and the European Union, among others. As at September 2010, the World Bank had approved over 130 International Bank for Reconstruction and Development (IBRD) loans and International Development Association (IDA) credits to Nigeria for a total amount of more than US\$10.5 billion.²² The impact of aid-funded procurement on national procurement systems is further considered in Chapter 11 of this volume.

22 See the World Bank's website for further details, <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/NIGERIAEXTN/0,,menuPK:368902~pagePK:141159~piPK:141110~theSitePK:368896,00.html> (accessed 13 March 2012).

In Nigeria, public procurement is conducted by designated public officers in the various MDAs, under the supervision of the MDAs' respective accounting officers. The accounting officer of a procuring entity shall be the person charged with line supervision of the conduct of all procurement processes; in the case of ministries, it is the Permanent Secretary, and, in the case of extra-ministerial departments and corporations, it is the Director-General or officer of corporate responsibility.²³ At the federal level, these public officers are formed into the MDA's Tenders Board, Procurement Planning Committee, and Evaluation Sub-committee. This is intended to depersonalise the procurement process. The Tenders Board is the approving authority for the conduct of procurement within the respective MDAs; it is also responsible for the award of contracts.²⁴ A Procurement Planning Committee undertakes procurement planning in the MDAs, such as preparing needs assessment and evaluation, identifying the items required and carrying out market surveys. The Evaluation Sub-committee evaluates the bids. Notwithstanding this, political officeholders such as federal ministers and state commissioners, still become involved in the procurement process either formally or informally. In particular, at the federal level, their formal involvement entails presenting the budgets of their respective MDAs to the Federal Executive Council for adoption and subsequent presentation to the legislature. They also implement the procurement decisions of their MDAs.²⁵ Their informal involvement is in the form of influence on the procurement process, since they would, following civil service practice, be consulted (and probably deferred to) before major contract awards are made.

However, it is the accounting officer of each federal MDA that is responsible for ensuring compliance with the provisions of the Act by his entity. He is liable in person for a breach of the Act or its derivative regulations, whether or not the act or omission was carried out by him personally or by any of his subordinates.²⁶ One could argue that the liability of these accounting officers is predicated on the fact that they are the highest-ranked civil servants in their respective MDAs, and are signatories to their MDAs' accounts. Furthermore, being largely civil servants, with security of tenure and ideally being apolitical, it is assumed that they will contextually act as checks to the political heads of the MDAs and that the procurement process will to an extent be protected from being used for politicking. In *Economic and Financial Crimes Commission v. Dimeji*

23 PPA, s. 20(1). 24 *Ibid.*, s. 22(3). 25 *Ibid.*, s. 22(5).

26 *Ibid.*, ss. 16(22) and 20(1)–(2).

Bankole and Another (2012),²⁷ the High Court of the Federal Capital Territory, Abuja, absolved the accused persons, who were the former Speaker and Deputy Speaker of the Nigeria House of Representatives, of breach of trust in the procurement of a N40 billion loan for the 'running cost' of the House during their leadership. The reasoning of the court was that the Clerk of the National Assembly and other top civil servants/management staff of the National Assembly were the accounting officer of the House and signatories to the House Account respectively, not the accused persons (who were politicians), and therefore that the accused persons were neither responsible nor liable for approving the loan.

