Strengthening Statutory Measures for Good Governance in Nigeria's Public Procurement

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ABSTRACT

Nigeria, in line with the requirements of the international public procurement framework-law, the UNCITRAL Model Law, reformed her public procurement system and practice and institutionalized statutory measures for ensuring good governance in public procurement. This was done through the enactment of the Public Procurement Act (PPA)in 2007. This study is concerned with the implementation and effectiveness if this Act. It finds that the Act has only been partially implemented and, consequently, not so effective in ensuring good government in Nigerian public procurement processes. In view of this, the study recommends, among other things that the Nigerian Federal Government should take steps to fully implement the Act, especially with regards to the constitution and inauguration of the National Council on Public Procurement (NCPP) as provided for in the Act. The study also calls for less interference by political executives in public procurement process so that professional civil servants may discharge their statutory duties and responsibilities as envisaged under the law.

1 INTRODUCTION

Nigeria undertook fundamental reform of her public procurement system between 2000 and 2007. This was born out of the need to reposition and reinvigorate the nation's procurement system and practice in order to facilitate the achievement of long-term social and economic development goals. Protracted military rule in Nigeria resulted in gross relegation of the rule of law and all basic principles of good public financial management and expenditure control, such as probity, transparency, accountability, and efficiency and effectiveness, resulting in severe deterioration of the country's socio-economic position. Consequently, since the restoration of democracy in 1999,

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civil society, donors and international community have ceaselessly mounted pressure on successive governments regarding the need to provide good public sector governance at all levels, especially in the public procurement field. This is based on the understanding that public procurement is central to social and economic development in all societies, developed and developing countries alike. Hence, good governance in public procurement is an essential aspect of overall strategies for engendering good governance in the broader context. This is true as all elements that constitute the pillars of good governance – preeminence of the rule of law, accountability, transparency, probity, equity, popular participation, efficiency and effectiveness, among others, are also the hallmarks of an adequate and well-governed public procurement system[1].

Public procurement involves management of huge public financial resources in the provision of essential public goods and services to the people, as well as the proper functioning of the State. Procurement is thus pivotal in delivering on the developmental goals of society. It suffices to state that procurement improves the quality of governance and it is one most important way citizens directly feel the impact of government. In developing countries such as Nigeria, provision of quality roads, bridges and fly-overs, government housing estates, educational facilities, hospitals, sports complexes, ultra-modern market facilities and other infrastructure is often used to gauge achievements and/or failures of various governments. Good governance in public procurement administration is, therefore, criterion for measuring governance effectiveness and responsiveness of government. It requires at a minimum compliance with established procurement rules and procedures, greater integrity, equity, citizen involvement**,** transparency, accountability, efficiency, and effectiveness in the use of government financial resources.

Through the 2007 procurement reforms, Nigeria institutionalized basic statutory, institutional, and administrative mechanisms aimed at promoting good governance in public sector procurement. However, the measures, mostly enshrined in the PPA of 2007, have observably remained weak and ineffective due to certain factors or circumstances. Against this backdrop, this paper basically advocates the need for Nigeria to strengthen the mechanisms put in place for enhancing good governance in her public procurement practice so as

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to regain public confidence in the system and facilitate quick actualization of the country's much-needed social and economic development. The rest part of the paper is structured into four sections. Section two defines or explains the meaning of concepts or terms that are key to the topic of the study. Section three looks at global effort at promoting good governance standards and practices in public procurement in States, using the specific examples the United Nations Commission on International Trade Law (UNCITRAL). Section four examines measures put in place for enhancing good governance in public procurement in Nigeria and the observed inadequacies. Section five suggests workable ways of strengthening the existing measures, while section six is the final conclusion.

2 CONCEPTUAL ELUCIDATION

2.1 Good Governance and Public Procurement

According to the United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP), governance means 'the process of decision-making and the process by which decisions are implemented (or not implemented)[2]. The United Nations Commission for Global Governance defines governance as follows:

> 'Governance is the sum of the many ways individuals and institutions, public and private, manage their common affairs. It is a continuing process through which conflicting or diverse interests may be accommodated and co-operative action may be taken. It includes formal institutions and regimes empowered to enforce compliance, as well as informal arrangements that people and institutions either have agreed to or perceive to be in their interests.[3]

Governance is applicable in a variety of contexts such as corporate governance, international governance, national governance and local governance.[4]

2 UNESCAP, 'What is good governance?' at https://www.unescap.org/sites/default/files/good-governance.pdf (accessed on 29 November 2018)

3 UN Commission on Global Governance, Our Global Neighborhood. The Report of the Commission on Global Governance, (OUP, Oxford 1995) 9.

4 UNESCAP (n2)

The concept of good governance gained popularity as many international organizations, particularly those involved in developmental and financial assistance require good governance by a borrowing state, to ensure that the financial assistance they provide is properly directed[5]. The concept was a rarely used term until it was brought to the fore by the World Bank in a 1989 report on the economic and development problems of sub-Saharan Africa[6]. Barber Conable, the then president of the World Bank stated thus in the foreword to the report regarding sub-Saharan Africa:

> 'A root cause of weak economic performance in the past has been the failure of public institutions. Private sector initiative and market mechanisms are important, but they must go hand-in-hand with good governance – a public service that is efficient, a judicial system that is reliable, and an administration that is accountable to its public.[7]

From the foregoing, it can be deduced that efficiency, reliability and accountability are among the principles of good governance. Similarly, according to the European Commission White Paper on Administrative Reform, the key principles of good governance are service, independence, responsibility, accountability, efficiency and transparency[8]. Furthermore, the Organization for Economic Co-operation and Development (OECD) defines good governance as follows:

> 'Good governance is the respect for the rule of law, openness, transparency and accountability to democratic institutions; fairness and equity in dealings with citizens, including mechanisms for consultation and participation; efficient, effective services; clear, transparent and applicable laws and regulations; consistency and coherence

5 See J Wouters and C Ryngaert, Good governance: Lesson from international organizations, Working Paper No. 54, Institute for International Law, KU Leuven, 2004.

