

# **INSISTING ON DUE PROCESS**

**(Public Procurement Monitoring Manual)**

**CSJ**

**Centre for Social Justice (CSJ)**  
(Mainstreaming Social Justice in Public Life)

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By

**Centre for Social Justice (CSJ)**

17 Yaounde Street, Wuse Zone 6  
P.O. Box 11418, Garki Abuja  
Tel: 09-6721902, 08055070909  
Email: [censoj@gmail.com](mailto:censoj@gmail.com)  
Website: [www.censoj.com](http://www.censoj.com)

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Written By

**Eze Onyekpere Esq.**

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## ABBREVIATIONS AND ACRONYMS

Act	Public Procurement Act
BEME	Bill of Engineering Measurement and Evaluation
BOQ	Bill of Quantities
BPP	Bureau of Public Procurement
Bureau	Bureau of Public Procurement
Bureau Manual	Procurement Procedures Manual published by BPP
CIPSMN	Chartered Institute of Purchasing and Supply Management of Nigeria
Council	National Council on Public Procurement
CPAR	Country Procurement Assessment Report
CSO	Civil Society Organisations
CSJ	Centre for Social Justice
EFCC	Economic and Financial Crimes Commission
FEC	Federal Executive Council
FRA	Fiscal Responsibility Act
GPN	General Procurement Notice
ICB	International Competitive Bidding
ICPC	Independent Corrupt Practices Commission
MDA	Ministries, Departments and Agencies of Government
MDGs	Millennium Development Goals
NAFDAC	National Agency for Food and Drug Administration and Control
NCB	National Competitive Bidding
NNPC	Nigerian National Petroleum Corporation
NBA	Nigeria Bar Association
NGOs	Non Governmental Organisations
NSCC	Nigerian Supreme Court Cases
NWLR	Nigeria Weekly Law Reports
PPA	Public Procurement Act
RfP	Request for Proposals
SPN	Specific Procurement Notice
TOR	Terms of Reference
VAT	Value Added Tax

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# Chapter One

## INTRODUCTION

### 1. BACKGROUND

Governments all over the world use public procurement policy and implementation mechanisms to address a number of issues including budget implementation, service delivery, social, economic, environmental, human rights and developmental concerns. It can be stated as a basic aphorism that the level of economic growth and development in any society is directly related and proportional to the maturity of its procurement policy and how the policy responds to the challenges facing the society. Thus, if Nigeria's procurement policies had responded positively to the challenges of underdevelopment, the country would have been able to develop its human capital, address infrastructure deficits and generate economic growth at the level required under its Vision 20-20-20<sup>1</sup>. Essentially, it would have been on target to meet the Millennium Development Goals, the promises of chapter 2 of the Constitution of the Federal Republic of Nigeria 1999<sup>2</sup> ("the Constitution") and life in larger freedom – freedom from want, hunger and diseases, promised under a plethora of international human rights standards including the Universal Declaration of Human Rights<sup>3</sup>, the International Covenant on Economic, Social and Cultural Rights<sup>4</sup> and the regional African Charter on Human and Peoples Rights<sup>5</sup>. These standards contain provisions on rights such as adequate housing, education, food, health and the right to the continuous improvement of the living condition.

Procurement has been simply defined in the Public Procurement Act 2007 ("PPA") as acquisition<sup>6</sup>. This is a very wide and general definition that offers no insight into the technical details, functions and imperatives of public procurement. The PPA's definition seems to tally with its concern with procurement proceedings which is limited to the initiation of the process of effecting a procurement up to the award of a procurement contract. The procurement process is more encompassing commencing from the beginning of the proceedings up to contract execution and the materialization of the benefits promised by the procurement transaction. The Blacks Law Dictionary defines "process" as a mode, method or operation whereby a result is produced; a series of actions, motions or occurrences; progressive act or transactions<sup>7</sup>, etc. By this definition, the entire proceedings plus execution, indeed everything about public procurement is included in the procurement process. The implication of the foregoing is that the PPA governs transactions up to the point of award of contract while the general law of contract

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<sup>1</sup> Nigeria targets to be among the 20 most developed nations by the year 2020 and the projection is a minimum of 13% annual growth rate.

<sup>2</sup> Any reference in this Manual to the Constitution is a reference to the Constitution of the Federal Republic of Nigeria 1999 unless the context otherwise indicates.

<sup>3</sup> Adopted and proclaimed by United Nations General Assembly resolution 217 A (III) of 10 December 1948.

<sup>4</sup> Adopted and opened for signature, ratification and accession by UNGA resolution 2200 A (XXI) of 16 December 1966 and entered into force on 3 January 1976 in accordance with article 27.

<sup>5</sup> Nigeria is also a signatory to the Convention on the Rights of the Child, Convention for the Elimination of All Forms of Discrimination Against Women, etc.

<sup>6</sup> See the interpretative section 60 of the PPA. The Blacks Law Dictionary, Centennial Edition at page 1208 defines procurement as obtaining, attainment, acquisition, bringing about, effecting.

<sup>7</sup> Blacks Law Dictionary, Centennial Edition at page 1205.

and commercial law take over from that point up to the full execution of the procurement. Wikipedia, the free encyclopedia defines procurement as the acquisition of goods and/or services at the best possible total cost of ownership, in the right quality and quantity, at the right time, in the right place and from the right source for the direct benefit or use of corporations, individuals, or even governments, generally via a contract.

Public procurement can be viewed as a process through which a government contracts with contractors, suppliers, consultants, etc to obtain goods, services and construction required to fulfill its objectives in the most timely and cost effective manner<sup>8</sup>. It imports the supply chain management concept as a process whereby the government meets its needs for goods, construction and services in a way that achieves value for money on a whole-life cycle basis in terms of generating benefits not only to the government department involved but also to the society and economy as a whole whilst minimizing damage to the environment<sup>9</sup>.

Value for money is an important attribute of a good procurement policy. With its cardinal objectives of economy, efficiency and effectiveness, a value for money public procurement process will to a great extent address the challenges faced by any given society. It is elaborated further as follows.

**Economy:** The practice by MDAs of thrift and good housekeeping, acquiring resources in appropriate quantity and quality at the lowest cost. A lack of economy would occur where there is overstaffing, or the acquisition and use of overpriced facilities. Essentially, it is about getting things done cheaply.

**Efficiency:** This ensures that maximum useful output is gained from the resources devoted to each activity of MDAs, or alternatively that only the minimum level of resources are devoted to achieving a given level of output. An operation could be said to have increased in efficiency if either lower costs were used to produce a given amount of output, or a given level of cost resulted in increased output. Money should not be spent simply because it has been budgeted and prudence should be the watchword in public procurement. Inefficiency will be revealed by identifying the procurement of work with no useful purpose, or the accumulation of surplus materials that are not needed to support operations. It is about getting things done well.

**Effectiveness:** This ensures that the output from any given activity (or the impact that services have on the community) is achieving the desired results. To evaluate effectiveness, we need to establish that the desired goals (for instance, if the MDGs and the right to an adequate standard of living) are being achieved. A goal for an operating objective should be defined as a concrete expression of a policy objective. It is about doing the right things<sup>10</sup>.

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<sup>8</sup> Adapted from the definition of procurement by P. Steele cited with approval by Frank Ojadi in *Procurement Management in the Private Sector* published in the Nigeria Public Procurement Journal of February-March 2009.

