

FINANCE BILL 2020 AND THE PUBLIC PROCUREMENT ACT OF 2007
(Memorandum Submitted by Centre for Social Justice Limited by Guarantee)

Opening Statement

The idea of a Finance Act accompanying the yearly Appropriation Act (App. Act) to facilitate the implementation of the App. Act is an adhoc arrangement which seeks to respond to the fiscal and related challenges that would otherwise hamper the implementation of the App. Act. If the Finance Act is tied to the App. Act, its tenure may also be tied to constitutional 12 months prescribed as the lifetime of the App. Act. But this is not the practice judging from the Finance Bill that accompanied the 2020 App. Act. In countries that accompany the App. Act with a Finance Act, the practice is to ensure that both Acts have the same lifespan.

The Finance Bill 2020 seeks to amend the Capital Gains Act, Companies Income Tax Act, Personal Income Tax Act, Tertiary Education Trust Fund (Establishment) Act, Customs and Excise Tariff, etc. (Consolidated) Act, Value Added Tax Act, Federal Inland Revenue Service (Establishment) Act, Nigeria Export Processing Zone Act, Oil and Gas Export Free Zone Act, Fiscal Responsibility Act, Companies and Allied matters Act and the Public Procurement Act.

It is simply too ambitious to propose to amend 12 Acts of the National Assembly (NASS) with just one Act of 39 pages. The competencies and expertise required to attend to the subjects covered by these laws are too wide to be considered in just one amendment bill. Furthermore, these laws are too fundamental to our economic management to contemplate amending them in a hurry. They require due contemplation, deep consultation with stakeholders and their presentation and consideration as single bills that would be considered on their merits. Lumping them together serves no useful purpose.

It is our recommendation that the issues contained in this bill be considered separately. But in the event, our recommendation is not accepted, find below our views on the proposed amendments to the Public Procurement Act.

Section	Principal Act	Proposed Amendment	Recommendation
17	<p>17. Subject to the monetary and prior review thresholds for procurements in this Act as may from time to time be determined by the Council, the following shall be the approving authority for the conduct of public procurement: (a) in the case of: (i) a government agency, parastatal, or corporation, a Parastatals Tenders Board; and (ii) a ministry or extra-ministerial entity, the Ministerial Tender Board.</p>	<p><i>Approving Authority</i> 52. Substitute for Section 17 of the Principal Act, a new Section "17":</p> <p>(1) Subject to the monetary and prior review thresholds for procurements in this Act as may from time to time be determined by the Council, the following Shall be the approving authority for the conduct of public procurement:</p> <p>(a) in the case of:</p> <p>(i). a government agency, parastatal, or corporation, a Parastatal's Tender s Board;</p> <p>(ii). a ministry or extra-ministerial entity, the Ministerial Tender's Board;</p> <p>(iii). the National Assembly, the Parastatals Tenders Board; and</p> <p>(iv). the Judiciary, the Judicial Bodies Tender's Board and the Courts Tender's Board;</p> <p>(b) In the case of any other public procurement, the value of which exceeds the Ministerial Tender's Board threshold, or any other threshold set by the Bureau and approved by the Council.</p>	<p>Retain the provisions of S. 17 of the Principal Act.</p>