6 See R Roos and S de la Harpe, 'Good governance in public procurement: A South African case study', Potchefstroom Electronic Law Journal, 11, 2 (2008) 125/252-169/252.

7 World Bank, Sub-Saharan Africa: From Crisis to Sustainable Growth. A Long – Term Study Perspective (Washington 1989) p xii, at http://documents.worldbank.org/curated/en/498241468742846138/pdf/multi0page.pdf (accessed on 29 November 2018).

8 Roos and de la Harpe (n 6)

in policy formation; and high standards of ethical behavior.[9]

For the UNESCAP, good governance has eight major characteristics, which include participation, consensus oriented, accountability, transparency, responsiveness, effectiveness and efficiency, equity and inclusiveness, and the rule of law.[10] A closer look at the above definitions reveals that there is a consensus that the core principles of good governance include the rule of law, accountability, transparency, equity and inclusiveness, participation, efficiency and effectiveness. As stated earlier, these principles are also applicable to public procurement.

Public procurement on the other hand 'refers to the government's activity of purchasing the goods and services which it needs to carry out its functions.[11] One view underscores the process of purchasing goods, services or works by the public sector from the private sector.[12] It is stated that 'the range of economic sectors concerned by public procurement is as wide as the needs of a government to properly function and deliver services to its citizens.[13] Good governance in public procurement envisages the application of the principles of good governance in the process of hiring or purchasing goods, services and works by government entities. As Kasim corroborates:

> 'Good governance programmes require that public procurement reforms support essential concepts and values, as follows: Accountability to establish clear lines of responsibility in decision-making structures; Responsiveness to citizens of the country; Professionalism to improve individual and system performance; Transparency to ensure that procedures and policies are understood and

9 As quoted by Roos and de la Harpe (n 6) at 130/ 252

10 UNESCAP (n 2)

11 S Arrowsmith (ed) 'Introduction' in Public Procurement Regulation: An introduction (EU Asia Inter University Network for Teaching and Research in Public Procurement Regulation, 2010) 1 at https://www.nottingham.ac.uk/pprg/documentsarchive/asialinkmaterials/publicprocurementregulationintroduction.pdf

12 S Djankov, F Saliola, and A Islam, 'Is public procurement a rich country's policy?' World Bank Bloggs, 22 December 2016, at http://blogs.worldbank.org/governance/public-procurement-rich-country-s-policy

13 Ibid

> acceptable by procuring entities; Competition to attract high-quality national and international partners investing in meeting government needs through contracts; and, Appeal rights to redress meritorious grievances of suppliers.[14]

Public procurement in most countries involves huge yearly capital outlays. This presents an almost irresistible lure for corruption and various sorts of malpractices in the procurement process. Good governance mechanisms, therefore, should aim to ensure utmost integrity of procurement processes and systems.

2.2 Global Advocacy for Good Governance in Public Procurement: Mainstreaming the United Nations Commission on International Trade Law

There has been a long sustained international effort at propelling states, especially developing countries, to institutionalize good governance mechanisms and standards in their public procurement processes. One notable global effort in this regard was the adoption by UNCITRAL at its twenty-seventh session, on 15 June 1994, of a 'Model Law' on Procurement of Goods, Construction and Services.[15] The Model Law is a non-binding international legal instrument. It serves as an ideal pattern for reforming public procurement regulatory systems.[16]

In other words, the Model Law is purely a model designed to assist states undertake reform or develop their public procurement systems. As the name depicts, UNCITRAL is an organization responsible for promoting international trade, and for advocating adoption by the international community of laws facilitative of international trade.[17]

14 BB Kasim, 'Public procurement reform and good governance in Nigeria' Developing Countries Quarterly, 6 (8) 2016, 117-126.

15 See UNCITRAL Model Law on Procurement of Goods, Construction and Services with Guide to Enactment (1994), at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/ml-procure.pdf (accessed on 29 November 2018).

16 S Arrowsmith, 'Public procurement: An appraisal of the UNCITRAL model law as a global standard' International and Comparative Law Quarterly, 53 (2004) 17-46.

17 S Arrowsmith (ed) Public Procurement Regulation: An introduction (EU Asia Inter University Network for Teaching and Research in Public Procurement Regulation, 2010) 27 at https://www.nottingham.ac.uk/pprg/documentsarchive/asialinkmaterials/publicprocurementregulationintroduction.pdf

The rationale for promoting the adoption of the Model Law remains that trade with governments will be improved if countries embrace more standardized approaches to public procurement. However, it is important to mention that the Model Law is only intended to provide a standard framework for regulation of public procurement, and not a complete and comprehensive code. It aims to assist states in achieving core procurement objectives such as value for money, efficiency, and probity among others. At the outset, it was anticipated that the Model Law would mostly be for the guidance of developing countries, but evidence shows that its influence was initially felt in Eastern and Central Europe. In recent times it has also influenced legal reforms in other regions of the world, including Africa and Asia.