The body exercising regulatory oversight over the implementation of procurement policies by federal procuring entities is the Bureau of Public Procurement (BPP). The BPP was established by the PPA as a body corporate with perpetual succession.²⁸ Its functions include monitoring of public procurement, formulating procurement policies, setting standards, and developing the legal framework and professional capacity for public procurement in Nigeria, among others. The President of Nigeria appoints a Director-General, with certain qualifications, to head the BPP for a fixed four-year term, renewable for another four years.²⁹ The BPP enjoys a level of financial autonomy, since its funds are appropriated directly to it by the National Assembly. It is noteworthy that the BPP is not directly involved in carrying out procurement transactions; and is not represented in any entity's Tenders Board or Tender Evaluation Subcommittee. However, it can procure for its own administration.³⁰ This separation of functions is aimed at avoiding any conflict of interest in the discharge of its duties. However, the BPP's Director-General regularly attends the Federal Executive Council (FEC) meetings, and the BPP is officially presented as an agency under the Presidency. The FEC is a body of federal ministers, presided over by the President or the Vice-President.³¹ The FEC is currently the approving authority for the award of contracts valued at N1 billion and above. It has been argued that the BPP Director-General's attendance of FEC meetings may subject him to political influence.³² However, an argument to the contrary is that it gives a high standing to the Director-General to enable him to perform his functions.³³

27 Unreported as at the time of writing. 28 PPA, s. 3.

29 *Ibid.*, s. 7. 30 *Ibid.*, s. 3(2)(c). 31 Constitution, ss. 144(5) and 148.

32 Public and Private Development Centre (PPDC), *Implementing the Nigerian Procurement Law: Compliance with the Public Procurement Act 2007* (PPDC, 2011), p. 85.

33 *Ibid.*

Another body, the National Council on Public Procurement (NCPP), is established by the Act and is responsible mainly for: approving policies and regulations on public procurement; recommending the appointment of the Director-General of the BPP, and approving the appointment of the directors of the BPP.³⁴ The Act³⁵ prescribes that the NCPP shall be composed of twelve members; out of which six are specified government officials (including the Minister of Finance as chairman, and the Director-General of the BPP as the secretary); and the other six shall be representatives of specified civil society/professional organisations.³⁶ This is another formal mechanism to involve civil society and the private sector in Nigeria's public procurement process to enhance integrity through social audit and control. However, the NCPP has not been inaugurated to commence its functions. This has been so since the coming into force of the PPA, notwithstanding mounting pressures from several quarters for its inauguration. Indeed, this is a grave oversight that threatens the Nigerian public procurement system with illegality. The aforementioned functions of the NCPP, which are critical to the sustenance of the procurement system of Nigeria, have either been left unattended to or performed illegally, since the NCPP has not been inaugurated. For instance, the BPP in fact has a Director-General and directors, but their appointments have not been recommended or approved by the NCPP as required by the Act. Further, if the relevant provisions of the PPA are interpreted strictly, one would regard the procurement policies and regulations made by the BPP after the commencement of the Act as inchoate, at best, since they have not been approved by the NCPP, in accordance with the law.

Playing a pivotal role in the public procurement system of Nigeria is the Economic and Financial Crimes Commission (EFCC), established by the Economic and Financial Crimes Commission (Establishment) Act 2004. It is charged with the investigation and prosecution of financial and economic crimes in both private and public sectors of the whole federation.³⁷ There is also the Anti-Corruption Commission,³⁸ whose

34 PPA, ss. 2 and 7(1). For a critical analysis of the current position, as outlined below, see A. J. Osuntogun, 'Procurement Law in Nigeria: Challenges in Attaining Its Objectives' (2012) 21 *Public Procurement Law Review* (forthcoming).

35 PPA, s. 1(2).

36 These include the Nigerian Bar Association; the Nigerian Institute of Purchasing and Supply Management; the Nigeria Association of Chambers of Commerce, Industry, Mines and Agriculture; the Nigeria Society of Engineers; civil society (understood as referring to non-governmental organisations in the narrow sense); and the media.

