



## LAWS AND PRINCIPLES RELATING TO PUBLIC PROCUREMENT IN NIGERIA: A REVIEW

By

**Amadi-Harry, Nancy PhD\***

**Amasiatu, Ifunanya PhD\*\***

### Abstract

*This work examined the public procurement reforms<sup>1</sup> and the challenges of implementing public procurement legal regime in Nigeria. The paper conceptualized public procurement and analyzed the provisions of the Public Procurement Act, 2007, which was promulgated to harmonize the various policies and practices regulating the procurement of goods and services in Nigeria. The study observed that the procurement system in Nigeria is not conducted in a transparent, timely and equitable manner and therefore not in compliance with the provisions of the Act. Using the doctrinal method, the paper examined the legislations, journal articles and internet sources relating to the laws and principles of public procurement in Nigeria, and observed that despite the promulgation of the Public Procurement Law, the procurement process in Nigeria is still marred by lack of transparency, unaccountability and corruption by public officials. In conclusion, it was recommended that public procurement laws should be domesticated by all states and local governments in Nigeria in order to ensure strict compliance, fairness and transparency in the award of contracts and procurement of goods and services. It was also recommended that the Public Procurement Act should be amended to make provisions for the establishment of an independent body for the award of contracts in Nigeria.*

### 1.0 Introduction

Nigerian Government have over the years provided certain basic amenities for its citizens and public procurement is one method through which these facilities are provided. Public procurement is the method by which government through third parties procures goods and services for the benefit of its citizens. However, the procurement process in Nigeria has been highly inefficient, ineffective and unprofessional. This is attributable to the lack of proper regulatory framework for Public Procurement which resulted in government contracts becoming avenues for syphoning public funds. The Federal Government in an attempt to regulate the procurement process in Nigeria, and in recognition of the fact that good procurement policies were necessary to reduce cost and enhance good governance, enacted the Public Procurement Act 2007, which seeks to harmonize the existing practices and policies on procurement and to provide the legal framework for the procurement of public goods and services.

Despite the promulgation of this law, the public procurement system in Nigeria is still characterized by large scale corruption, lack of transparency and unaccountability in the award of contracts. This paper therefore examined the public procurement system in Nigeria, and observed that the process did not reflect the principles of public procurement to wit: fairness, competition and transparency and therefore

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\* Amadi-Harry, Nancy, LL.B, BL, LL.M, Ph.D, is a Lecturer with the Department of Jurisprudence and International Law, Faculty of Law, Rivers State University. She can be reached at harrynancy710@gmail.com, 08160445664

\*\* Amasiatu, Ifunanya, LL.B, BL, LL.M, Ph.D, is a Lecturer with the Faculty of Law, Madonna University, Nigeria. She can be reached at ifyamasiatu2@gmail.com 08023108862.

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is not in sync with acceptable global standards. It also observed that there is no strict adherence to the provisions of the law due to corruption. The paper therefore advocated for equal opportunities for competition by bidders and observance of due process in award of contracts. This will not only enhance proper planning and implementation in the procurement of goods and services but will also ensure that the processes are transparent and professional.

## 2.0 Conceptual Clarifications

Before we discuss the public procurement process in Nigeria, it is pertinent for us to define and understand certain concepts that are relevant to this research.

### 2.1 Law

It is difficult to give an all-embracing definition of the term law however, this work will attempt to define it. Law is that which is laid down, ordained or established<sup>2</sup>. A rule or method according to which phenomena or actions coexist or follow each other<sup>3</sup>. Salmond<sup>4</sup>, defined law as a body of principles recognized and applied by the state in the administration of justice. Law can also be defined as a scheme of social control for the protection of those social interest which society in some way decides shall be protected<sup>5</sup>. Law has also been said to be a regime that regulates human activities and relations through systematic application of the force of politically organized society, or through social pressure, backed by force, in such a society<sup>6</sup>. Laws are rules and regulations applied by the state for the maintenance of peace and security in the society.