In terms of scope, Article 1(1) of the UNCITRAL's Model Law suggests that it could be adapted to apply 'to all procurement by procuring entities, except as otherwise provided by paragraph (2)' of the article. Paragraph (2) then indicates that the Law does not apply to the following: (a) procurement involving national defence or national security; (b) additional types of procurement the enacting State may specify as excluded; or (c) procurement of a type excluded by the procurement regulations. The enacting State, therefore, may circumscribe the types of procurement to benefit from good governance and the objectives espoused by the Model Law. These objectives are indicated thus in the preamble of the Model Law:

> 'Whereas [it is considered] desirable to regulate procurement of goods, construction and services so as to promote the objectives of:
>
> (a) Maximizing economy and efficiency in procurement;
> (b) Fostering and encouraging participation in procurement proceedings by suppliers and contractors, especially where appropriate, participation by suppliers and suppliers regardless of nationality, and thereby promoting international trade;
> (c) Promoting competition among suppliers and contractors for the supply of the goods, construction or services to be procured;
> (d) Providing for the fair and equitable treatment of all suppliers

and contractors;

(e) Promoting the integrity of, and fairness and public confidence in, the procurement process; and

(f) Achieving transparency in the procedures relating to procurement.'

The Model Law is a harmonization framework-law. It sets froth basic rules governing procurement that are intended to be supplemented by regulations promulgated by the appropriate authority of the enacting State. These rules, as set-out in various chapters and articles of the Model Law, are aimed at ensuring good governance in public procurement systems of the enacting States. They specifically seek to encourage domesticating States to integrate into procurement rules and regulations objectives and values reflected in the preamble of the Model Law. For purposes of this review, the salient and most notable aspects of the Model Law may be highlighted under the sub-headings below.

2.2.1 Requirement for Regulatory Institutions/ Authorities

To promote the good governance principle of compliance with constituted rules, or respect for the rule of law, the Model Law requires an enacting State to put in place proper institutional structures for the overall supervision of the implementation of domestic procurement laws and regulations. Article 4 of the Model Law requires an enacting State to specify the organ or authority that will be responsible for promulgation and implementation of procurement regulations in a manner consistent with the objectives and dictates of the Model Law. This may be a single central procurement organ or authority, or two or more organs or institutions.

2.2.2 Transparency Promotion

In line with the good governance principle of transparency, Article 5 of the Model Law requires that procurement laws and regulations and all administrative rulings and directives of general
application relating to procurement, and all amendments thereof, shall be promptly made accessible to the public and systematically maintained by

enacting States. Public knowledge and awareness of existence of legal frameworks within which public procurement is conducted is also imperative for attainment of the other objectives articulated in the preamble of the Model Law. Further, to promote transparency in the procurement process, and accountability of procuring entities to the general public for their use of public funds, Article 14 of the Model Law enjoins procuring entities in enacting States to promptly publish notice of procurement contract awards. The Model Law however refrains from prescribing on the manner in which the notice may be published, leaving it to procurement regulations to provide accordingly.

2.2.3 Enhancing Accountability through Record Keeping

The Model Law envisages that transparency, promotion of competition among suppliers and contractors, fair and equitable treatment of all suppliers or contractors, accountability, and the integrity of, and public confidence in procurement processes, may all be facilitated through proper record keeping. Thus, Article 11 of the Model Law provides that enacting States shall require procuring entities to maintain records of key decisions and actions taken in the conduct of procurement proceedings. The Model Law prescribes the information which, at a minimum, such records must contain. In addition to facilitating transparency and the other objectives of the Model Law, adequate records of procurement proceedings may also facilitate review of decisions of procuring entities and resolution of disputes and grievances lodged by aggrieved contractors or suppliers.

2.2.4 Participation in Procurement by Foreign Entities

To ensure equal opportunities for all entities desiring to do business with governments, Article 8(1) of the Model Law demands that suppliers or contractors shall normally be permitted to participate in procurement proceedings without regard to nationality. Participation may, however, be limited on the basis of nationality in cases in which a procuring entity is required to do so under procurement regulations or other provisions of law. And the record of procurement proceedings shall include a clear indication of the grounds or

basis upon which participation is limited. This provision is meant to create a level playing field for all contractors and bidders, and to make participation in procurement process as inclusive and broad as possible.

2.2.5 Promoting Integrity and Safeguarding Against Corruption

Public procurement is generally prone to corruption and malpractices that usually undermine its integrity and public interest in the process. Consequently, the Model Law includes provisions and measures that may guard against corruption, uphold the integrity of the procurement process and system as well as protect public interest. Article 15 of the Model Law requires that enacting countries include in procurement regulations provision for the rejection of a tender, proposal, offer or quotation by any supplier or contractor that attempts to improperly influence a procurement entity or its officials. It acknowledges that abusive practices in public procurement cannot be completely eradicated by a procurement law, but the safeguards in the Model Law are designed to promote transparency and objectivity in procurement proceedings, and thereby reduce corruption. In addition, the article generally requires enacting States to put in place an effective system of sanctions against corruption by Government officials, employees of procuring entities, and suppliers and contractors, which would also be applicable to the procurement process. Article 12 of Model Law also requires that procurement regulations shall provide for rejection of all tenders, proposals, offers or quotations by procuring entities where there is need to protect public interest, including where there seems to have been a lack of competition or to have been collusion in the procurement proceedings. Still on safeguards against corruption, Article 35 suggests a clear-cut provision prohibiting negotiations between the procuring entity and suppliers or contractors with regard to tenders submitted by the suppliers or contractors. This provision is necessary to avoid familiarity and collusion between officials of procuring entities and contractors or suppliers.