<sup>9</sup> Definition offered by Professor Bola Afolabi in the *Impact of Sustainable Procurement on Good Governance*, paper presented at the Second International Conference of the Bureau of Public Procurement, 2009. Professor Afolabi further stated that sustainable procurement considers the environmental, social and economic consequences of design; non renewable material use, manufacture and production methods, logistics, service delivery, use, operation, maintenance, reuse, recycling options, disposal and suppliers capabilities and addresses these consequences throughout the supply chain.

<sup>10</sup> Adapted from *The Pursuit of Value for Money*, Samuel Afemike, Spectrum Books, 2003, pages 6-9.

One of the major problems of the procurement of goods and public service delivery in Nigeria is the disconnection between resources invested, and the output and outcomes achieved. Despite Nigeria's oil income, its social indicators such as maternal and child mortality and morbidity, access to basic education, sanitation and water are at the same level with other Sub Saharan African countries and in some instances, falls below the average. Thus, value for money has been lacking and the focus of most spending agencies is on maximising budgetary inputs as against delivering effective and cost efficient services. Before the advent of the current procurement reforms, the cost of public works in Nigeria was one of the highest in the world.

## 2. BEST PRACTICES - CURING THE MISCHIEF IN THE SYSTEM

New laws such as the PPA are made to cure mischief in existing law or where there is a lacuna in the legal framework. The posers are; what was the mischief in the existing framework that the PPA was enacted to remedy? What was the mischief and defect for which existing law did not provide? What remedy did the legislature provide to cure the defect? What are the true reasons for the remedy contained in the PPA?<sup>11</sup> Although the mischief rule is used as a canon of statutory interpretation, it is however useful as a basis of understanding the need for a new law, especially within the Nigerian procurement context where poor procurement outcomes fuel underdevelopment.

The best practices in procurement are discussed hereunder and they include the other attributes of good procurement policy and its implementation. These include transparency and accountability, timeliness, fitness for purpose, promotion of competition, etc<sup>12</sup>. These attributes were lacking in Nigeria's procurement policy before the enactment of the PPA. Although positive changes have been effected since the PPA came into force, a lot of challenges remain to be addressed. Since the mischief in the existing law and practice led to the enactment of the PPA, it is therefore the duty of civil society in interventions under the Act to move in suppression of the mischief while advancing the remedy proposed in the PPA and to decisively call in public opinion and the courts to suppress subtle inventions and evasions for the continuance of the mischief and to add life and force to the remedy according to the intention of the legislature<sup>13</sup>. Apparently, some of the mischief continued till date despite the enactment of the Act. The intervention of civil society through monitoring and reporting is premised on the need to ensure that the promises of public procurement legislation are not mere pipe dreams. The best practices include the following.

**A. Transparency:** The principle of transparency is crucial to the public procurement process mandating that information affecting public procurement decisions should be accurate, address the needs of society and should be available and accessible to the public, open to public scrutiny and readily understood by the public<sup>14</sup>. Procurement transparency requires the provision of reliable information of government's procurement intentions, detailed data and reports of procurements and capital budget implementation. The establishment of a single internet portal as required by section 5 (r) of the PPA, to serve as the primary and definitive source of all government procurement information will facilitate transparency. Procurement transparency also encompasses definition of conflict

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<sup>11</sup> . *Heydon's Case* (1584) 3 Co. Rep 7a; *International Bank for West Africa Ltd v Imano (Nig) Ltd & Anor* (1988) 3 N.W.L.R. (Pt.85) 633 at 668.

<sup>12</sup> See section 16 (1) of the PPA.

<sup>13</sup> Adapted from the rule in *Heydon's case*, and specifically per Aniagolu JSC in *Ifezue v Mbadugha* (1984) N.S.C.C. 314 at 325.

<sup>14</sup> Adapted from *A Rights Based Approach Towards Budget Analysis*, International Human Rights Internship Programme, 1999.

of interest rules and sanctions for elected and appointed officials<sup>15</sup>; meeting of freedom of information requirements<sup>16</sup>; functional legislative oversight over procurements, existence of non-opaque regulations and recourse mechanism and published procurement audits<sup>17</sup>. The transparency of the procurement process can facilitate the following<sup>18</sup>:

- Procurement transparency is at the heart of good fiscal governance. It helps prevent public officials and institutions from doing things that cannot stand the test of scrutiny from outside. It provides the feedback for informed debate on procurement and indeed, is a pre-requisite for public debates which can lead to better procurements and more efficient resource use. Transparency facilitates the identification of weakness which will lead to reforms. It also facilitates the identification of best practices which can be replicated.
- Transparent procurements can be held accountable; legislatures and civil society will be better able to hold governments accountable if they have information on public procurements. Elected and appointed officials will be more likely to make procurement decision in accordance with their mandate if those decisions are open to public scrutiny. Transparency will facilitate the checkmating of procurement frauds and corruption; for instance, where contracts have been cash backed in accordance with section 16 (1) (b) of the PPA and public officials are refusing to pay a contractor who has satisfied all requirements, the contractor will clearly know that he need not bribe any person to get paid.
- Adherence to procurement transparency increases faith in public procurements and the government's ability to address economic and social needs of the people. Support can come from the public who better understand the underlying philosophy and reasons for particular contract awards, the cost, implementation schedule and life span of the goods, works or services. Project beneficiaries will be placed in a position to hold contractors and service providers accountable to project design and implementation frame.
- Procurement transparency contributes to macroeconomic and fiscal stability as it prevents the build-up of a procurement crisis in secret, bringing about adjustments sooner. The link between the medium term sector strategies and procurement options and choices will have implications for the implementation of the MTEF and the realization of its goals. Procurement transparency will provide an early warning mechanism to show when capital budget matters are on a proper alignment with other government policies.

**B. Accountability:** The principle of accountability involves among others to ensure that procurement supports state duties to respect, protect and fulfill human rights obligations. Issues of accountability for procurements will raise questions on what is procured and the means of procuring them; and of performance and results - whether procurement objectives were met and people had value for money. If for example, the Ministry of Health is targeting the reduction in immunization preventable diseases for children under

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<sup>15</sup> See sections 57 and 58 of the PPA.

<sup>16</sup> Section 16 (14) and 38 (1) and (2) of the PPA.

<sup>17</sup> See *Civil Society and the Budget- A Reader*, (at page 16) by Eze Onyekpere, Socio Economic Rights Initiative, 2004.

<sup>18</sup> Adapted from *Civil Society and the Budget – A Reader* (supra) citing with approval Mike Obadan in *Achieving Value for Money and Sustainable Impact*, Budget Office of the Federation, 2002.

5, then the success of the procurements can be measured by the level of change or reduction in the immunization preventable disease for under 5 children based on the declared objectives in the Ministry's sector strategies. If informed questions are asked the cost of public procurements, they could lead to considerable reductions in over-invoicing so that citizens can begin to get value for money<sup>19</sup>.