		<ul style="list-style-type: none"> (i) the Federal Executive Council for the Executive Arm of Government; (ii) the National Assembly Tender's Board for the Legislative Arm of Government; and (iii) the National Judicial Council Tender's Board for the Judicial Arm of Government. <p>(2) The Chief Executive and Accounting Officer of the procuring entity shall chair the Parastatal Tender's Board; the Permanent Secretary shall chair the Ministerial Tender's Board; while the President or his representative shall chair the Federal Executive Council.</p> <p>(3) The accounting officers of the parastatals under the National Assembly shall chair the Parastatals' Tender's Board; while the Clerk to the National Assembly shall chair the National Assembly Tender's Board.</p> <p>(4) The Secretaries and Chief Registrars shall chair the Boards of the judicial Bodies respectively; while the Chief Justice of Nigeria, or his representative, shall chair the National Judicial Council Tender's Board.</p>	
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Justification: There is only one government, one treasury/ministry of finance and procurement need not reflect the arms of government. Creating second level approving authorities in the Federal Executive Council for the Executive, National Assembly Tender's Board for the Legislature and National Judicial Council Tender's Board for the Judiciary runs counter to best practices. Nigeria's Country Procurement Assessment Report June 2000 had warned against this. The Report had recommended as follows: *"Once a law on public procurement has been enacted and regulations, manuals and standard bidding documents issued, carrying out public procurement including contract awards will clearly be an administrative function, the mechanics of which should be disengaged from the executive. Currently, high level politicians such as Governors, Ministers and Commissioners are operationally involved in the procurement process. However, under the reformed procurement system, high level politicians should maintain their overall managerial oversight responsibilities while leaving administrative and operational matters (including procurement) to the civil servants."* When this recommendation is juxtaposed with the intended amendment, it becomes quite easy to assert that this amendment is not in line with best practices. The implication of continuing of this new path may lead to a situation where the President of the Federal Republic or the Chief Justice of Nigeria will be cited for procurement fraud. Furthermore, the proposed amendment still makes reference to a Council everyone knows does not exist.

20	<p>20.—(1) 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 the Permanent Secretary and in the case of extra-ministerial departments and corporations the Director-General or officer of co-ordinate responsibility.</p> <p>(2) The accounting officer of every procuring entity shall have overall responsibility for the planning of, organization of tenders, evaluation of tenders and execution of all procurements and in particular shall be responsible for: (a) ensuring compliance with the provisions of this Act by his entity and liable in person for the breach or contravention of this Act or any regulation made hereunder whether or not the act or omission was carried out by him personally or any of his subordinates and it shall not be material that he had delegated any function duty or power to any person or group of persons; (b) constituting the Procurement Committee and its decisions; (c) ensuring that adequate appropriation is provided specifically for the procurement in the Federal budget; (d) integrating his entity's procurement expenditure into its yearly budget; (e) ensuring that no reduction of values or splitting of procurements is carried out such as to evade the use of the appropriate procurement method; (f)</p>	<p><i>Accounting Officer</i> 53. Section 20 of the Principal Act is amended:</p> <p>(a) in subsection (1), by inserting after the word, "responsibility" in line 4, the words, "in the case of the National Assembly, the Clerk; and in the case of the Judiciary, the Secretaries of the Judicial Bodies and the Chief Registrars of the Courts";</p> <p>(b) by inserting after subsection (2), new subsections "(3)-"9)</p> <p>(3) The accounting officer of each procuring entity is empowered to purchase or approve contracts without open competitive tendering provided the value of such procurement (low value Procurement) does not exceed certain thresholds set by the Bureau and approved by the Council.</p> <p>(4) For the low-value procurements, the advert shall be for one week on the Notice Board of the procuring entity.</p> <p>(5) The Bureau shall prescribe the procedure and other conditions applicable for different procuring entities and for different goods, works and services to be procured</p>	<p>Retain existing provisions in the Principal Act.</p> <p>There is no need for the new subsection (3), (4) and (5). They add no value to the Act. Subsections (7), (8) and (9) are already covered in different sections of the principal legislation. They add no value to the Act.</p> <p>The new subsection (6) may be saved and added to the principal legislation since it adds a new dimension of accountability.</p>
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	<p>constituting the Evaluation Committee; (g) liaising with the Bureau to ensure the implementation of its regulation.</p>	<p>(6) The accounting officer shall render a quarterly Report to the Parastatal's Tender's Board.</p> <p>(7) Each employee of a procuring entity and each member of a board or committee of a public entity shall ensure that this Act, within the areas of assigned responsibility of the employee or member, is complied with.</p> <p>(8) All bidders for the procurement of any goods, works and services for any public entity shall comply with all relevant provisions of this Act.</p> <p>(9) Any stakeholder, be it the accounting officer, an officer of the procuring entity, a member of a committee or board of a public entity and any bidder of public goods, works and services, who fails to independently perform within the respective assigned responsibility as prescribed under this Act and who contravenes the provisions of this Act, shall be guilty of an offence.</p>	
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Justification: The principal legislation has already set out provisions for special and restricted tendering including request for quotations, direct procurement and emergency procurement, etc. The Bureau already has powers to formulate general policies and guidelines relating to public sector procurement for the approval of Council – S.5 (a). Bidders who fail to comply with the Act and requirements of bid solicitation risk being disqualified. Offences have already been created in the Act and nothing new is added. These new subsections distort existing provisions.