2.2.6 Complaint/ Review Mechanism

In several articles in Chapter VI, the Model Law underscores the right of any contractor or supplier aggrieved by perceived irregularities in procurement proceedings to seek review or redress in respect thereof. Article 52(1) requires State regulations to provide for review where a supplier or contractor claims that a breach of duty imposed on the procuring entity by law causes or is likely to cause it to suffer loss or injury. According to section 52 (2), however, certain decisions or actions shall not be subject to review in terms of Article 52 (1). These notably include selection of a method of procurement pursuant to framework rules of the Model law providing for such a choice; and the limitation of participation in procurement on the basis of nationality if this is provided for under the rules or regulations. The Model Law elaborates on three types of review, being internal, administrative and judicial review. Article 53 provides for internal review by the procuring entity itself, or if its decisions are to be approved by another authority, by that authority. Article 54 provides for administrative review by administrative bodies where these are provided for by the enacting State. Article 57, finally, provides for judicial review by courts with appropriate jurisdiction in the enacting States. It should be self-evident that effective review of acts and decisions of procuring entities taken during procurement proceedings ensures proper functioning of the procurement system and promotes trust and confidence in the system.

3 STATUTORY MEASURES PROMOTING GOOD GOVERNANCE IN PUBLIC PROCUREMENT IN NIGERIA

Through the Public Procurement Act (PPA) of 2007, designed after the UNCITRAL Model Law, Nigeria joined the league of countries with modern laws on public procurement. The PPA of 2007 attempted to align Nigeria's public procurement practice with international standards by incorporating provisions required for achieving good governance in the regulation of public procurement in the country. This part of the paper highlights and discusses measures incorporated in the PPA for ensuring good governance in public procurement regulations in Nigeria under sub-headings similar to those employed in the review of the Model Law.

3.1 Regulatory Institutions/Authorities

In conformity with the Model Law's requirement for dedicated procurement regulatory institutions or authorities in enacting States, Nigeria's PPA of 2007 provided for the establishment of two main bodies to oversee the implementation of public procurement policies in the country. These are the Bureau of Public Procurement (BPP) and National Council on Public Procurement (NCPP). Section 1(1) of the PPA provided for the establishment of the NCPP to serve as the apex procurement regulatory authority in Nigeria. Section 3(1) of the Act, on the other hand, provided that the BPP shall have the primary responsibility of regulating implementation of procurement proceedings in all federal government's Ministries, Departments and Agencies (MDAs). As the highest procurement regulatory institution, the NCPP was meant to directly supervise the activities of the BPP, while the BPP in-turn supervised execution of procurement functions by MDAs. The essence was to provide checks and balances and to ensure superlative operations of the BPP in delivering on its mandate in the public sector procurement sphere.

Thus, on the face of it, the PPA of 2007 adequately provided for the regulatory structures insisted upon in the Model Law as necessary for promoting good governance in public procurement administration in Nigeria. The challenge, however, is that since the passing of the PPA in 2007, the Federal Government of Nigeria, the executive branch of Government, has not seen it fit to constitute and inaugurate the NCPP as provided for by the Act. As contended by some commentators, the BPP has consequently been operating as the sole and all-in-all authority, without the body that was intended to exercise oversight over all its functions and activities.[18] This has compromised attainment of good governance in Nigerian procurement practice and reduced public confidence in the system. This also portrays outright

18 See MB Attah, 'Public procurement and resource governance' paper delivered at the National Policy Dialogue on Resource Governance in Nigeria, Abuja, 25 August 2011 (Accessed on 6 November 2013 at http://newsdiaryonline.com/attah_lecture.htm; M E Onyema, 'Challenges and prospects of public procurement practice in Nigeria' NewsDiaryOnline, 30 September 2011, accessed at http://newsdiaryonline.com/procured.htm on 20 November 2013; and E Onyekpere, 'Revisiting the national council on public procurement' The Punch, 29 July 2013. Accessed at http://www.punchng.com/opinion/revisiting-the-national-council-on-public-procurement/ on 20 November 2013.

disrespect for the rule of law, and a gross violation of the provisions of the PPA. It also undermines the functioning and effectiveness of the PPA as a procurement institution or authority.[19]

3.2 Transparency Measures

Some of the measures included in the Nigerian PPA of 2007 aimed at ensuring greater transparency in the procurement process included provisions making important information related to public procurement available to the entire public; well-articulated and transparent procedures to be followed by MDAs when executing procurement functions;[20] and BPP Regulations to be adhered to by procuring entities in the implementation of procurement proceedings. In Section 19(a), for example, the PPA requires procuring entities to advertise details of all procurement contracts, and to solicit for bids. The advertisement must be in at least two national newspapers. Section 5(f) of the PPA, also mandates the BPP to publish details of major contracts in the Public Procurement Journal. By virtue of Section 5(g) of the Act, the BPP is to publish both print and electronic editions of the Public Procurement Journal. In addition to these, the BPP also provides Standard Bidding Documents to MDAs, Contractors, Service Providers and the general public.[21] This is to ensure that all and sundry are well informed about government procurement activities and opportunities.