### 2.2 Principles

Principle can be defined as a basic idea or rule that explains or controls how something happens or works<sup>7</sup>. It can also be seen as a comprehensive and fundamental law, doctrine or assumption<sup>8</sup>. A principle is a basic belief, theory or rule that has a major influence on the way in which something is done<sup>9</sup>. A principle is a rule, belief or idea that guides people's actions.

### 2.3 Public Procurement

Procurement refers to the process of acquiring goods, works and services resulting in the award of contracts under which payments are made in the implementation of projects in accordance with the governing rules, procedures and guidelines of the financing agency<sup>10</sup>.

Public procurement can be defined as the purchase by governments and state- owned enterprises of goods, services and works<sup>11</sup>. It is the process by which public authorities such as government

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<sup>2</sup> Black's Law Dictionary 'Law Definition & Legal Meaning' <<https://www.thelawdictionary.org>> accessed 22nd August, 2023

<sup>3</sup> Ibid

<sup>4</sup> National Institute of Open Schooling 'Meaning of Law' <<https://www.natinsopensch.com>> accessed 22nd August, 2023.

<sup>5</sup> Hugh Evander Willis, 'A Definition of Law' <<https://www.repository.law.indiana.edu>> accessed 22nd August, 2023

<sup>6</sup> C C Wigwe, *Jurisprudence and Legal Theory* (Readwise Publishers Accra 2011)71

<sup>7</sup> Cambridge Dictionary 'Principle' Law' <<https://www.dicionarycambridge.org>> accessed 23<sup>rd</sup> August, 2023

<sup>8</sup> Merriam-Webster Law 'Principle, Definition & Meaning' <<https://www.merriam-webster.com>> accessed 22<sup>nd</sup> August, 2023

<sup>9</sup> Macmillan Dictionary 'Principle, Definition & Synonyms' <<https://www.macmillandictionary>> accessed 22<sup>nd</sup> August, 2023

<sup>10</sup> AFDB 2008 Rules <<https://www.afdb.org>> accessed 22<sup>nd</sup> August, 2023

<sup>11</sup> Global NAPs 'Public Procurement' <<https://www.globalnap.org>> accessed 22<sup>nd</sup> August, 2023

departments or local authorities, purchase work, goods or services from companies<sup>12</sup>. It has also been defined as the buying of goods and services by government organizations<sup>13</sup>. Public procurement accounts for a substantial portion of the taxpayers' money, governments are therefore expected to carry it out efficiently and with high standards of conduct in order to ensure high quality of service delivery and safe guard the public interest.

### 3.0 The Process of Public Procurement

The procurement process typically involves the following steps; planning, identifying suppliers, evaluating proposals, negotiation of contract terms and award of contract. This paper will now discuss the outlined stages.

1. **Planning:** This is usually the first step in the public procurement process and it involves the development of a clear understanding of the goods or services that are needed, it also involves preparing the budget and setting a specific time frame for procurement of the projects<sup>14</sup>.
2. **Identifying Potential Suppliers:** After the planning process, the next stage is to identify potential suppliers who can provide the goods and services required. This is done by issuing a request for proposals from interested parties<sup>15</sup>.
3. **Evaluating Proposals:** After the proposals are received, the next step is to evaluate the proposals in order to select the best bid option. The evaluation is based on the following factors; price, quality, time of delivery and past performance amongst others.
4. **Negotiation of Contract Terms:** After selection of the best bid, the next stage is to negotiate the contractual terms<sup>16</sup>. A consensual contractual agreement must be reached between the contracting parties.
5. **Award of Contract:** Contracts are awarded to the selected supplier after the contractual terms have been agreed upon by the parties.

### 4.0 Principles of Public Procurement

The fundamental principles of the public procurement process of any given state has following objectives; accountability, competition, value for money, efficiency, equity and fairness and transparency<sup>17</sup>. This work will now discuss the following objectives.