**C. Timeliness:** Procurement of goods, works and services should be timely and meet the demands and needs of the implementing agency and the beneficiaries. A good example is the procurement of fertilizers and seeds for the agricultural sector. It should be programmed in such a way as to be available when needed in the planting season. Procurement of construction such as roads should make resources available for works during the dry season since most road contracts are suspended during the rains. The regulations made by the Bureau of Public Procurements have indicated a total timeframe of five months for procurement planning and award of contracts. Sticking to this timeline by MDAs will lead to enhanced capital budget implementation. Timeliness implies that the service provider should stick to time schedules agreed in the contract documentation and should apply professionalism and reasonable care to meet the schedules. Timeliness also includes payments by government agencies to contractors when due. Section 37 of the PPA provides a clue:

*(1) Payment for the procurement of goods, works, and services shall be settled promptly and diligently.*

*(2) Any payment due for more than sixty days from the date of the submission of the invoice, valuation certificate or confirmation or authentication by the Ministry, Extra-Ministerial Office, government agency, parastatal or corporation shall be deemed a delayed payment.*

*(3) All delayed payments shall attract interest at the rate specified in the contract document.*

*(4) All contracts shall include terms, specifying the interest for late payment of more than sixty days.*

Timeliness will facilitate the prevention of demands for review and variation of the contract price, budget overruns and underperformance. However, it must be noted that procurement is part of a chain - the larger chain being public expenditure management which provides the framework under which procurements are performed. If for instance, the budget that should authorise procurements is passed late in the year, the probability of timely procurements will be reduced. Since budgeted sums fall back to the treasury at the end of the year, the procurement function may become ineffective for implementing the budget. Poor resource allocation, bad policy decisions and late or non release of appropriated sums will negatively impact on public procurements.

**D. Fitness for Purpose:** A procurement transaction ought to provide goods, works or services that meet the demands of the procuring entity and the beneficiaries of its services. The fitness of purpose is both quantitative and qualitative. The product or goods should fit the service environment, be durable and respond to the challenges stated in the procurement plan. Fitness for purpose implies that a needs assessment was

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<sup>19</sup> See *Civil Society and the Budget – A Reader*, supra.

undertaken which led to the identification of a need, a gap or a challenge which the procurement seeks to address and the goods, services or works procurement is the least costly option to address the challenge. Least cost here includes taking cognizance of environmental, social and economic costs. On this basis, many projects that find their way into the capital budget would not qualify to be there. In many communities, boreholes have been sunk by local and state governments, UNICEF, DFRR<sup>20</sup>, etc and what may be needed is maintenance of existing facilities, reticulation, distribution and the chemicals needed to treat the water (if applicable) and other recurrent costs. Yet, contracts for the sinking of boreholes are still the order of the day. Where for instance, a vehicle is needed for rough roads and terrains, a four wheel drive may be the best option instead of a sleek and flashy saloon car. The product or works should also meet the cost savings anticipated in the overhead budget and general efficiency demands.

**E. Sustainability:** The procurement must address the requirement of sustainability which involves the total life cycle. The issues to be addressed include economic impact which focuses on issues such as ethical trading, corporate governance, timely payment and payment of realistic living wage. A cost benefit analysis may be needed at the procurement planning stage. Environmental issues include the challenge of biodiversity, climate change, carbon footprints, recycling and disposal options and renewability. Environmental sustainability may require an environmental impact analysis at the procurement planning stage. The social issues include human rights, workforce, impact of the procurement on existing livelihoods and whether alternative livelihoods will be available to communities if the existing livelihood options are destroyed. Diversity of beneficiaries from the procurement or those to suffer reverses in terms of sex, disability and race should also be considered. Essentially, a social impact analysis may be necessary at the stage of procurement planning<sup>21</sup>.

**F. Gender Issues:** It is fundamentally flawed to assert that procurement contains no gender dimensions. A gender blind procurement policy discriminates against the non dominant societal gender. Therefore, it is imperative in formulating procurement policy and taking procurement decisions to consider its likely impact on men, women, children, boys and girls. It is also imperative in procurement audits, research and studies to find out how particular procurements affect different segments of society. The experience of previous procurements can be used to project and forecast how new and proposed procurements will affect the different social segments. Further, public procurements should address the specific and special needs of all segments of society. Unfortunately the extant PPA appears gender blind.

**G. Competition:** Introducing competition in government commerce should be one of the hallmarks of a reformed procurement policy. Section 24 of the PPA is relevant for any discourse on competition.

*(1) Except as provided by this Act, all procurements of goods and works by all procuring entities shall be conducted by open competitive bidding.*

*(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*

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<sup>20</sup> Directorate of Foods, Roads and Rural Infrastructure.

<sup>21</sup> See Professor Bola Afolabi in the *Impact of Sustainable Procurement on Good Governance*, paper presented at the Second International Conference of the Bureau of Public Procurement, 2009.

*procurements by offering to every interested bidder, equal simultaneous information and opportunity to offer the goods and works needed.*

The concept of open competitive bidding is based on the peremptory norm of non discrimination<sup>22</sup> and the principle of equality before the law, equal protection of the law and equality of opportunities, rights and obligations of natural and artificial persons<sup>23</sup>. Essentially, open competitive bidding is the procurement method preferred by the Act. Other methods are to be employed as an exception to the general rule, in which case, there must be adequate reasons and grounds for deviating from the general rule of open competitive bidding. Competition ensures that government gets the best technical and financial bids and proposals to meet its needs. The devious practice of collusions and schemes that shut out qualified participants and bidders from the procurement process will not provide equality of opportunities for all and as such will frustrate competition.

**H. Risk Management:** Risk management should be embedded in the efficiency and effectiveness indicators of procurement planning because risks need to be identified, documented, analysed and mitigations found for them. Sometimes, risks may involve liabilities and as a general rule, the government should not accept risks and liabilities which a supplier or contractor is in a better position to manage. Organizations must take risks to create or add value to services and risk management impacts on the cost, quality and performance of a public service. Contingency planning as part of the procurement plan is therefore a necessity<sup>24</sup>. Procurement reforms should encompass guidelines for managing risks and liabilities.

**I. Anti-Corruption:** The level of corruption in Nigeria is phenomenal. Public procurements provide opportunities for over-invoicing, demanding kickbacks and gratification as basis for award of contracts or payment of fees to contractors, contract abandonment after collecting mobilization fees, executing jobs with cheaper and inferior materials, etc. A reformed procurement regime should grossly diminish the opportunities for the corruption malfeasance. It should also criminalise and punish perpetrators as a deterrence to others who may wish to engage in corrupt practices. Considering the high level of procurement frauds that have been revealed after the coming into operation of the PPA<sup>25</sup>, it appears that Nigeria still has along way to go in curbing procurement corruption.

**J. Professionalism:** The Nigerian Country Procurement Assessment Report (CPAR) 2000 laid the foundation for some of the reforms contained in the PPA. It states inter alia:

*The procurement function is not generally performed by professionally qualified staff. Although, there is a shortage of such staff in the public service, even the few available are not properly utilised. There is a tendency to believe that the procurement function can be performed by anybody and hence the procurement function is held in low esteem. Training in public procurement procedures for civil servants is generally insufficient due to low regard for the profession and due to lack of funding. In addition, procurement training is offered by few institutions in Nigeria. The Institute of Purchasing and Supply Management [now Chartered*

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<sup>22</sup> See section 42 of the Constitution on the right to freedom from discrimination and article 2 of the African Charter on Human and Peoples' Rights, Cap A9, Laws of the Federation, 2004, etc.