These transparency measures notwithstanding, procurement proceedings in Nigeria are not sufficiently insulated from political interference and pre-determination of outcomes. It is alleged that contracts are in many instances shared among politicians, with the assistance and supervision of Ministers responsible for procuring entities even before they are advertised.[22] It is also alleged that Accounting Officers, assisting their political masters, often direct procurement officers to work towards ensuring that 'preferred Contractors/

19 A Akosile 'Procurement act: Experts, stakeholders challenge government' ThisDayLive, 29 September 2010, at http://www.thisdaylive.com/articles/procurement-act-experts-stakeholders-challenge-govt/77748 Accessed on 16 November 2013; and E Onyekpere Diagnostics on the implementation of the Public Procurement Act (LASEC Consulting, Abuja 2010).

20 The PPA of 2007, Ss 19 (a) – (j)

21 ME Onyema (n 18) 6.

22 Onyema (n 18) 12

Service Providers' are pre-prequalified and emerge as winners of contracts. It is also alleged that Ministers have been known to bring memos to Federal Executive Council's weekly meetings for approval of procurements above certain thresholds.[23] This has created a role for Ministers in procurement proceedings which was never contemplated by the PPA. It would appear that public servants with statutory duties and responsibilities for procurement under the PPA are not able to resist political interference and manipulation of the award of procurement contracts. One study has suggested that political interference ranks as the second most significant challenge for Nigerian public procurement, inhibiting attainment of desired levels of transparency and good governance in the process.[24]

3.3. Accountability Framework

Accountability in the use of public funds is an essential element of good public sector management. Thus, emulating UNCITRAL's Model Law, the Nigerian PPA of 2007 includes measures seeking to achieve this objective. Section 38(1) of the PPA, for example, demands that all procuring entities should maintain a comprehensive record of procurement proceedings. Section 38(5) the quires that records and documents maintained by procuring entities should, upon request, be made available for inspection by the BPP, an investigator appointed by the BPP and the Auditor-General. And where donor funds are used for procurement, donor officials should also have access to procurement files for the purpose of audit and review. More importantly, section 88 of the 1999 Nigerian Constitution also empowers the National Assembly to carry out investigations with the view to exposing and curtailing corruption and to ensuring proper protection of the interests of the general public.

Further, by the virtue of Section 5 (p) of the PPA, the National

23 See Public and Private Development Center (PPDC), Implementing the Nigerian procurement law, Compliance with the Public procurement Act, 2007: A Survey of Procuring Entities, Civil Society Observers, Bidders and Contractors, Legislators, and the Bureau of Public Procurement (Abuja Nigeria 2011) pp 85-86, at http://library.procurementmonitor.org/backend/files/Implementing%20the%20 Nigerian%20Procurement%20Law.pdf (accessed on 4 September 2015); and SW Elegbe 'A comparative analysis of the Nigerian Public Procurement Act Against International Best Practice' paper presented at the Fifth International Public Procurement Conference, 17-19 August 2012, Seattle, USA.

24 O Familoye, D Ogunsemi and OA Awodele, 'Assessment of the challenges facing the effective operations of the Nigeria Public Procurement Act 2007' (2015) International Journal of Economics, Commerce and Management, 3(11), 957-968.

Assembly has oversight responsibilities on public procurement activities in the country to ensure strict conformity with the law. To ensure activism in undertaking this responsibility, there exists in the Nigerian National Assembly a House Committee on Public Procurement. It would appear, however, that the National Assembly has not been discharging this important function effectively. The Public Private Development Center suggests that the National Assembly has not been consistent in demanding the BPP to submit bi-annual audit reports of government procurement activities to it as the law demands.[25] This has contributed to laxity in the manner in which the BPP has been discharging its own duties and responsibilities.

Another development hindering full attainment of the objective of accountability in public procurement in Nigeria is the refusal by the Legislature itself to subject its own procurement activities to BPP's regulations and supervision. The PPA provides in Section 15 (1) (a) that the provisions of the Act are applicable to procurement of all goods and services carried out by the Federal Government of Nigeria and all procurement entities. According to section 15 (2), however, the exception is procurement of special goods and works, and procurements relating to national defense or national security. By virtue of these provisions, the PPA should apply to all procurements by the Federal Government of Nigeria and all its institutions, including the National Assembly and the Judiciary. Refusal by the National Assembly to subject its procurement activities to regulation and supervision of the BPP may therefore be a gross abuse of the procurement Act, its own piece of legislation, and contempt or disrespect for the rule of law.[26]

3.4 Popular Participation Strategies

To ensure participation in the public procurement process by all categories of contractors, service providers, and suppliers, as recommended by the Model law, section 24 (1) of the PPA demands that all procurements of goods and works by all procurement entities are to be conducted by the means of open competitive bidding, which according to the Act means the process by which procurement

25 PPDC (n 23) 68
26 PPDC (n 23) 67

entities offer every interested bidder equal simultaneous information and opportunity to be involved in offering the goods and works needed. This applies to both National Competitive Bidding and International Competitive Bidding. More fundamentally, to ensure that the citizens take part in the procurement process, section 19 (b) of the PPA provides that while implementing procurement proceedings, procurement entities must ensure the presence of private sector professional organizations and non-governmental organizations working in the areas of transparency, accountability and anti-corruption, as representatives of the general public. The organizations are entitled to write and submit a report to any relevant government bodies regarding the execution of the procurement proceedings. This measure is meant not only to ensure citizens participation in the procurement process, but also promotes transparency in the system.