37 Economic and Financial Crimes Commission (Establishment) Act, s. 6.

38 Established by the Corrupt Practices and other Related Offences Act 2003.

powers are mainly focused on corruption in the civil/public service; however, its operations are not as active as those of the EFCC. The EFCC has prosecuted, or facilitated the prosecution of, some procurement-related cases, the two most famous being *Economic and Financial Crimes Commission v. Dimeji Bankole*,³⁹ and *Federal Republic of Nigeria v. Chief Olabode George and Others*.⁴⁰ Although the offences for which the accused persons in Olabode George's case were charged were not founded on the PPA, since the offending procurement actions occurred before the Act commenced, the prosecution succeeded in securing their conviction for abuse of office in the form of splitting of contracts (contrary to section 104 of the Criminal Code Act). This demonstrates that previously existing laws could have been relied upon to tackle corruption in government procurement prior to the PPA, if government had had the will. Indeed, the Criminal Code Act and the Penal Code Act, which apply to the various states of the federation directly or by re-enactment, sufficiently provide for offences and punishments for corrupt practices in the public service that have a direct bearing on public procurement.⁴¹

Apart from the roles played by the institutions mentioned above in public procurement regulation, the BPP has other specific functions that touch on enforcement of public procurement rules, which are presented below.

2.3. *The legal regime on public procurement*

The PPA is the main legal instrument that currently regulates public procurement conducted by the Nigerian federal government. As noted earlier, this legislative instrument does not apply to the states, since they have their own public procurement regimes, although the PPA is increasingly being adopted through enactment by the states. The Act contains sixty-one sections divided into thirteen parts, and is supplemented by the Regulations issued from time to time by the BPP. The provisions of the PPA cover the steps in the procurement process from procurement

39 Another aspect of this case directly relating to the contravention of the PPA (namely, the inflation of the prices of goods purchased for members of the House of Representatives) is still pending before the Federal High Court, Abuja.

40 Suit No. LD/71C/2008, High Court of Lagos State.

41 The Criminal Code Act applies to states in the southern part of Nigeria, while the Penal Code Act applies to states in the northern parts. Both Acts were enacted before Nigeria's political independence.

planning to contract award and disposal of properties, but do not cover budgeting processes and the performance of contracts.

The budgeting and financial management practices of the federation are regulated by the Nigerian Constitution and the Finance (Control and Management) Act, in addition to government circulars in that regard. The performance of the procurement contracts awarded is governed by common law principles. Some of the common law principles of contract have been codified or modified by some extant legislation in the federation and states.⁴² Contractual rights and obligations involving the government, are protected or enforced in the regular courts of Nigeria, and there is a plethora of decided cases on this. As was held by the Nigerian Court of Appeal in *Bamidele v. Commissioner for Local Government and Community Development, Lagos State*,⁴³ every right founded on contract (whether or not the government is involved) is a private right conferring sufficient interest on a party to seek redress in the courts in order to protect the contractual relationship or enforce the contractual obligations. However, it can be noted that the PPA provides that all procurement contracts shall contain provisions for arbitral proceedings as the primary form of dispute resolution.⁴⁴ Noteworthy also is that the PPA provides for payment of mobilisation fees and prompt payment for contracts, which concern the performance of contracts.⁴⁵

The PPA is quite detailed in providing for procurement rules. Procurement and disposal decisions of procuring entities must be carried out with strict adherence to the provisions of the Act and its derivative regulations.⁴⁶ Only very minimal discretion is allowed to procuring entities. Instances where a procuring entity's discretion is allowed include: deciding what documentary evidence or other information it may require bidders to provide as proof that they are qualified in accordance with the PPA and the solicitation documents; deciding whether to reject all bids at any time prior to the acceptance of a bid; and deciding whether to pay a mobilisation fee to the bidder awarded the contract.

The procurement rules established by the PPA are enforceable. The enforcement may occur by way of: supplier remedies arising from procurement reviews;⁴⁷ debarment by BPP of any contractor or supplier

42 An example is the Law Reform (Contracts) Act 1961, which deals mainly on frustration and enforcement of contract.

43 [1994] 2 NWLR (PT. 328) 568 (per Uwaifo JCA). 44 PPA, s. 16(26).