<p>22.</p>	<p>22.—(1) There is hereby established by this Act in each procuring entity a tenders board (in this Act referred to as “the Tenders Board”).</p> <p>(2) Subject to the approval of the Council, the Bureau shall, from time to time, prescribe guidelines for the membership of the Tenders Board.</p> <p>(3) The Tenders Board shall be responsible for the award of procurements of goods, works and services within the threshold set in the regulations.</p> <p>(4) In all cases where there is a need for pre-qualification, the Chairman of the Tenders Board shall constitute a technical evaluation sub-committee of the Tenders Board charged with the responsibility for the evaluation of bids which shall be made up of professional staff of the procuring entity and the Secretary of the Tenders Board who shall also be the Chair of the Evaluation Sub-committee.</p> <p>(5) The decision of the Tenders Board shall be communicated to the Minister for implementation</p>	<p><i>Tenders Board 54.</i> Section 22 of the Principal Act is amended by substituting for subsections (1) and (5), new subsections "(1) and "(5)":</p> <p>1) There is established by this Act:</p> <p>(a) For the Executive Arm of Government:</p> <p>(i) the Parastatals Tender's Board in each procuring entity;</p> <p>(ii) the Ministerial Tender's Board in each Ministry Department; and</p> <p>(iii) the Federal Executive Council;</p> <p>(b) for the Legislative Arm of Government:</p> <p>(i) the Parastatals Tender's Board in each procuring entity under the legislature; and</p> <p>(ii) the National Assembly Tender's Board in National Assembly; and</p> <p>(c) for the Judicial Arm of Government:</p> <p>(i) the Judicial Bodies and Courts Tender's Boards in each parastatal under</p>	<p>Retain the provisions of the Principal Act in line with S.17 of the Act.</p>
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		<p>the Judiciary and all Court; and</p> <p>(ii) the National Judicial Council Tender's Board.</p> <p>5) The decisions of all Tender's Boards shall be confirmed respectively by the Political Heads of the procuring entities, provided that the Political Head are not the Chairmen of the Tender's board."</p>	
<p>Justification: The same arguments applicable in S.17 against the setting up of the new approving authorities are also applicable here. Subjecting the decisions of the Tender's Boards to the confirmation of the political head of the procuring entity serves no useful purpose but to introduce the outright politicization of the procurement process. It will introduce unnecessary setbacks to the process. Furthermore, subjecting the Tender Board approval to the approval of the political head is a sure way not to implement projects. It introduces conflict in several sections of the Principal Act as to who is the accounting officer. The political heads can then as well take over the day to running of the MDAs.</p>			
24.	<p>24.—(1) Except as provided by this Act, all procurements of goods and works by all procuring entities shall be conducted by open competitive bidding.</p> <p>(2) Any reference to open competitive bidding in this Act means the process by which a procuring entity based on previously defined criteria, effects public procurements by offering to every interested bidder, equal simultaneous information and opportunity to offer the goods and works needed.</p>	<p>Open competitive bidding 55. Section 24 of the Principal Act is amended by substituting for subsections (1) and (2), new subsections "(1)" and "(2)":</p> <p>(1) Except as provided by this Act:</p> <p>(a) all procurements of goods, works and services by all procuring entities shall be conducted by open competitive bidding; and;</p> <p>(b) any procuring entity that applies any other procurement option prescribed in this Act, the accounting officer of the entity shall submit a request and</p>	Retain the provisions of S. 24 of the Principal Act.