It would appear that the involvement of civil society organizations (CSOs) in procurement monitoring and observation does not take place as envisaged under the Act. Despite repeated requests, many MDAs hardly avail procurement information and documentation to CSOs, and the regulatory authority appears to be unable to intervene. Further, whereas some CSOs could be invited to bid opening events, there were hardly invited to bid examination and evaluation and the later stages of the procurement process.[27] One commentator suggests that MDAs sabotage CSO procurement monitoring through tactics such as giving of late and sudden notices relating to bid opening and pre-qualification exercises, and manifestation of hostile attitudes when CSOs demand details of procurement processes.[28] These tactics discourage the CSOs from attempting to fulfil their statutory duties and responsibilities and inevitably frustrate attainment of the underlying objectives of the law on good governance, transparency and encouraging participation by many in public procurement.

3.5 Anti-Corruption Measures

Several notable provisions in the Nigerian PPA of 2007 adapt from the Model Law measures aimed at promoting integrity and safeguarding the country's

27 PPDC (n 23) 84
28 Onyema (n. 18)

procurement system against corruption and other malpractices associated with public procurement. By virtue of Section 5(n), for example, the BPP is mandated to prevent fraudulent and unfair procurement and, where necessary, apply relevant administrative sanctions. Section 5 (o) also enjoins the BPP to review the procurement and award of contract procedures of every entity to which the Act applies. The rationale behind this is to ensure that procedures for award of procurement contracts are devoid of irregularities or sharp practices that could mar the integrity of the procurement process. The PPA criminalizes corruption and places severe sanctions on any entities, public officials and companies that indulge in any form of corrupt practices. Included among the offences that can be committed under the Act is 'conducting or attempting to conduct procurement fraud by means of fraudulent and corrupt acts, unlawful influence, undue interest, favor, agreement, bribery or corruption …'[29]

Section 58 (4) (c) of the Act suggests that corruption includes 'directly, indirectly or attempting to influence in any manner the procurement process to obtain an un fair advantage in the award of a procurement contract.' Section 58 (6) stipulates that any legal person convicted for committing an offence under the Act shall be liable to a 'cumulative penalty of: (a) debarment from all public procurements for a period not less than 5 calendar years; and (b) a fine equivalent to 25% of the value of the procurement in issue.' According to section 58 (5), an officer of the BPP or any procuring entity convicted of committing an offence under the Act shall be liable to 'a cumulative punishment of: (a) a term of imprisonment of not less than 5 calendar years without any option of fine; and (b) summary dismissal from government services.

These, especially debarring corrupt firms from participating in procurement processes, must have been regarded as sufficiently deterrent criminal sanctions. It would appear, however, that this sanction is rarely imposed, if at all. Corruption has in consequence continued to thrive in Nigerian public procurement.[30] It has long been regarded by some as systemic and entrenched.[31] The nature and form it takes has been described thus:

29 Section 58 (4) (b)

30 See SW Elegbe (n 23); JK Achua, 'Anti-corruption in Public Procurement in Nigeria: Challenges and Competency Strategies' 11, 3 (2011) Journal of Public Procurement 323-353, at 334; and MB Attah (n 18).

31 AA Adebayo and S Arawomo, 'An appraisal of the structure, operation and performance of the contract due process unit in Nigeria' (2008) Covenant Journal of Business and Social Science, 2 (1), 6-7.

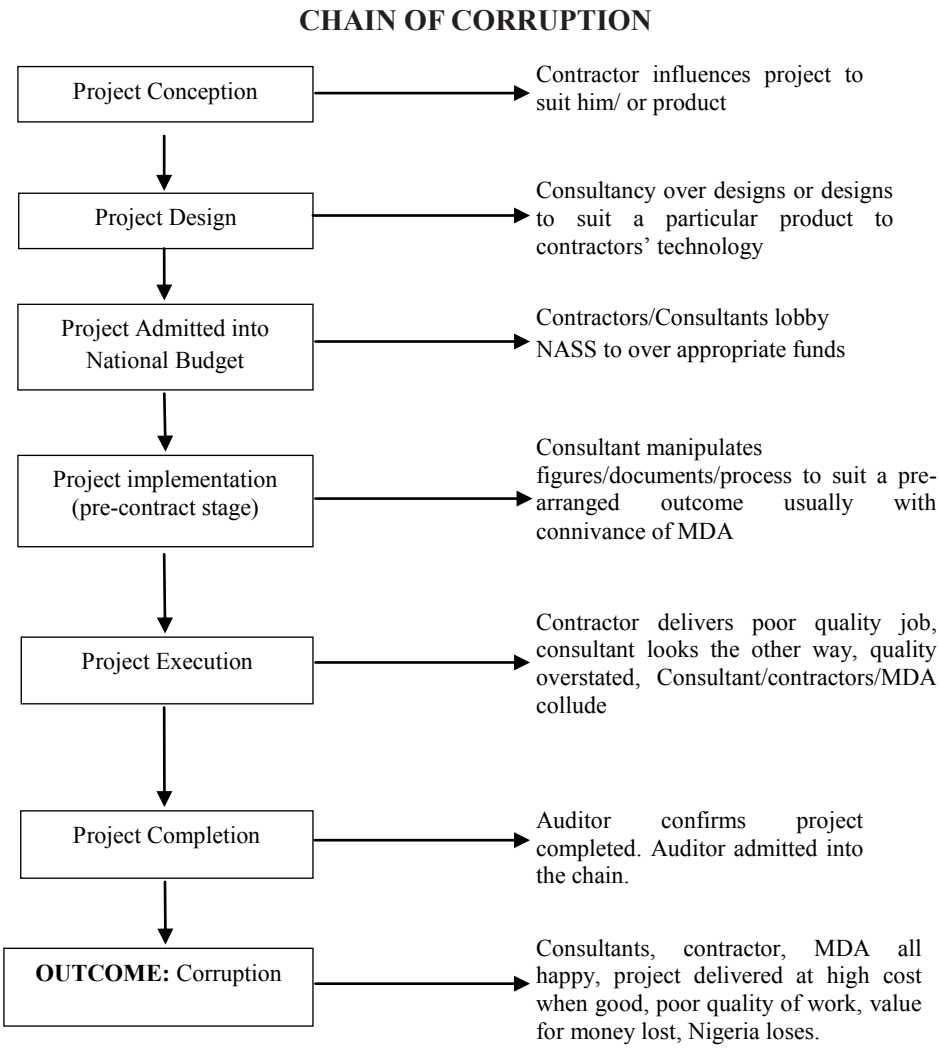
> 'It is obvious that processes, procedures, and guiding rules for the award and execution of public contracts for the procurement of materials, goods, works and services are grossly abused to the detriment of the nation's development efforts. It is evident that there is over-invoicing for procurement, inflation of contract costs, proliferation of white elephant projects and mass diversion of public funds through all forms of manipulations of procurement and contract processes leading to acquisition of substandard goods and low quality services. Considerable portion of public treasury is lost due to poor contracting system which accommodates opaqueness, influence peddling, inefficiency, inflated costs and other incidences of corruption.'[32]