45 *Ibid.*, ss. 35(2) and 37. 46 *Ibid.*, s. 16(23). 47 *Ibid.*, s. 54.

that contravenes the procurement rules;⁴⁸ the BPP investigating, and, if satisfied, nullifying a procurement proceedings or cancelling a contract awarded or performed in breach of the Act;⁴⁹ and criminal prosecution of any person that contravenes any provision of the PPA by relevant authorities, such as the EFCC.⁵⁰

A bidder may seek administrative review for any breach of procurement rules by a procuring entity. The complaint must be made first, in writing, to the accounting officer of the procuring entity within fifteen working days from the date the bidder first became or should have become aware of the breach. The accounting officer has fifteen days to make a decision indicating the corrective action to be taken, if any. Where he fails to make a decision or the decision made is not satisfactory to the bidder, the bidder may file a complaint to the BPP within ten working days of receiving the decision. The BPP must give its written decision within twenty-one working days of receiving the complaint. The remedies it may grant the complainant-bidder include:

- (a) prohibiting the procuring entity from taking any further action;
- (b) nullifying the unlawful procurement act or decision;
- (c) revising an improper decision by the procuring entity or substitute its own decision for such a decision.

However, the BPP has no power to grant compensation.

There are indications that bidders have taken advantage of the review process, but the BPP does not publish the complaints and its related decisions.

It is noteworthy that the BPP does not constitute any panel to hear complaints. Rather, it considers the written complaint and then simply writes to the procuring entity concerned to obtain its written response before making a decision on the complaint.

The bidder may appeal the decision of the BPP or its lack of decision within the stipulated time to the Federal High Court, within thirty days of receipt of the decision, or the expiration of the stipulated time. The PPA neither states that the decision of the Federal High Court may be appealed, nor that it is final. It is therefore assumed that the decision of the Federal High Court may be appealed to the higher courts, by virtue of the inherent jurisdiction of those courts. If this is so, it may result in prolonged litigation that may derail or frustrate procurement processes that should ordinarily have been concluded within a financial year. It is

48 *Ibid.*, s. 6(1)(e). 49 *Ibid.*, s. 53. 50 *Ibid.*, s. 58.

advised that an amendment of the PPA making the Federal High Court's decision final on procurement reviews be considered.⁵¹

In *AC Egbe Nig Ltd v. Director-General of Bureau of Public Procurement and Others*,⁵² the Federal High Court held that the court will not entertain any suit challenging a procurement decision of an entity unless a complaint has first been made to the accounting officer concerned and to the BPP. This decision has helped to settle the rule that the administrative remedies provided in the PPA must be exhausted before embarking on actual litigation in court.

It is to be noted that procurement-based litigation is only beginning to arise in the Nigerian courts. However, the decisions of the courts on the few instances that public procurement rules were considered have thrown more light on the PPA.

Remedies systems in procurement in Africa are considered in more detail in Chapter 13 of this volume.

2.4. *Public procurement regulation: the context*

Prior to the PPA, public procurement at the federal and state levels was regulated simply by Financial Regulations and official circulars issued respectively by the federal Minister of Finance and the various states' Commissioners of Finance. The provisions of these federal and state regulations and the circulars were generally unenforceable by private persons; but, where a public servant violates their provisions, he can be prosecuted and convicted for abuse of office or other offences contained in the Penal Code or Criminal Code, as was the case in *Federal Republic of Nigeria v. Chief Olabode George*.⁵³ The use of financial regulations and circulars to regulate public procurement is a practice rooted in Nigeria's colonial heritage, consolidated by the still extant Finance (Control and Management) Act 1958, which was enacted two years before Nigeria's independence. However, in 2000, the federal government partnered with the World Bank to conduct a nationwide assessment of public procurement regulations and practices. This was a first step to introducing acceptable international standard practices and regulations for public procurement in Nigeria. The result of that assessment was Nigeria's 'Country Procurement Assessment

51 This is the case in Kenya. See the Kenya Public Procurement and Disposal Act 2005, s. 100(2). The Kenyan public procurement regime is discussed in more detail in Chapter 5 of this volume.