<sup>23</sup> Article 3 of the African Charter on Human and Peoples' Rights, supra.

<sup>24</sup> Lee Tribe in a presentation at the Second National Procurement Summit, organized by BPP in Abuja.

<sup>25</sup> The UBE, NERC, REA, etc, procurement frauds.

*Institute of Purchasing and Supply Management of Nigeria] is the only organisation which has, for many years, provided training in public procurement and promoting professional standing of procurement staff, and their skills. It has recently introduced a system of certifying procurement specialists.*

.....

*There is the need to restore and strengthen the professional procurement cadre and allow them to practice their profession. The procurement function should be carried out by these professionals.*

Thus a reformed procurement system should be managed by qualified professional personnel who will continue to undergo training to enrich their experience and capacity.

**K. Fairness:** According to the Bureau Manual, good procurement is impartial, consistent and therefore reliable. It offers all interested contractors, suppliers and consultants a level playing field on which to compete and thereby, directly expands the government's options and opportunities<sup>26</sup>.

**L. Oversight and Benchmarking:** A good procurement system should create adequate opportunities for oversight by a number of agencies. From the internal audit function to the Auditor General for the Federation, the Bureau and finally the legislature, there is a plethora of agencies whose work should impact on the system. The pre and post review powers of the Bureau clearly fits into this role. Its detailed function in performing procurement audits to be submitted bi-annually to the National Assembly is also an oversight function. The National Assembly on its own has the power to look into any matter pertaining the implementation of laws or the expenditure of public resources. The results of these oversight activities should feed into the system for its improvement.

In benchmarking, the Bureau is expected to ensure that MDAs learn from the experience of the best in class, leaders in the field with whom legitimate comparisons can be made<sup>27</sup>. This can be achieved through the collection and analysis of data determining the performance gap and identification of critical success factors<sup>28</sup>.

### 3. OVERVIEW OF THE PPA

Part I establishes the National Council on Public Procurement, determines its membership and its functions. Part II establishes the Bureau, clothes it with legal personality, perpetual succession and sets out its functions and powers; provides for appointment of the Director General, principal officers and staff of the Bureau. The Bureau is conferred with broad powers to oversee procurement implementation by MDAs subject to the rules and regulations made by the Council. This includes certification of federal procurements, maintenance of database on the registration and classification of contractors and service providers, procurement audit and administrative sanction mechanism. Part III details the scope of application of the Act. The Act applies to all federal procurements or where the Federal Government is contributing at least 35% of the funds for procurement implementation.

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<sup>26</sup> Page 3 of the *Procurement Procedures Manual* published by BPP.

<sup>27</sup> Eze Onyekpere in *Civil Society and the Budget- a Reader*, at page 135; Socio Economic Rights Initiative, 2004.

<sup>28</sup> Eze Onyekpere, *supra*

Part IV is on the fundamental principles for procurement. Its section 16 is the lengthiest section of the Act containing 28 subsections. It prescribes open competitive bidding (unless the Act prescribes otherwise), equity, timeliness, value for money, fitness for purpose, etc as irreducible minimums for procurement. It addresses issues of the technical and financial capacity of bidders, ethical issues and conditions that will lead to disqualification of bidders, etc. Part V continues with procurement planning, its implementation and the role and duties of the accounting officer, procurement planning committee; tenders board and prequalification of bidders.

Part VI deals with procurement methods for goods and services, advertising, bid security, submission and rejection of bids, validity period, modification and withdrawals of tenders, bid opening, examination and evaluation of bids. For evaluation, no other method or criteria shall be used except those stipulated in the solicitation documents. The Part further deals with acceptance of bids, domestic preferences, mobilization fees, contract performance guarantee, interest on delayed payment, and records of procurement proceedings.

In Part VII, the special and restricted methods of procurement are discussed. These include two stage tendering, restricted tendering, request for quotations, direct and emergency procurement. These are exceptions to the general rule and should not be used except open competitive bidding cannot produce the desired results. In Part VIII, procurement of consultant (services) lays the framework for expression of interest to provide ascertained needs, request for proposal for unascertained needs, contents of requests for proposals, clarifications and modifications of requests for proposals. It also provides for submission of proposals, criteria for evaluation of proposals. It further provides for the general selection procedure, procedure for selection of proposal where price is a factor and the procedure for selection where price is not a factor.

Part IX is on procurement surveillance and review. The Bureau is given further powers to ensure the functionality of procurement proceedings in accordance with best practices. It can liaise with relevant agencies including the Economic and Financial Crimes Commission and the Independent Corrupt Practices Commission to conduct investigations where a criminal investigation becomes necessary. Administrative review is provided - the complainant to submit a complaint to the accounting officer of the procuring entity within 15 days of actual or constructive awareness of the circumstances giving rise to the complaint. The accounting office to give a decision within 15 working days and if the complainant is dissatisfied, he can appeal to the Bureau and thereafter to the Federal High Court. Part X is on disposal of public property.

The Code of conduct forms the subject of Part XI and the principles of honesty, accountability, transparency, fairness and equity are stated to be the guiding lights for MDA and Bureau staff and bidders. Conflict of interest issues are defined while reaffirming the need for procurement to contribute to good governance.

Part XII is on offences and they include bid rigging, collusion, altering, uttering or forging, tender splitting etc. The penalties are prescribed ranging from 5 calendar years but not exceeding 10 calendar years for natural persons who are not public officers while public officers are liable to a minimum of 5 years imprisonment without an option of fine and summary dismissal from government service. Legal persons are on conviction to be debarred from public procurement for a period of not less than 5 calendar years, a fine equivalent to 25% of the value of the procurement in question. Further, the directors

whose names appear in the books of the Corporate Affairs Commission are to be liable to imprisonment for 3 years but not exceeding 5 years without option of fine. Part XIII is on miscellaneous provisions with section 60 as the interpretation of terms used in the Act. Section 61 is the short title which ends the Act.

#### 4. THE ROLE OF CIVIL SOCIETY

Civil society includes the traditional NGOs, the media, professional groups, the academia and other non governmental stakeholders but excludes the private sector. Depending on the competencies and capacity of different segments of civil society, they can contribute to the work of promoting the rights and duties enshrined in the Act while ensuring that obligations are respected by duty holders. The expectations from civil society fall under a number of headings including observation, research, advocacy, sensitization and awareness raising, etc. The central objective of CSO interventions is to improve the system, enhance value for money and governmental service delivery.

**A. Awareness Raising and Sensitisation:** Civil society should compliment the ongoing efforts of BPP in sensitization and creating massive awareness of the provisions of the Act. This can be done through seminars, publications and discussions in the print and electronic media, dissemination of information through websites, newsletters and pamphlets. The media should consider setting up dedicated columns in the print media and special discussions focused on the procurement function in the electronic media. Stickers and posters can be used by NGOs to reach out to communities. Professional groups can include courses in public procurement in their professional training package or in their compulsory refresher and continuous training courses. The general thrust is to raise consciousness in society of the inextricable link between public procurement, service delivery and the well-being of society particularly the poor and the vulnerable. Important websites where public procurement information are currently disseminated include the Bureau's website [www.bpp.gov.ng](http://www.bpp.gov.ng), the website of the Procurement Committee of the House of Representatives [www.nasspubproc.org](http://www.nasspubproc.org) and the website of the Centre for Social Justice [www.censoj.com](http://www.censoj.com).