		<p>obtain the approval of the Bureau.</p> <p>(2) Any reference to open competitive bidding in this Act means the process by which a procuring entity based on previously defined criteria, effects public procurements by offering to every interested bidder, equal simultaneous information and opportunity to offer the goods, works and services needed.</p>	
<p>Justification: The new (1) (b) adds no value because other methods of procurement in the special and restricted category have been provided for in the Act including the conditions under which they can be used. The new paragraph simply distorts existing provisions and creates confusion in a settled area of the law.</p>			
25	<p>2) Every invitation to an open competitive bid shall: (i) in the case of goods and works under International Competitive Bidding, the invitation for bids shall be advertised in at least two national newspapers and one relevant internationally recognised publication, any official websites of the procuring entity and the Bureau as well as the procurement journal not less than six weeks before the deadline for submission of the bids for the goods and works,(ii) in the case of goods and works valued under National Competitive Bidding, the invitation for bids shall be advertised on the notice board of the procuring entity, any official web sites of the procuring entity, at least two national newspapers, and in the procurement journal not less than six weeks</p>	<p>Invitations to bid 56. Section 25 of the Principal Act is amended by substituting for subsection (2), a new subsection “(2)”:</p> <p>(2) Every invitation to an open competitive bid shall, in the case of goods, works and services:</p> <p>(b) under International Competitive Bidding, the invitation for bid shall be advertised in at least two national newspapers and one relevant internationally recognized publication, any official websites of the procuring entity and the Bureau as well as the procurement journal of not more than four weeks for contracts within the thresholds of the Parastatals and Ministerial Tender’s Boards and not more than six</p>	<p>Retain the provisions of S. 25 of the Principal Act.</p>

	<p>before the deadline for submission of the bids for the goods and works.</p>	<p>weeks for contracts above the threshold of the Ministerial Tender's Board before the deadline for the submission of the bids for the goods, works and services; and</p> <p>(c) valued under National Competitive Bidding, the invitation for bids shall be advertised on the notice board of the procuring entity; any official websites of the procuring entity; at least two national newspapers, and in the procurement journal not more than four weeks for contracts within the thresholds of the Parastatals and Ministerial Tender's Board before the deadline for submission of the bids for the goods, works and services”.</p>	
<p>Justification: Shortening the time for advertisement of invitation to bid in open competitive bidding from “not less than six weeks” to “not more than four weeks for contracts within the thresholds of the Parastatal and Ministerial Tenders Board and not more than six weeks for contracts above the threshold...” in both international and national competitive bidding short-circuits the process. The word used to qualify the timing is “not more than” and as such the actual length of time is now at the discretion of the procuring entity provided it does not exceed the limitation. Bidders need sufficient time to prepare their bids and the present arrangement guarantees adequate transparency and opportunities for all interested bidders. The introduction of a distinction to the timing based on a categorization of thresholds adds no value to the procurement process.</p>			
27	<p>27.—(1) All bids in response to an invitation to open competitive bidding shall be submitted in writing and in addition to any other format stipulated in the tender documents, signed by an official authorized to bind the bidder to a contract and placed in a sealed envelope.</p>	<p>57. Section 27 of the Principal Act is amended by substituting for subsection (1), a new subsection “(1)”:</p> <p>“All bids in response to an invitation to open competitive bidding shall be submitted in writing, electronic or any other format stipulated in the tender documents signed (physically or electronically) by an official</p>	<p>Amend the subsection as proposed in the Amendment Bill.</p>