**a) Accountability** - For the public procurement process of a state to be in accordance with international best practices, the process must be credible and transparent and the procurement entities must be accountable to the public.

**b. Value for Money** – In the procurement process, value does not necessarily translate into low price<sup>18</sup>. It also includes quality, quantity and a minimal cost. It means getting optimum value at the least possible

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<sup>12</sup> Ibid

<sup>13</sup> Cambridge Dictionary 'Public Procurement English Meaning' <<https://www.dictionary.cambridge.>> accessed 22nd August, 2023

<sup>14</sup> Obaloo 'What is Public Procurement? Definition' <https://obaloo.com> accessed 25th August 2023.

<sup>15</sup> Ibid

<sup>16</sup> Ibid

<sup>17</sup> Ibid

<sup>18</sup> A A Aliu, O Olorunmaiye, D O Ajayi 'The Public Procurement Reforms In Nigeria: Implementation and Challenges'[2010](8)(4)53 *European Journal of Logistics, Purchasing and Supply Chain Management*.

cost. A significant objective of public procurement is the attainment of maximum benefit at a minimal cost.

**c. Competition** – it is mandatory for the procurement process to be advertised and made open to all interested bidders<sup>19</sup>. There must be equal opportunity for all interested bidders to participate.

**d. Efficiency** - The procurement process must be simple and not complicated, and there should be no room for delay. The process should not result in wastage of financial and human resources for the procuring entity.

**e. Fairness and Equity** – The evaluation for bids should be objective and fair<sup>20</sup>. It should be done in the open with equal opportunity given to all interested bidders.

**f. Transparency** – The rules and guidelines of the procurement must be accessible to all participants as well as the public<sup>21</sup>. The rules must be consistent from the beginning to the end of the process for all interested bidders.

### 5.0 Assessment of the Public Procurement Act 2007

The Public Procurement Act, 2007, was promulgated by the Nigerian government to ensure good governance and to promote transparency, accountability and openness in the public procurement of goods and services. The Act, is designed after the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Public Procurement<sup>22</sup>. The purpose of the Public Procurement Act, 2007, is to ensure transparency, competitiveness, value for money and professionalism in the public sector procurement system.

Sections 1 and 2 of the Act<sup>23</sup>, (Part I), established the National Council on public procurement with the functions of considering, approving and amending the monetary and prior review thresholds for the application of the provisions of this Act by procuring entities.

Sections 3, 4 and 5<sup>24</sup>, (Part II), established the Bureau of Public Procurement with the objective of harmonizing existing government policies and practices on public procurement and ensuring probity, accountability and transparency in the procurement process. The Bureau is also expected to maintain a national database of the particulars and categorization of federal contractors and service providers in order to prevent fraudulent and unfair procurement and where necessary apply administrative sanctions. The Bureau is empowered to issue a certificate of “No objection for contract award” within the prior review threshold for all procurements within the purview of the Act<sup>25</sup>, and to review and determine whether any procuring entity has violated any provisions of the Act.

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<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

<sup>22</sup> S O Olatunji, T O Olawumi and H A Odeyinka, ‘Nigeria’s Public Procurement Law- Puissant Issues and Projected Amendments’ [2016](6)(6) *Journal of Public Policy and Administrative Research*.

<sup>23</sup> Public Procurement Act 2007.

<sup>24</sup> Ibid.

<sup>25</sup> Ibid section 6 (b) and (d).

Section 15<sup>26</sup>, (Part III), provides for the scope of the Act, to cover all procurement of goods, works and services carried out by the federal government of Nigeria and all procurement entities or all entities which derive at least 35% of the funds appropriated for any type of procurement from the federal share of the consolidated revenue fund.

Section 16, (Part IV), provides that all public procurements shall be conducted by open competitive bidding<sup>27</sup>, in a transparent, timely and equitable manner in order to ensure accountability and conformity with this Act<sup>28</sup>. The section further provides that the aim is to achieve value for money and fitness for purpose, in a manner which promotes competition, economy and efficiency<sup>29</sup>.