**B. Capacity Building:** For CSOs to effectively engage the process, they must have a level of capacity sufficient to understand the issues and challenges of the system. Thus, the first challenge is to raise the capacity through training, development of manuals, checklists and other requisite tools. These would facilitate the monitoring process and ensure that CSO reports are relevant to the procurement issues at stake. Simplified versions of the Act can also be published in ordinary English devoid of the technical legalese. It can also be published in street/pidgin English and the local languages.

**C. Observation and Monitoring:** Civil society groups can focus on specific aspects of the procurement function or the procurement of an MDA or sector, observe and monitor the process over a period of time and issue reports of their findings. It may not be possible to focus on all agencies because of limited human and financial capacities. Thus, strategic thinking makes some form of structured intervention for results necessary. The idea is to monitor from *cradle to grave* - from the procurement plan to implementation and achievement of results. Observation will proceed from the angle of ensuring that the PPA and due process of procurement reforms are followed by MDAs in letter and spirit. It will include both violations and result based approaches. Red flags should be raised for violations particularly those violations that seek to distort the fundamentals of procurement. Engagement of the accounting officer of the procuring entity, the Bureau,

anti corruption agencies and legislative oversight committees may follow such violations. But where these engagements fail to produce results, CSO may consider resort to the altar of public opinion and the courts.

**D. Action Research:** The concept of action research is to design research methodology and implementation in such a way that it will produce results to improve the system. Thus, the research should not be a pure academic exercise, but a functional research linked to the improvement of the system and ultimately the improvement of service delivery. It may be form of diagnostics study leading to the identification of strengths, weaknesses, challenges, threats and replicable best practices. The participation and buy in of the practitioners in the field – MDAs, contractors, service providers and civil society, etc, would be imperative and this would lead to a shared vision of reform among all the stakeholders. Essentially, the findings will lead to recommendations and the recommendations will lead to action for positive change. There may therefore be the need for collaboration between civil society and state actors to achieve the desired results.

## **PUBLIC PROCUREMENT ACT, 2007**

SECTION:

### **ARRANGEMENT OF SECTIONS**

#### **PART 1 – ESTABLISHMENT OF NATIONAL COUNCIL ON PUBLIC PROCUREMENT**

1. Establishment of the National Council on Public Procurement and its membership
2. Functions of the Council.

#### **PART II – ESTABLISHMENT OF THE BUREAU OF PUBLIC PROCUREMENT**

3. The Establishment of the Bureau of Public Procurement.
4. Objectives of the Bureau.
5. Functions of the Bureau.
6. Powers of the Bureau.
7. Director-General and Staff of the Bureau.
8. Principal Officers of the Bureau
9. Other Staff of the Bureau.
10. Staff Regulations.
11. Pension Provisions.
12. Funds of the Bureau
13. Financial Year, Budgeting and Annual Report.
14. Legal Proceedings.

#### **PART III – SCOPE OF APPLICATION**

15. Scope of Application.

#### **PART IV- FUNDAMENTAL PRINCIPLES FOR PROCUREMENTS**

16. Fundamental Principles for Procurement.

#### **PART V – ORGANISATION OF PROCUREMENTS**

17. Approving Authority
18. Procurement Planning.
19. Procurement Implementation
20. Accounting Officer.
21. Procurement Planning Committee.
22. Tenders Board.
23. Prequalification of Bidders.
24. Open Competitive Bidding.

#### **PART VI – PROCUREMENT METHODS (GOODS AND SERVICES)**

25. Invitations to Bid.
26. Bid Security.
27. Submission of Bids
28. Rejection of Bids.
29. Validity Period of Bids, Modification and Withdrawal of Tenders.
30. Bid Opening.
31. Examination of Bids
32. Evaluation of Bids.
33. Acceptance of Bids.

34. Domestic Preferences.
35. Mobilization Fees.
36. Contract Performance Guarantee.
37. Interest on Delayed Payments.
38. Record of Procurement Proceedings.

#### **PART VII – SPECIAL AND RESTRICTED METHODS OF PROCUREMENT**

39. Two Stage Tendering.
40. Restricted Tendering.
41. Request for Quotations.
42. Direct Procurement.
43. Emergency Procurements.

#### **PART VIII-PROCUREMENT OF CONSULTANT (SERVICES)**

44. Expressions of Interest to Provide Services for Ascertained Needs.
45. Request for Proposals to Provide Services for Unascertained Needs.
46. Content of the Requests for Proposals.
47. Clarification and Modification of Requests for Proposals.
48. Submission of Proposals.
49. Criteria for Evaluation of Proposals
50. General Selection Procedure (Services).
51. Procedure for Selection of Proposal where Price is a Factor
52. Selection Procedure where Price is not a Factor.

#### **PART IX- PROCUREMENT SURVEILLANCE AND REVIEW**

53. Bureau to Recommend Investigation.
54. Administrative Review.

#### **PART X -DISPOSAL OF PUBLIC PROPERTY**

55. Disposal of Public Property.
56. Planning of Disposals.

#### **PART XI - CODE OF CONDUCT**

57. Code of Conduct for Public Procurement.

#### **PART XII - OFFENCES**

58. Offences Relating to Public Procurement.

#### **PART XIII - MISCELLANEOUS**

59. Miscellaneous.
60. Interpretation.
61. Short Title.

# Chapter Two

## PARTS I-III

### GENERAL APPROACH

The approach adopted in chapters Two to Six, after each relevant section and subsection, is to make comments, identify issues and then suggest action points including what can be monitored, the persons or institutions to be monitored, how they can be monitored and the time for the monitoring exercise, etc. Where no issues are identified, no comments and action points are raised. In some instances, comments are made without action points where there is no need for action.

### PUBLIC PROCUREMENT ACT, 2007

**AN ACT TO ESTABLISH THE NATIONAL COUNCIL ON PUBLIC PROCUREMENT AND THE BUREAU OF PUBLIC PROCUREMENT AS THE REGULATORY AUTHORITIES RESPONSIBLE FOR THE MONITORING AND OVERSIGHT OF PUBLIC PROCUREMENT, HARMONISING THE EXISTING GOVERNMENT POLICIES AND PRACTICES BY REGULATING, SETTING STANDARDS AND DEVELOPING THE LEGAL FRAMEWORK AND PROFESSIONAL CAPACITY FOR PUBLIC PROCUREMENT IN NIGERIA; AND FOR RELATED MATTERS.**

[4<sup>th</sup> Day of June, 2007]

Enacted by the National Assembly of the Federal Republic of Nigeria

Commencement

### PART 1 - ESTABLISHMENT OF NATIONAL COUNCIL ON PUBLIC PROCUREMENT

1. (1) There is established the National Council on Public Procurement (in this Act referred to as "the Council").

Establishment of the National Council on Public Procurement and its Membership

(2). The Council shall consist of:

- a) the Minister of Finance as Chairman;
- b) the Attorney-General and Minister of Justice of the Federation;
- c) the Secretary to the Government of the Federation;
- (d) the Head of Service of the Federation;
- d) the Economic Adviser to the President;
- e) Six part-time members to represent;
  - (i) Nigeria Institute of Purchasing and Supply Management;
  - (ii) Nigeria Bar Association;

(iii) Nigeria Association of Chambers of Commerce, Industry, Mines and Agriculture;

(iv) Nigeria Society of Engineers;

(v) Civil Society;

(vi) the Media and

(g) the Director-General of the Bureau who shall be the Secretary of the Council.