52 Suit No. FHC/B/CS/116/2010, Federal High Court. 53 Note 40 above.

Report' (CPAR),⁵⁴ which formed the basis of the Public Procurement Bill later sent to the National Assembly, which was revised and enacted as the Public Procurement Act. Also in response to the CPAR, the federal government established the Budget Monitoring and Price Intelligence Unit (BMPIU) in June 2003 as the procurement regulatory body. The structure and staff of the now-defunct BMPIU were later inherited by the BPP following the enactment of the PPA.

There are reports on the assessment of the levels of compliance of the federal MDAs and the National Assembly with the provisions of the PPA, conducted by a Nigerian CSO⁵⁵ with the support of the United Nations Democracy Fund in 2011 and 2012 respectively. There have also been assessments of the procurement systems of some states in Nigeria conducted in conjunction with EU/UNICEF in 2011, which have galvanised some of the states to adopt by enactment the PPA as their procurement regulations. The compliance assessment reports on the federal entities suggest that there is still only partial compliance with the PPA; however, there has been a reduction of the impropriety in contract award processes following the enactment of the PPA.

3. Coverage of the public procurement rules

3.1. Procuring entities

The provisions of the PPA apply to all procurement carried out by the federal government of Nigeria and all federal public bodies, including ministries, extra-ministerial offices, government agencies, parastatals and corporations.⁵⁶ In addition, where a particular procurement conducted by any entity other than those just mentioned is funded by a contribution of at least 35 per cent from the federal government, this procurement must be regulated by the PPA.⁵⁷ For instance, procurement activities of the federal government joint venture partners in the oil sector come within this definition, although there is no evidence that the provisions of the Act are being applied to them. In addition, water supply agencies of states which receive a percentage of their funds from the federal government for certain projects under the Water Supply and Sanitation Sector Reform

54 See World Bank, *Nigeria Country Procurement Assessment Report*, vol. 1, *Summary of Findings and Recommendations* (30 June 2000); and World Bank, *Nigeria Country Procurement Assessment Report*, vol. 2, *Main Text and Annexes* (30 June 2000).

55 The Public and Private Development Centre (PPDC).

56 PPA, ss. 15 and 60. 57 *Ibid.*, s. 15(1)(b).

Programme (WSSSRP) are required to apply the provisions of the PPA to procurements for such projects.

These procuring entities may undertake the types of procurement contracts discussed below.

3.2. *Type of procurement subject to regulation*

Procurement of goods, works and services by the procuring entities are covered by the PPA. The rules under the PPA apply uniformly to all these types of procurement. However, a separate part of the PPA deals with the procurement of consultancy services. It is only under this part of the PPA that request for proposal is mentioned as a procurement method. This part of the PPA provides criteria for the evaluation of proposals which are different to the evaluation criteria for other forms of bids/tenders.⁵⁸

The Act does not leave open for argument the issue of whether the selling and letting of public assets fall within the application of the procurement rules. Part X of the Act specifically deals with the selling and letting of public assets (referred to in the Act as 'disposal of public property'). In fact, section 55(2) of the Act provides that '[f]or the purposes of this Act every procuring entity shall also be a disposing entity'.

For defence procurement, section 15(2) of the Act states that '[t]he provisions of this Act shall not apply to the procurement of *special* goods, works and services involving national defence or national security, unless the President's express approval has been first sought and obtained'.⁵⁹ What constitutes 'special' is not defined in the Act. However, it could be argued that 'special' refers to those goods, works and services for national defence/security whose procurement ought not to be made public so as to protect national defence/security interests or secrets; or those that the President, as Commander-in-Chief of the Nigerian armed forces, declares as 'special'. These may include arms and ammunition, and security/defence intelligence services. Note that defence and security is within the exclusive legislative competence of the National Assembly.⁶⁰ In practice, defence and security agencies use the competitive procedures provided by the PPA to conduct a significant proportion of their procurement, since they are not 'special'. In fact, President Yar'adua was reported to

⁵⁸ *Ibid.*, ss. 32 and 49–52. ⁵⁹ Emphasis added.