		authorized to bind the bidder to a contract and placed in a sealed envelope”.	
Justification: The proposed amendment specifically introduces the electronic submission of bids and electronic signatures to bind the bidder. It is in line with modern e-procurement practices.			
30	30. All bids shall be submitted before the deadline or date specified in the tender documents or any extension of the deadline for submission and the procuring entity shall : (a) permit attendees to examine the envelopes in which the bids have been submitted to ascertain that the bids have not been tampered with; (b) cause all the bids to be opened in public, in the presence of the bidders or their representatives and any interested member of the public; (c) ensure that the bid opening takes place immediately following the deadline stipulated for the submission of bids or any extension thereof ; (d) ensure that a register is taken of the names and addresses of all those present at the bid opening and the organizations they represent which is recorded by the Secretary of the tenders board; and (e) call-over to the hearing of all present, the name and address of each bidder, the total amount of each bid, the bid currency and shall ensure that these details are recorded by the Secretary of the Tenders Board or his delegate in the minutes of the bid opening.	58. Section 30 of the Principal Act is amended by substituting a new section 30 as follows: “All bids (physical or electronic) be submitted before the deadline or date specified in the tender documents or any extension of the deadline for submission and the procuring entity shall:” (a) Substituting for paragraph (e), a new paragraph “(e)”: “(e)” call-over to the hearing of all present, the name and address of each bidder, the total amount of each bid, the bid currency, validity period, completion period and shall ensure that these details are recorded by the Secretary of the Tenders Board or his delegate in the minutes of the bid opening”; and (b) Inserting after paragraph (e), a new paragraph “(f)”: “(f)” this exercise shall be carried out by the procurement department of the procuring	Retain the opening paragraph of the Principal Act. Amend paragraph (e) as proposed in the Amendment Bill. Leave out the proposed paragraph (f) and its proviso.

		<p>entity in the presence of the legal officer or other relevant official of the entity and all those specified in Section 19 (b) of this Act”.</p> <p>(c) Inserting after paragraph (f), a new proviso as follows:</p> <p>“Provided always that the procuring entity shall in lieu of sub-section (a) to (f) above, comply with any Regulations that the Bureau may make for electronic and virtual procurement pursuant to Section 18 of this Act, which Regulations shall ensure the security, transparency, integrity and fairness of such electronic and virtual procurement process.”</p>	
<p>Justification: Having provided that bids can be electronic in S.27, it is not necessary to keep repeating “physical or electronic” across the other sections as stated in the opening paragraph of S.30.</p> <p>The new paragraph provides additional issues to be called over to hearing of all present; they are “validity period” and “completion period”.</p> <p>The proposed paragraph (f) and its proviso are matters that should be dealt with by the Bureau’s regulations. The Bureau and Council have already been given the requisite powers to carry out their duties including making regulations for e-procurement.</p>			
35	<p>35.—(1) In addition to any other regulations as may be prescribed by the Bureau, a mobilization fee of not more than 15% may be paid to a supplier or contractor supported by the following :(a) in the case of National Competitive Bidding - an unconditional bank guarantee or insurance bond issued by an institution acceptable to the procuring entity</p>	<p>59. Section 35 of the Principal Act is amended by:</p> <p>(a) substituting for subsection (1), a new subsection “(1)”:</p> <p><i>“(1) In addition to any other regulation as may be prescribed by the Bureau, a mobilization fee of not more than 30% for</i></p>	<p>Retain the provisions of S.35 of the Principal Act.</p>