(3) Notwithstanding the provisions of section (2), the Council may co-opt any person to attend its meeting but the person so co-opted shall not have a casting vote or be counted towards quorum.

(4) The Chairman and other members of the Council shall be appointed by the President.

(5) Subject to subsection (2) of this section, a member of the Council being:

(a) the holder of an elective office under the Constitution of Nigeria, shall hold office for a period he remains so elected and no more; and

(b) the Director-General of the Bureau shall hold office on such terms and conditions as may be specified in his letter of appointment.

**Comment:** The establishment of the National Council on Public Procurement (“Council”) and the Bureau of Public Procurement (“Bureau” or “BPP”) creates a bicameral approach to public procurement regulation. The Council is the policy arm while the Bureau established in section 3 of the Act, which is the second leg of the bicameral regulation, implements approved Council policies. The Council unlike the Bureau is not specifically stated to be a juristic person with powers to sue and be sued in its corporate name. This omission is not fatal and does not confer immunity on the Council since it is a creature of statute. It can therefore sue and be sued as a statutory body<sup>29</sup>.

The composition of the Council to include professional associations and civil society demonstrates the intention of the legislature for an inclusive, transparent and rule based procurement policy formulation process. It is an opportunity for civil society to positively impact on the procurement system of Nigeria. Thus, beyond the mention of a civil society representative, civil society is represented by at least five representatives<sup>30</sup>. But what is the nature of civil society. It is:

*..the arena of un-coerced collective action around shared interests, purposes and values. In theory, its institutional forms are distinct from those of the state, family and market, though in practice, the boundaries between state, civil society, family and market are often complex, blurred and negotiated. Civil society commonly embraces a*

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<sup>29</sup> See *Fawehinmi v NBA (No.2)* (1989) 2 NWLR (Part 105) 538 and Kalu Onuoha in *Legal Issues in the Public Procurement Act*, being a paper presented at CSJ’s capacity building workshop September 25 2009.

<sup>30</sup> The representatives are the three representatives of professional associations, the media and civil society - totaling five.

*diversity of spaces, actors and institutional forms, varying in their degree of formality, autonomy and power. Civil societies are often populated by organizations such as registered charities, development non governmental organizations, community groups, women's organizations, faith based organisations, professional associations, trade unions, self help groups, social movements, business associations, coalitions and advocacy groups*<sup>31</sup>.

It appears that there can be a confluence of interests between all the representatives of civil society. The major issue of concern is how to use the numbers to influence procurement policy to reflect best practices that not only enhances transparency and accountability but promotes national development.

However, since the Act's commencement date of the 4<sup>th</sup> day of June 2007, the President has failed, refused and neglected to constitute the Council. As such, there is a vacuum in the policy making and other roles of the Council. By section 5 (1) of the Constitution of the Federal Republic of Nigeria 1999:

*(1) Subject to the provisions of this Constitution, the executive powers of the Federation-*

*(a) shall be vested in the President and may, subject as aforesaid and to the provisions of any law made by the National Assembly, be exercised by him either directly or through the Vice-President and Ministers of the Government of the Federation or officers in the public service of the Federation; and*

*(b) extend to the execution and maintenance of this Constitution, all laws made by the National Assembly and to all matters with respect to which the National Assembly has, for the time being, power to make laws. (underlining supplied for emphasis)*

Thus, the President has no discretion to pick and choose the laws validly enacted by the National Assembly to implement. The non constitution of the Council has adversely affected the implementation of many provisions of the Act as shall be demonstrated in the later parts of this Manual.

In subsection 5 (a) of the Act, the reference to "holder of an elective office" is surprising considering that virtually all the members on the government side are appointed officials or career civil servants. It would have made eminent sense if the appointees of the professional bodies, civil society and the media were nominated by their respective associations as their true representatives. The proposal would be for the associations to nominate three persons and the President would select one of the nominees to represent the association.

The Council appears gender blind and could as well be only composed of men. However, Nigeria is a signatory to a plethora of international standards on gender equality. There is the need to provide more opportunities and space for women's participation in public life and the PPA should respond to that challenge.

The position of the Director-General of the Bureau of Public Procurement is an important position for the regulation of federal public procurements. Such a position should be strengthened to serve the common good. As such, his tenure, terms and conditions of service should have a statutory flavor instead of being reduced to "such terms and

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<sup>31</sup> The definition offered by the Centre for Civil Society of the London School of Economics; from Wikipedia, the internet Encyclopedia.

conditions as may be specified” in a mere letter of appointment which can be changed or withdrawn at the behest of the appointing authority.

**Action:** Civil society should design advocacy to compel the President to appoint and inaugurate the Council. Some of the advocacy could focus around media campaigns, letter writing and signature campaigns, public demonstrations, letters to the President and the Attorney General on the need for the rule of law to govern the implementation of the PPA, legislative engagement with committees in the Senate and the House of Representatives for them to take up the matter with the President. Professional associations such as the Nigeria Bar Association and the Nigerian Society of Engineers could book appointment with the President and deliver the message to him on the need to constitute the Council. Finally, if all other approaches fail, litigation for an order of mandamus to compel the President to perform his duties under the Act may also be considered.

In the future and when the Act has been tested, amendment proposals for a secured, statutory-flavor terms and conditions of service for the Director General of the BPP and the nomination of candidates by associations, for eventual appointment by the President should be proposed. CSOs should also consider legislative advocacy for the addition of a proviso after (2) (a) (f) which would read: *“provided that at least three of the appointees shall be women”*. Legislative advocacy should include changes in subsection 3 line 2, the word “casting” before “vote” should be deleted because a casting vote is a deciding vote in the event of a tie in voting. The co-opted person is not counted towards the determination of quorum and therefore has no vote. Subsection 5 (a) should refer to the holders of offices referred to in subsection 2 (a) to (e) because none of the positions is an elective one, rather, they are all appointees of the President.

**2.** The Council shall:

- a) consider, approve and amend the monetary and prior review thresholds for the application of the provisions of this Act by procuring entities;
- b) consider and approve policies on public procurement;
- c) approve the appointment of the Directors of the Bureau;
- d) receive and consider, for approval, the audited accounts of the Bureau of Public Procurement; and
- e) approve changes in the procurement process to adapt to improvements in modern technology
- f) give such other directives and perform such other functions as may be necessary to achieve the objectives of this Act.

Functions  
of the  
Council.

**Comment:** The approval and maintenance of monetary and prior review thresholds is important for the faithful implementation of the Act. The thresholds establish relevant approving authorities and methodologies. “Monetary Threshold” is defined in the interpretative section of the Act to mean the value limit in Naira set by the Bureau outside of which an approving authority may not award a procurement contract. The current approved revised thresholds for service wide application are detailed in Appendix 2. Since the Council has not been set up; pray, who is approving the monetary and prior review thresholds as published by the Bureau? Who is approving the policies so far published by the Bureau?