Other commentators have referred to collusion between officers in charge of procurement in MDAs with contractors/bidders, suppliers and service providers.[33] Figure 1 below is a diagrammatic depiction of the nature and form of corruption that takes place at each stage of the public procurement process in Nigeria.

32 MF Adegbola, EE Akpan, BO Eniaiyejuni, JK Alagbe, EE Kappo and DA Yunusa The problem of effective procurement and contract management in the public sector (Administrative Staff College of Nigeria, Lagos, Nigeria, 2006) 7.

33 Onyema (n 18)

Figure 1.1 Chain of Corruption in Nigeria's Public Procurement Process



Source: Nigerian Bureau of Public Procurement[34]

The inevitable overall effects of corruption at the various nodes of the procurement process indicated in the diagram include very high costs of government projects in Nigeria, leading to huge budgetary expenditures for the provision of goods

34 Reproduced from BPP, *Public Procurement Act 2007 as it Affects Contractors and Consultants* (State House, Abuja, Nigeria year ?) 7.

and services; delivery of poor quality or substandard works and/or projects, even after quality prescriptions are built into contracts; and huge waste of the nation's scarce financial resources.[35]

It has also been alleged that inherent weaknesses of the country's key anti-corruption agencies, the Economic and Financial Crimes Commission (EFCC) and Independent Corrupt Practices and Other Related Offences Commission (ICPC), is another major reason for the thriving of corruption in Nigerian public procurement.[36] Anti-corruption agencies have apparently manifested gross inability to investigate and promptly dispose of cases relating to corruption or other public procurement malpractices. An important factor is that laws establishing these agencies do not allow them to prosecute cases in court after investigation without the Attorney-General's authorization. There is a possibility in this process that a case may be dropped or unnecessarily delayed. There is also a perception that lawyers involved in such cases connive with the courts to unreasonably and unnecessarily delay trials through legal tactics such as injunctions and adjournments. Some cases, mostly those involving past Governors and other Politicians, taken to court in 2007, are still pending. In one case an injunction was issued restraining the EFCC, sine die, from mentioning the offences against the accused.

3.6 Complaint/ Redress Mechanism

The most notable mechanism for redressing grievances arising from the procurement process provided for in the PPA of 2007 is administrative review. Section 54 (1) states that a bidder may seek administrative review for any omission or breach by a procuring or disposing entity under the provisions of this Act, or any regulations or guidelines made under this Act or the provisions of bidding documents. Section 54 (2) then outlines a long and cumbersome process for seeking such review.[37] It stipulates that any complaint against a procuring entity by a bidder should be submitted in writing to the accounting officer, who should review the complaint within 15 working days from the date the

35 See HB Ahmed, 'Cost of contracts in Nigeria' 10 November 2011, at http://baba-ahmed.blogspot.com/2011/11/cost-of-contracts-in-nigeria.html (Accessed on 20 November 2013); and Onyema (n18).
36 PPDC (n 23) 88-89 and Onyema (n 18)
37 Section 54 (2) paras (a) to (c).

bidder became aware or should have become aware of the circumstances giving rise to the complaint. Upon review the accounting officer shall render a decision in writing within the 15 working days, indicating the corrective measures to be taken if any, including the suspension of the proceedings if deemed necessary, and must give reasons for his decision.