	<p>;and (b) in the case of International Competitive Bidding, an unconditional bank guarantee issued by a banking institution acceptable to the procuring entity.</p> <p>(2) Once a mobilization fee has been paid to any supplier or contractor, no further payment shall be made to the supplier or contractor without an interim performance certificate issued in accordance with the contract agreement</p>	<p><i>local contractors only may be paid to a supplier or contractor supported by an unconditional bank guarantee or insurance bond issued by an institution acceptable to the procuring entity until the mobilization fee is fully amortised or recovered”.</i></p> <p>(b) inserting after subsection (2), a new subsection “(3)”:</p> <p><i>“(3) Where the Bureau has set prior review thresholds in the procurement regulations, no funds shall be disbursed from the Treasurer or Federation Account or any bank account of any procuring entity for nay procurement falling above the set thresholds unless the cheque, payments or other form of request for payment is accompanied by a “Certificate of No Objection” to award of contract duly issued by the Bureau”.</i></p>	
<p>Justification: Increasing mobilization fees to 30% for local contractors will create perverse incentives that may increase the level of contract abandonment. First, if the profit margin at the end of the contract is about or less than 30%, what incentive would a contractor have to fully execute the project and still get the 30% margin after all the associated challenges? Secondly, the contractor as a bidder has vouched his financial capacity under S.16 (6) (a) (ii) of the PPA and this is verified under oath in (f) of S.16. Financial capacity includes ability to use own funds or raise third party funds to execute the project.¹ The demand in the extant law and the proposed amendment for unconditional bank guarantee and insurance bond has been more obeyed in the breach. Empirical</p>			

¹ Financial capacity provides evidence that the bidder will be capable of meeting the financial needs of the project, which may be summarized as having funds available to meet equity needs as well as capacity to raise third party funds in the form of long-term debt- <https://ppp-certification.com/ppp-certification-guide/72-financial-economic-capacity-criteria>.

evidence shows that the comfort documents provided by most contractors is a worthless document that provides no legal comfort in the event of a breach.

The proposed (3) adds no value as this is already covered in S.16 (2) of the Principal Act under the Fundamental Principles for Procurement”.

36	36. The provision of a Performance Guarantee shall be a precondition for the award of any procurement contract upon which any mobilization fee is to be paid, provided however it shall not be less than 10% of the contract value in any case or an amount equivalent to the mobilization fee requested by the supplier or contractor whichever is higher.	60. Substitute for Section 36 of the Principal Act, a new Section “(36)”: (1) The provision of a performance guarantee and, an unconditional insurance bond shall be a precondition for the award of any procurement contract upon which any mobilisation fee is to be paid, provided it is not less than 10% of the contract value. (2) All contracts approved by a Tenders Board requiring the opening of an irrevocable letter of credit shall be stated explicitly in the contract agreement and the procuring entity shall liaise with the Central Bank of Nigeria for further guidelines.	Amend the provisions in accordance with the new proposal. Add a proviso to subsection (1): “Provided that where an advance payment guarantee is required, it shall be valid until the entire payment received is amortised”
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Justification: The major change is that the proposed amendment omitted the phrase “or an amount equivalent to the mobilization fee requested by the supplier or contractor whichever is higher”. Adding an unconditional insurance bond to the performance guarantee should be a guarantee for quality performance over the project life cycle while advance payment guarantee is a guarantee against payment received before performance. Advance payment shall be valid until the entire payment received is amortised as against the current practice where the advance payment is time dependent within which the payment may not have been fully recovered. Ensure that at no time is government left exposed to the risks of contractors absconding with public money without a fall-back position to recover the funds without a protracted process of litigation.

The proposed (2) will facilitate proper documentation of contract terms and ease of doing business.

58 (2)	2) Any offence in contravention of this Act shall be tried by the Federal High Court.	61. Section 58 (2) of the Principal Act is amended by inserting after the word, "court", in line 2, the words, "or a tribunal set up by the Chief Justice of Nigeria."	Retain the provisions of the Principal Act.
<p>Justification: The setting up of a tribunal or any other adjudicatory body that will exercise jurisdiction in the determination of the civil rights and obligations of Nigerians is not done by the mere words "or a tribunal set up by the Chief justice of Nigeria". What would be the composition, quorum and extent of powers of the tribunal? Would such a tribunal be a superior or inferior tribunal? Which court will exercise appellate jurisdiction over the tribunal? So many unanswered questions that the proposed amendment leaves hanging.</p>			