The broad power of approving policies on public procurement is in recognition of the need to separate policy making (the Council) from regulation (the Bureau) and implementation (MDAs). The last function in paragraph (f) of giving other directives is meant to cover the field and is an omnibus power to ensure that the Council moves in the direction of curing the mischief in the system through the instrument of the PPA.

Proposals in the Amendment Bill sent by the President to National Assembly to include the thresholds in the body of the Act appear to be a misunderstanding of the roles of the various actors. If the thresholds are inserted into the Act without granting powers to the Council to amend them, the implication is that every review will require a legislative amendment of the Act. This will be cumbersome and will negatively impact on the implementation of the Act. Inflationary spirals and other macroeconomic changes require that the amendments be left as an administrative act of Council.

**Action:** CSOs should consider suggesting work plans and proposals to the Council whenever it is inaugurated. Such plans should include changes in procurement process to reflect best practices, particularly those that open up the system to greater public scrutiny. CSOs should campaign against the inclusion of thresholds in the body of the Act since every amendment of the threshold will require the cumbersome legislative approval through an amendment of the law.

## PART II - ESTABLISHMENT OF THE BUREAU OF PUBLIC PROCUREMENT

3. (1) There is established an agency to be known as the Bureau of Public Procurement in this Act referred to as “the Bureau”. The  
Establishment  
of the Bureau  
of Public  
Procurement
- (2) The Bureau:
- (a) shall be a body corporate with perpetual succession and a common seal;
  - (b) may sue and be sued in its corporate name; and
  - (c) may acquire, hold or dispose of any property, movable or immovable for the purpose of carrying out any of its functions under this Act.

**Comment:** This section gives the Bureau a distinct legal personality as an incorporated body that can sue to claim rights and can be sued for infringement of the rights of others. Perpetual succession is defined as:

*“the continuous existence which enables a corporation to manage its affairs and hold property without the necessity of perpetual conveyances for the purpose of transmitting it. By reason of this quality, this ideal and artificial person remains in its legal entity and personality, the same, though frequent changes may be made of its members”<sup>32</sup>.*

This attribute differentiates a corporation, quasi corporation from an unincorporated association.

4. The objectives of the Bureau are: Objectives  
of the  
Bureau

<sup>32</sup> Blacks Law Dictionary, Centennial Edition at page 1141.

- (a) the harmonization of existing government policies and practices on public procurement and ensuring probity, accountability and transparency in the procurement process;
- (b) the establishment of pricing standards and benchmarks;
- (c) ensuring the application of fair, competitive, transparent, value-for money standards and practices for the procurement and disposal of public assets and services; and
- (d) the attainment of transparency, competitiveness, cost effectiveness and professionalism in the public sector procurement system.

**Comment:** This provision recognises the existence of prior provisions on procurement in accordance with the Financial Regulations 2006. Chapters 22-26 and 29 of the Financial Regulations specifically deal with acquisition of stores: local purchase and indents; government contracts; tenders board and tenders respectively. However, the experience of practice has shown that these provisions are inadequate to regulate modern day public procurements.

The key words in the objectives are accountability, benchmarking, competition, probity, professionalism, transparency and value for money. Value for money comes with its three parameters of economy, efficiency, and effectiveness. Accountability will include ensuring the economy of operations and the duty to report to stakeholders on the procurement operations undertaken with public funds.

Value for money is more detailed as follows:

*Economy:* The practice by MDAs of thrift and good housekeeping, acquiring resources in appropriate quantity and quality at the lowest cost. A lack of economy would occur where there is overstaffing, or the acquisition and use of overpriced facilities. Essentially, it is about getting things done cheaply.

*Efficiency:* This ensures that maximum useful output is gained from the resources devoted to each activity of MDAs, or alternatively that only the minimum level of resources are devoted to achieving a given level of output. An operation could be said to have increased in efficiency if either lower costs were used to produce a given amount of output, or a given level of cost resulted in increased output. Inefficiency will be revealed by identifying the procurement of work with no useful purpose, or the accumulation of surplus materials that are not needed to support operations. It is about getting things done well.

*Effectiveness:* This ensures that the output from any given activity (or the impact that services have on the community) is achieving the desired results. To evaluate effectiveness, we need to establish that the desired goals (for instance, if the MDGs and the right to an adequate standard of living) have been achieved. A goal for an operating objective should be defined as a concrete expression of a policy objective. It is about doing the right things<sup>33</sup>.

For the term benchmarking, the Bureau is expected to ensure that MDAs learn from the experience of the best in class, leaders in the field with whom legitimate comparisons can

<sup>33</sup> Adapted from *The Pursuit of Value for Money*, Samuel Afemike, Spectrum books, 2003, pages 6-9.

be made<sup>34</sup>. This can be achieved through the collection and analysis of data determining the performance gap and identification of critical success factors<sup>35</sup>.

**Action:** CSOs should canvass for the review of the Financial Regulations 2006 to reflect current procurement norms as dictated by the PPA. The foregoing objectives give a general framework of action for assessing the performance of the Bureau. It is therefore expected that in CSO annual or other periodic reports, these parameters should inform the assessment of the work of MDAs and the Bureau including the assessment of their public reports.

**5. The Bureau shall:**

Functions of  
the Bureau

- (a) formulate the general policies and guidelines relating to public sector procurement for the approval of the Council;
- (b) publicize and explain the provisions of this Act;
- (c) subject to thresholds as may be set by the Council, certify Federal procurement prior to the award of contract;
- (d) supervise the implementation of established procurement policies;
- (e) monitor the prices of tendered items and keep a national database of standard prices;
- (f) publish the details of major contracts in the procurement journal;
- (g) publish paper and electronic editions of the procurement journal and maintain an archival system for the procurement journal;
- (h) maintain a national database of the particulars and classification and categorization of federal contractors and service providers;
- (i) collate and maintain in an archival system, all federal procurement plans and information;
- (j) undertake procurement research and surveys;
- (k) organise training and development programmes for procurement professionals;
- (l) periodically review the socio-economic effect of the policies on procurement and advise the Council according;
- (m) prepare and update standard bidding and contract documents;
- (n) prevent fraudulent and unfair procurement and where necessary apply administrative sanctions;
- (o) review the procurement and award of contract procedure of every entity to which this Act applies;

<sup>34</sup> Eze Onyekpere in *Civil Society and the Budget- a Reader*, at page 135; Socio Economic Rights Initiative, 2004.

<sup>35</sup> Eze Onyekpere, *supra*

- (p) perform procurement audits and submit such report to the National Assembly bi-annually;
- (q) introduce, develop, update and maintain related database and technology;
- (r) establish a single internet portal that shall, subject to section 16 (21) of this Act serve as a primary and definitive source of all information on government procurement containing and displaying all public sector procurement information at all times; and
- (s) coordinate relevant training programs to build institutional capacity.

**Comment:** The Bureau has wide ranging functions. The policy formulation function of the Bureau subject to the approval of Council is reiterated while the dissemination of information about the Act is also a major function. It appears that the Bureau has started the implementation of many of these duties such as certification of federal procurements, capacity building for MDAs<sup>36</sup>, preparation of standard bidding documents,<sup>37</sup> public sensitization on the provisions of the Act<sup>38</sup>, etc. Capacity building should take into cognisance the duties of the Chartered Institute of Purchasing and Supply Management of Nigeria under its enabling law. The Bureau has also started the establishment of a procurement cadre in the public service. This is in recognition of the need for the professionalisation of the procurement function in the public sector.