⁶⁰ Constitution, 2nd Schedule, Part 1, Items 17 and 45.

have approved the application of the Act to all federal government procurement without exception, and there is no evidence of a reversal of this approval by the current administration.⁶¹

For contracts funded by international development agencies, the agencies may impose their own procurement rules. An example is the European Development Fund (EDF) projects in Nigeria's water and sanitation sector, for which the EU's Procurement Guidelines and templates for aid-funded projects are used. Also, for public projects in Nigeria funded by the World Bank, the Bank's Procurement Guidelines apply. Notwithstanding, there is no provision in the PPA that is akin to Article 3 of the 1994 UNCITRAL Model Law. Article 3 suggests that, where the national procurement law conflicts with the requirement of a treaty between the government and an intergovernmental international finance institution, the treaty requirement shall prevail. As already alluded to above, the direction of Article 3 is followed in practice in Nigeria. However, almost all the projects funded or co-funded by these international agencies in Nigeria usually rely on the established procurement structures and personnel in the government institutions involved in the projects. Also, the PPA may apply to supplement the rules of the international development/financing institutions. For instance, the Act was applied as a supplementary regulatory instrument in the WSSSRP projects co-funded by UNICEF/EU and other contributors, including the federal government. The World Bank, which is a major development partner of Nigeria, enjoins aggrieved bidders in Bank-financed procurement to lay their complaints first to the borrowing country.⁶² To make such a complaint in Nigeria, the aggrieved bidder, it appears, would be required to follow the procurement review/complaint mechanism provided under the Act. In addition, aggrieved bidders may copy or complain directly to the Bank. The borrowing country also submits its decision on such complaints to the Bank for reviews and comments.⁶³ The issue of multiple remedies regimes as a result of foreign aid procurement is further discussed in Chapter 13 of this volume, and the impact of aid-funded procurement on national procurement systems generally is analysed in Chapter 11.

61 Public and Private Development Centre, note 32 above, p. 23.

62 International Bank for Reconstruction and Development and the World Bank, *Guidelines on Procurement of Goods, Works and Non-Consulting Services under the IBRD Loans and IDA Credits and Grants* (January 2011), Appendix I, para. 2(e), and Appendix III, paras. 11–14.

63 *Ibid.*, Appendix I, para. 2(e), and Appendix III, para. 11.

4. Public procurement procedures

The rules on procurement methods and the conditions for their use provided by Nigeria's Public Procurement Act are substantially modelled on the provisions of the 1994 UNCITRAL Model Law on this subject, which are examined further in Chapter 12 of this volume, dealing with procurement methods. Similar to the Model Law, the PPA provisions cover the procurement of goods, works and services. However, as is also the case in the Model Law, certain procurement methods are to be used only for the procurement of goods and works. For instance, open competitive bidding,⁶⁴ in both the PPA and the Model Law is to be used as the default method for goods and works, but not services.⁶⁵ Unlike the Model Law, the request for proposal method under the PPA is specifically limited to the procurement of services, particularly consultants.⁶⁶ The PPA does not include competitive negotiation, contained in the Model Law, as a procurement method.⁶⁷ This, apparently, is in response to the advice contained in the Guide to Enactment of the Model Law 1994, that, where request for proposal and or two-stage tendering are provided for, competitive negotiation need not be provided since the three methods could be used in similar circumstances, and uncertainty is likely to be encountered by procuring entities in trying to discern the most appropriate method from among the two or three similar methods.⁶⁸ Generally, the conditions for the use of the procurement methods are virtually the same as those contained in the Model Law, as set out in Chapter 12 of this volume.⁶⁹

The main procurement methods prescribed by the PPA include open competitive tendering, two-stage tendering, restricted tendering, request for quotations, and direct procurement. Community participation as a form of procurement method is not provided under the PPA. The PPA provides that all procurement of goods and works by all procuring entities shall be conducted by open competitive bidding, except where the Act states otherwise. The circumstances in which other less competitive

64 These are referred to as 'tendering proceedings' in the Model Law.

65 See UNCITRAL Model Law 1994, Art. 18(1); and the Nigerian PPA, s. 24(1). This is unlike Kenya's PPA, s. 51(c), that includes services as part of what shall be procured by open competitive bidding: see Chapter 5 of this volume.