Section 19, (Part V), requires the use of advertising methods to ensure a competitive selection of suppliers. It further mandates procuring entities to receive, evaluate and make a selection of the bids received in adherence to this Act<sup>30</sup>. This provision is significant because it removes the barriers to the public procurement market for new players, thus, enhancing competition. It also streamlines the elaborate registration procedures which contractors were required to undergo before they were eligible for government contracts<sup>31</sup>.

Sections 21-23 of the Act<sup>32</sup>, provide for procurement planning and the role of the procurement planning committee. It identifies the approving authority, accounting officer, procurement planning process, procurement implementation, procurement planning committee, tenders board and prequalification of bidders. The projects procurement planning will ensure that there is proper procurement planning with regards to availability of funds. Hence, eliminate problems of anticipatory procurement.

By section 24, the method of procurement of goods and works by all procuring entities (except as provided by the Act), shall be by open competitive bidding. The section also provides that the winning bid shall be that which is the lowest evaluated responsive bid with regards to work specification and standard<sup>33</sup>.

Section 25, (Part VI)<sup>34</sup>, provides for publicity of contract opportunities. The provision requires that goods shall be procured using either national or international competitive bidding methods and invitation for bids shall be advertised in national or international newspapers at least six weeks before the deadline for submission of bids. This provision will not only ensure that the procurement process is conducted in an open and impartial manner but will also discourage the practice of awarding unpublicized contract to friends and cronies of public officials.

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<sup>26</sup> Ibid section 16 (c).

<sup>27</sup> Ibid section 16 (d).

<sup>28</sup> Ibid section 16 (e).

<sup>29</sup> Ibid section 16 (f).

<sup>30</sup> S Williams – Egbe, ‘A Comparative Analysis of the Nigerian Public Procurement Act Against International Best Practices’ <<https://www.ippa.org>> accessed 25<sup>th</sup> August 2023.

<sup>31</sup> S Arrow Smith, *The Law of Public and Utilities Procurement* (London Smith and Maxwell 2009).

<sup>32</sup> n 21

<sup>33</sup> Public Procurement Act 2007 section 24(3).

<sup>34</sup> Ibid, section 25.

Section 39, (Part VII), provides for special and restricted methods of procurement. These methods include two stage tendering, restricted tendering, request for quotations, direct and emergency procurement. The section also provides that for any procuring entity to adopt any of these methods, there must be an approval from the Bureau of Public procurement. This provision is very important because in the past public officials hide under special and restricted procurements to perpetuate corrupt practices<sup>35</sup>.

The Act provides for the methods and processes of disposing public property and assets. It provides that the open competitive bidding is the primary source of receiving offers for the purchase of any public property offered for sale<sup>36</sup>. It also provides for the preparation of a valuation report for such property by an independent evaluator and integration of such property into the income and expenditure budget projection of the procuring entity<sup>37</sup>. The section further provides that all procuring entities shall distribute responsibility for the disposal of public property between the procurement unit and the Tenders Board<sup>38</sup>.

Section 58<sup>39</sup>, (Part XII), provides specific offences for various categories of infraction in public procurement process. The section identifies various classes of offences and provides sanctions for contravention of the provisions of the Act.

## **6.0 Issues Against Effective Implementation of Public Procurement Law in Nigeria**

The Public Procurement Act, 2007, has undoubtedly streamlined the procurement process in Nigeria, however, the procurement system in Nigeria is still marred by irregularities and lack transparency. This paper will discuss some of the challenges of the Act and recommend measures that will enhance competition and fairness in the procurement process.