If the accounting officer does not take any decision within the 15 working days or, as specified in section 54(3), if the bidder is not satisfied with the decision of the accounting officer, he could lodge a complaint with the Bureau within ten working days from the date the decision of the accounting officer was disclosed or communicated to him. In terms of section 54 (4), upon receipt of the complaint, the Bureau should immediately notify the respective procuring or disposing entity about it and suspend any further action by the entity until the matter is resolved by the Bureau. Unless the Bureau dismisses the complaint, it should prohibit the procuring or disposing entity from taking any further action; nullify in whole or in part any unlawful act or decision made by the procuring or disposing entity; declare the rules or principles that govern the subject matter of the complaint; and revise an improper decision by the procuring or disposing entity, or substitute its own decision for such an inappropriate decision. According to section 54 (5), before the Bureau takes any decision on a complaint, it should first communicate the complaint to all interested bidders and may take into account representations from the bidders and from the respective procuring or disposing entity.

In terms of section 54 (6), the Bureau must make its decision within 21 working days after receiving the complaint, stating the reasons for its decisions and remedies granted, if any. If, according to section 54 (7), the Bureau fails to make a decision and communicate same within the specified period, or the bidder is not satisfied with decision of the Bureau, he may appeal to the Federal High Court within 30 days after receiving the Bureau's decision, or at the expiration of the time stipulated for the Bureau to make a decision.

By all indications, this is an excessively lengthy and cumbersome process, likely to deter aggrieved bidders from seeking redress even in cases where glaring violations of the Act have occurred.

3.7 Strengthening the Measures

To strengthen or improve existing measures for promoting good governance in public procurement in Nigeria, the study recommends a number of interventions by key actors and stakeholders such as the Executive arm of Government, the National Assembly, MDAs and other procuring entities in the public service, the BPP and other statutory anti-corruption agencies.

The Political Executive should take necessary steps to fully implement provisions of the PPA of 2007, especially the establishment of the NCPP. This will complete establishment of the regulatory institutions proposed in the PPA for implementation of public procurement regulations and policies. It should be recalled that the Act proposes the NCPP as the higher body, responsible for supervising and ensuring the effective performance of the BPP. The Executive arm of Government in Nigeria should also desist from interfering in public procurement processes in a manner that leads pre-determination of the award of contracts. Professional civil servants tasked with execution of procurement functions must be allowed to perform their duties without interference or direction, and in a manner conducive to greater transparency in these processes.

To enhance accountability in public procurement processes, the National Assembly should also ensure that its House Committee on Public Procurement effectively utilizes the powers conferred upon it under Section 5 (p) of the PPA. It should be insistent and consistent in demanding from the BPP bi-annual audit reports of government procurement activities. The National Assembly has also been indicted above for assuming or pretending that it is not subject to existing regulations in its own procurement activities. This must cease. It has been contended that correctly, Regulations issued under the PPA of 2007 apply to procurement activities by the National Assembly. It should, therefore, take the lead in ensuring that laws which it has helped to bring into effect are fully observed and respected by everyone.

To ensure adequate participation or involvement of Nigerians in public procurement processes, MDAs should also be in forefront of respecting laws that require observation or participation by CSOs and other professional bodies in public procurement processes. MDAs should desist from conduct that can be regarded as aimed at frustrating the involvement of CSOs as envisaged

under the Act, such as giving of late information on conduct of meetings and other procurement proceedings. CSOs should also have full access to relevant documents and records to be considered at procurement meetings at which they should participate. It is also imperative that the BPP should intensify its monitoring and supervisory role over MDAs to ensure that procurement proceedings are conducted full consistent with the law, and those responsible for non-compliance in the MDAs are held legally accountable. Sanctions should be meted out, if necessary, to top management and staff of MDAs other procuring entities in the public sphere. The BPP, as the lead anti-corruption agency in Nigeria, should not be shy of wielding some of its powers in the discharge of its statutory duties and responsibilities. This should include reviewing the procurement and award of contract procedures of every entity to which the Act applies;[38] prompt investigation of procurement transactions made, and procuring entities that could have acted, in contravention of the law;[39] and debarring any supplier, contractor or service provider acting in contravention of the Act or Regulations made under the Act.[40] The EFCC and ICPC, the other anti-corruption agencies in Nigeria, should also always expedite investigations and actions relating to procurement corruption to ensure quick disposal of such cases. Laws establishing the EFCC and the ICPC should be amended to empower these agencies to directly prosecute procurement corruption cases in the courts after investigations. The requirement for prior approval of Attorney General, which causes delay in the prosecution of suspects in the courts, should be dispensed with. Ways should also be found of facilitating disposal of corruption cases in the courts, without undue regard to technicalities.

Considering the nature of public procurement, the process or mechanism for seeking redress needs to be more efficient, concise, less cumbersome and result oriented. The cumbersome, bureaucratic processes described in the Act does not make for quicker delivery of verdicts, and actually discourages reporting of observed violations of the Act, and by extension, adherence to procurement rules and regulations by all stakeholders.

38 PPA, 2007 s 5 (0)
39 PPA, 2007 s 6 (d)
40 PPA, 2007 s 6 (e)

4. CONCLUSION

Nigeria, through the reform of her public procurement system and practice between 2000 and 2007, has aligned her procurement practices with international standards and best practices, which require the institutionalization of measures for promoting good governance in public procurement regulations. The UNCITRAL Model Law is a global framework law which serves to help States reform or improve procurement laws and regulations while upholding the good governance principles of respect for rule of law, transparency, accountability, among others. In line with requirements of the UNCITRAL's Model Law Nigeria enacted her public procurement law, the PPA, in 2007. The law, however, has only been partially implemented. Nigeria, therefore, has very weak measures for securing good governance and other cherished values in public procurement. Attainment of the country's public procurement objectives, and consequent national development, are therefore severely compromised.