66 See UNCITRAL Arts. 3(c) and 4(b); and PPA, Part VIII generally.

67 See UNCITRAL Model Law 1994, Arts. 19 and 49.

68 Para. 19 of section 1 of the Guide to Enactment.

69 See Chapter 12, sections 3 and 5, below.

methods may be used are clearly specified by the PPA and, as we have stated, are similar to those prescribed by the Model Law. The restricted methods are used subject to prescribed monetary thresholds, and some cases require the approval of the BPP. For instance, contracts of less than N5 million may be awarded by restricted tendering. Splitting of contracts to evade the use of the appropriate procurement method is prohibited and punishable.⁷⁰

Apart from the above procurement methods, the federal government may also grant a concession to any duly pre-qualified project proponent in the private sector for the financing, construction, operation or maintenance of any infrastructure or development facility owned by the federal government that is financially viable. Concession contracts are awarded by way of open competitive bid to a contractor who submits the most technically and economically responsive bid. Infrastructure/project concession is regulated by the Infrastructure Concession Regulatory Commission (Establishment, etc.) Act of 2005. Approvals to undertake a project by concession are granted by the Federal Executive Council. The Infrastructure Concession Regulatory Commission supervises the execution of concession agreements.

The choice of procurement methods used by procuring entities is not exempted from procurement review. It is noteworthy that the PPA provided for this even though it was enacted during the tenure of the 1994 UNCITRAL Model Law that exempted the choice of procurement methods from procurement review. In fact, there have been instances of procurement review in Nigeria arising from improper use of procurement methods prescribed by the Act. However, the level of compliance with use of appropriate procurement methods is still not high in many MDAs, according to recent assessments.⁷¹

Advertisement of procurement opportunities in Nigeria is mainly by publication in at least two national daily newspapers, particularly for open competitive bidding and requests for proposals. Where international competitive bidding is used, the procuring entities are required additionally to advertise in one relevant internationally recognised publication.⁷² Other media used for bid advertisement include the notice board and any official website of the procuring entity and the *Procurement Journal* published by the BPP (which is yet to serve this purpose). There is a popular publication

70 PPA, ss. 58(4)(d) and 20(2)(e).

71 Public and Private Development Centre, note 32 above, p. 50.

72 PPA, s. 25(2).

of the federal Ministry of Information called the *Federal Tenders Journal* which is used exclusively to advertise federal, and occasionally state, procurement opportunities. At least sixty days from the date of advertisement is allowed for submission of bids; and at least thirty days from the date of advertisement of notice/request is allowed for submission of request for proposals.⁷³ The BPP has established a single Internet portal intended to serve as the main source of all federal government procurement information in accordance with the PPA;⁷⁴ however, the portal is yet to really serve as a source of bid advertisement.

To determine whether bidders are qualified, procuring entities require bidders to provide documentary evidence or other information they consider necessary as proof that the bidders are qualified in accordance with the Act and the solicitation documents. Also, pre-qualification of bidders is usually conducted before the bidding proper. The PPA does not provide or permit that suppliers must register on any supplier list to be allowed to participate in procurement. However, many procuring entities in Nigeria require bidders to pay and register for various categories of contracts before they can bid for them. This is actually more or less targeted at revenue generation and not at ascertaining the qualifications/capabilities possessed by contractors, since what gets contractors registered in a particular category is the payment of the sum stipulated for the category and nothing more. Furthermore, the registration is almost always done when a bid advertisement has been placed so that any contractor interested in bidding may register. The BPP has frowned on this practice. Although this practice is not expressly prohibited by the PPA, it may be viewed as inconsistent with the intention of the Act, considering that sums of money are paid, while the Act directs that the only money to be paid for bidding to procuring entities, if any, shall be the purchase price for tender/pre-qualification documents, which shall only cover the cost of printing and providing the documents.⁷⁵