### **a) Pre-Qualification of Bidders**

Section 22(4)<sup>40</sup>, which provides for pre-qualification of bidders, although aimed at streamlining the procurement process by eliminating the need for contractors to provide separate qualification information for each contract and ensuring that the procuring entities do not assess the same information for each contractor. Pre-qualification of bidders, may however, limit competition as non-pre-qualified suppliers would be excluded from participating in the procurement.

### **b) Selection of the Lowest Responsive Bid**

Section 24(3)<sup>41</sup>, provides for all procurement of goods and works to be conducted by open competitive bidding and the winning bid shall be the lowest responsive bid. It is submitted here that emphasis is not

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<sup>35</sup> A Adewole, 'Governance Reform and the Challenge of Implementing Public Procurement Law Regime Across Nigerian State and Local Governments'[2014](2)(4)25-32. *International Journal of Public Administration and Management Research*.

<sup>36</sup> Public Procurement Act 2007, s. 55.

<sup>37</sup> Ibid, s. 56.

<sup>38</sup> Ibid.

<sup>39</sup> Ibid.

<sup>40</sup> Ibid

<sup>41</sup> Ibid



placed on quality as the lowest price may not necessarily translate into the best value. Therefore, the Act should be amended to make provision for the award of tender to the 'best value bid'.

**c) Lack of Specification of Monetary Thresholds for Bid Security**

Section 26<sup>42</sup>, provides that subject to the monetary thresholds as may be set by the Bureau, all procurements valued in excess of a particular sum shall require a bid security from a reputable bank in an amount that does not exceed 2% of the bid price. The Act, did not however, specify the monetary thresholds that will require a bid security. This provision creates confusion in the minds of contractors. Furthermore, section 28, which allows a procuring authority to reject bids prior to the acceptance of a bid, will clearly encourage corruption as procuring authorities may reject bids without giving any cogent reason to the contractors.

**d) No Opportunity for Verification and Enforcement**

Section 32(8), provides that information relating to the examination, clarification and evaluation of bids and recommendations concerning awards shall only be given to unsuccessful bidders after the successful bidder has been notified of its award. The Act did not however, mandate procuring entities to give unsuccessful bidders reasons why they were not successful. The provision clearly inhibits healthy competition because it does not give bidders opportunity to verify why their bids were rejected and if bidders are not given reasons why their bids were unsuccessful, they would not be able to make necessary amendments for future contracts, and would not be aware of irregularities in the procurement process, which may be a ground for review of the process

The Act<sup>43</sup>, further provides that the lowest tender need not be selected where there are good grounds for doing so. But again, the Act did not specify these grounds. Thus, this provision is left at the discretion of the public officials to determine what these grounds may be which creates more room for corruption.

**e) Lack of Specific Timelines for Consideration of Tenders**

Section 25<sup>44</sup>, which provides timelines for procurement procedures, specifies time limits for adverts, response to queries for information on pre-qualification and on the procurement of consultant services. The section did not however, provide time limits for submission and consideration of tenders but rather provided that the time limits should be stated in the bidding document. Hence, the provision leads to inconsistent time limits by procuring entities which works hardship on contractors.

**f) Absence of Strong Institutions**

Another major challenge to the implementation of public procurement Act in Nigeria is the absence of strong and compelling institutions to make states and local governments enact their public procurement laws. Apart from the World Bank and other international institutions, there are no strong institutions compelling states to make public procurement laws to institutionalize fairness, openness and accountability. Furthermore, the Public Procurement Act, was enacted by the National Assembly and its scope does not go beyond the Federal Government expenditure. This is a constitutional limitation in the application of the PPA in Nigeria because government contract falls within the concurrent list and can be legislated upon by both the states and federal government. Although some states in Nigeria have

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<sup>42</sup> Ibid

<sup>43</sup> Ibid, ss. 39-40

<sup>44</sup> Ibid.

passed their public procurement law, the relevant provisions of the Act have been narrowed to suit their own interest. In other words, states have leveraged on the Federal system of government in Nigeria to water down some significant provisions of the Public Procurement Act. This paper therefore submits that public procurement laws should be domesticated across states in Nigeria.