The contract is awarded after evaluation to the contractor who submitted the lowest cost bid out of the bidders whose bids conformed to all the mandatory requirements in the bid solicitation. All factors (such as deviations, preferences, etc.) to be considered for the purpose of bid evaluation must be calculated in monetary terms to determine the lowest cost.⁷⁶ The PPA directs that the evaluation and award criteria shall be contained in the bid solicitation.⁷⁷ However, the procuring entity may

73 *Ibid.*, ss. 24(2) and 48(1). 74 *Ibid.*, s. 5(r). 75 *Ibid.*, s. 23(2).

76 *Ibid.*, s. 32(5). 77 *Ibid.*, s. 32(1).

refrain from awarding the contract to the bidder with the lowest cost if the entity can show good grounds derived from the provisions of the Act to that effect. Such a ground may be that during post-qualification, conducted after evaluation, the bidder in question could not demonstrate a current ability to perform the contract.⁷⁸ The above award criteria apply to all types of procurement and disposal, except for procurement of consultancy services where price is not a deciding factor but the rating of the consultants – in these cases, the procuring entity negotiates with the best rated participating consultant for an acceptable price, failing which it moves to negotiate with the next highest rated.⁷⁹ By implication, where direct procurement is used, the award is not based on the above criterion of lowest responsive bidder.

Every procuring entity is required to maintain file and electronic records of all procurement proceedings made within each financial year.⁸⁰ The keeping of electronic records of procurement and the publication of procurement advertisement on procuring entities' websites are the only forms of electronic procurement provided in the PPA. However, findings show that many federal procuring entities rarely keep electronic records of all procurement proceedings made, nor do these entities publish procurement adverts on websites as an established practice. A reason for this may be that bidders are usually not required to submit electronic copies of their bids, which leaves the procuring entities with only hard copies that would be expensive to convert into electronic format through scanning, etc. Again, some procuring entities do not have functional websites, and some that have do not consistently update them. In addition, it is yet to become a common practice for Nigerian contractors to search procuring entities' websites for opportunities, except where publications (which they usually rely on) direct them there for further information.

It is noteworthy that the BPP has recently reviewed and published standard bidding/contract documents (SBDs) which incorporate relevant clauses that meet the requirements of the PPA on issues relating to instructions to bidders, bid opening, bid evaluation, contract award and aspects of contract administration. However, there is still a need to train the procuring entities on how to adapt these SBDs in carrying out their procurements, since it appears that there is a minimal use of the SBDs. The BPP presented a letter from the World Bank indicating that the documents may be used in the Bank's funded projects. These SBDs

78 See generally *ibid.*, s. 32(3). 79 *Ibid.*, s. 52. 80 *Ibid.*, s. 16(12).

are intended to act as tools for implementing procurement in Nigeria according to the provisions of the PPA and best international practices.

5. Concluding remarks

This chapter has presented the main features of the regulatory and institutional framework for public procurement in Nigeria. On the whole, it is reasonable to hold that Nigerian federal public procurement law is consistent with accepted international standards, especially as captured by the UNCITRAL Model Law. The extent to which the procuring entities and procurement processes are regulated by the procurement regulatory framework could be said to be adequate. However, the existence of an adequate public procurement regulation in Nigeria is yet to translate into a fully efficient and transparent public procurement system. More concerted efforts ought to be made towards enforcing the procurement rules and reorienting all stakeholders to support the creation of a procurement market known for integrity and efficiency.