#### **g) Corruption**

The Public Procurement Act which was principally enacted to improve the procurement process and reduce corruption in Nigeria has a not realized its objective. This is because most organizations still conduct their procurement process without complying with the provisions of the Act. Some MDAs still insist that contractors register with them before bidding for contracts which clearly violates the provisions of the Act. Politicians manipulate and influence the outcome of the procurement process by putting pressure on the civil servants, and contracts are awarded to firms of their choice. The result is that there are several uncompleted projects because some contractors receive upfront payment and abandon the projects<sup>45</sup>. The open bidding conducted by the NTA for the procurement of its services on 16<sup>th</sup> day of June, 2022, is commendable and this paper advocates that more agencies should conduct open and fair bidding for contracts.

#### **h) Accommodate Only Two Methods of Tendering**

The Public Procurement Act, 2007, favours only open tendering and two stages tendering procedures, whereas in other jurisdictions like the United States, no single procurement method is deemed to fit all situations. Not using appropriate procurement can also lead to project delays, cost overruns, project abandonment and building collapse as has been witnessed in Nigeria<sup>46</sup>. Furthermore, secs 25 – 28 of the Act, which deals with procurement methods only makes provision for the procurement of goods and services. The Act did not clearly state how construction projects or specialized projects can be procured. This gap in the law is quite worrisome because specialized and construction projects usually differ in their scope and nature, and clients may also vary in their level of experience and exposure.

#### **i) Failure to provide methods for dispute resolution**

The Public Procurement Act in part Xii, stated various activities that might be charged as an offence. However, the Act did not provide methods for dispute resolution which often arises during project execution. It is well known that conflicts arise from projects which often degenerates into litigation and the absence of such provision in the Act will result in greater problems for the contractor and the procuring entities<sup>47</sup>.

### **7.0 Conclusion**

The Public Procurement Act, 2007, was enacted to provide a framework for the procurement process in Nigeria. While we agree that the promulgation of this Act is laudable as it has harmonized the public procurement of goods and services in Nigeria. It is glaring that the procurement process is still marred

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<sup>45</sup> n 21

<sup>46</sup> A A Aibinu and G O Jagboro 'The Effects of Construction Delays Project Delivery in Nigerian Construction Industry' [2000](20)(8) 593 *International Journal of Project Management*.

<sup>47</sup> T O Ossai, 'A Review of Nigeria Procurement Process' [2014] <https://www.saharareports.com> accessed 29<sup>th</sup> August, 2023





by corruption, lack of transparency and fairness and unaccountability. An examination of the Act revealed that there are major loopholes in the law as currently framed which creates room for corruption and other sharp practices by public officials as witnessed in Nigeria. Some of the problems identified include; prequalification of bidders, no time limit for submission and consideration of tenders, award of contract to the lowest evaluated responsive bid amongst others. The paper therefore made useful recommendations.

### **8.0 Recommendation**

- Efforts should be made to domesticate public procurement practices across all the states and local governments in Nigeria. This will help to ensure openness, transparency and accountability in the public procurement system in Nigeria.

The Public Procurement Act should be amended and provisions should be made for the award of tender to the 'best value bid' taking into consideration the best price, quality delivery, previous performance and time frame. The Act should also make provisions for pre-qualification of tenders based on tenderers ability to perform and for the exclusion of tenders on the basis of fraud, abandonment of previous contracts and tax evasion. There should also be a provision for the reasons for the award and rejection of tenders.

- It is also recommended that a sole department for the award of contracts should be established at the federal level. This will help to ensure that there is effective monitoring of the procurement process and a data base of all contracts awarded by the federal government in Nigeria.

It is recommended that various methods of dispute resolution to wit, arbitration, adjudication, alternative dispute resolution (ADR), should be included in the Act. This will ensure that the parties have alternative ways of resolving disputes that often arises during execution of a project.