In applying the mischief rule for the interpretation of statutes, it appears the Nigerian Country Procurement Assessment Report (CPAR) 2000 laid the foundation for some of the reforms contained above as the Bureau's functions. It states inter alia:

*The procurement function is not generally performed by professionally qualified staff. Although, there is a shortage of such staff in the public service, even the few available are not properly utilised. There is a tendency to believe that the procurement function can be performed by anybody and hence the procurement function is held in low esteem. Training in public procurement procedures for civil servants is generally insufficient due to low regard for the profession and due to lack of funding. In addition, procurement training is offered by few institutions in Nigeria. The Institute of Purchasing and Supply Management [now Chartered Institute of Purchasing and Supply Management of Nigeria] is the only organisation which has, for many years, provided training in public procurement and promoting professional standing of procurement staff, and their skills. It has recently introduced a system of certifying procurement specialists. However IPMS is not recognised/chartered by the Nigerian Government as a professional body.*

.....

*There is the need to restore and strengthen the professional procurement cadre and allow them to practice their profession. The procurement function should be carried out by these professionals.*

<sup>36</sup> Sector specific training have been organised for the respective MDAs to ensure that the demands of the PPA are met in their procurement functions.

<sup>37</sup> The standard bidding documents already prepared include those for goods, works, small works, national shopping, selection of consulting firms in complex lump sum contracts and in time based assignments. It also includes standard bidding documents for the selection of individual consultants.

<sup>38</sup> The Bureau has organised public forums in the six geopolitical zones; contractors, the media, non governmental organisations, public servants, etc are generally invited to these sensitization forums.

The foregoing capacity building functions of the Bureau should be read jointly with the functions of the Chartered Institute of Purchasing and Supply Management of Nigeria<sup>39</sup> (CIPSMN) under section 1 of its enabling law:

*“Establishment of the Chartered Institute of Purchasing and Supply Management and its functions:*

- (1) There is established a body to be known as the Chartered Institute of Purchasing and Supply Management of Nigeria (in the Act referred to as “the Institute”) which shall be a body corporate under that name and be charged with the general duty of –*
  - (a) determining and reviewing, from time to time, the academic standards, knowledge and skills that shall be attained by persons seeking to qualify as registered members of the Chartered Institute of Purchasing and Supply Management (in this Act referred to as “the Professional”);*
  - (b) ensuring that its members maintain a reputable and high standard of behaviour expected of any professional in purchasing, procurement, stores, materials, warehouse, logistics management or supply chain management in Nigeria and other parts of the world;*
  - (c) providing for the training, education and examination of persons desiring to become professional procurers according to the provisions of this Act whether in Nigeria or abroad;*
  - (d) regulating the discipline and professional conduct of its members;*
  - (e) promoting and projecting the welfare of its members both in Nigeria and abroad;*
  - (f) arranging conferences, seminars, symposia and meetings for discussion of supplies and related matters, reading of papers and delivery of lectures, publishing copies of abridgment of papers, books, lectures, records and other memoranda instilling high standard of professional ability and knowledge by means of periodic issue of journals of the Institute and to organise post qualification course for its members; and*
  - (g) performing such functions as are incidental to the objects or as the Council may deem necessary for the attainment of all or any of these objects.*

On the basis of the foregoing, the Bureau and the Council (when established) should collaborate with the CIPSMN to build the capacity of the procurement cadre of the civil service and certify those that are yet to get their professional qualifications. The CPAR 2000 had recommended steps to ameliorate the above cited deficiencies and these include supporting IPSM (now CIPSMN) and other organisations engaged in training and promoting the procurement profession and supporting them to be chartered by the National Assembly which has now been realised. The need for collaboration is further fuelled by the provisions of section 13 (2) of the CIPSMN Act to the effect that:

*The Institute shall have powers to accredit any institution of higher learning offering courses leading to the award of Degree, Higher National Diploma and Diploma in purchasing and supply in order to maintain standard.*

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<sup>39</sup> Cap.C53, Laws of the Federation of Nigeria, 2004.

However, the Bureau is yet to commence the implementation of a number of other duties including the establishment of a single internet portal, procurement audits, procurement research and surveys, etc. Procurement audits refer to an objective investigation or examination or inspection or observation, inquiry, perusal, search, survey, scrutiny, interrogation, studying or testing of a government procuring entity's environment, objectives, methods, tactics in a bid to identify challenges, opportunities and facilitate the development of appropriate action plans and or express an independent opinion<sup>40</sup>. It involves the systematic or comprehensive examination of public procurement proceedings<sup>41</sup>. Procurement audit reports are to be submitted to the National Assembly bi-annually. These audit documents are public documents and should attract the attention of CSOs. It is expected that the National Assembly Committees would hold public hearings to give opportunities for CSO interventions.

To implement its duties, the Bureau needs adequate funding from the federal budget and other sources and adequate human resources knowledgeable in procurement processes and its regulation. The maintenance of a national database, archival system, single internet portal<sup>42</sup>, and a list of persons debarred from procurement proceedings, etc, all point in the direction of providing access to information to the public. Access to information is a necessary condition for transparency and is critical for informed interventions to the procurement process.

**Action:** The performance or non performance of these functions or the quality of the performance should be the basis for determining whether the Bureau is discharging its statutory responsibilities. CSOs should monitor and report on a periodic basis the performance of these duties. CSOs should also through active collaboration move the Bureau towards the implementation of these outstanding duties and further help the Bureau in canvassing for adequate funding during Medium Term Expenditure Framework and budget preparations.

CSOs can engage in the publication of the Act to make it easily accessible, engage in media discussions on the Act, publish it on their respective websites, publish abridged and simplified versions of the Act. CSOs can organize capacity building workshop for their members. They can also subject to resource and capacity constraints engage in independent procurement audits and this would be facilitated by information gathered through the monitoring and observation process, interactions with contractors and service providers and literature review. This alternative source of information from CSOs can be provided to the Bureau and the relevant legislative Committees. CSOs should endeavour to get copies of the bi-annual audits and make presentations to the legislature and the Bureau on remedial measures when flaws have been detected by audits. CSOs should also consider rendering advice and where available, legal services to bidders to facilitate the implementation of the Act and activate redress mechanism when there are genuine grievances.

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<sup>40</sup> *Public Procurement Audit in Nigeria- the Theory and Practice* being a paper presented by Engr Ibiam Oguejiofo at the CIPSMN National Seminar in Abuja 20-21 August 2009.

<sup>41</sup> *Public Procurement Audit*, etc, supra.

<sup>42</sup> "An internet portal is a site that that serves as a point of access to information within the entire system and, if properly done should present information from various units, departments, procuring entities and their sources in a unified way. The advantages of such a portal are many. But most significantly, the portal will point users from a single point to all the information available on public procurement which they might otherwise not have seem aware of or able to track"; Edetaen Ojo in *Access to Information under the Public Procurement Act 2007 in Non State Actors and Procurement Watch in Nigeria* published by Public Private Watch.

6. (1) The Bureau shall have the power to:

Powers of  
the  
Bureau.

(a) enforce the monetary and prior review thresholds set by the Council for the application of the provisions of this Act by the procuring entities;

(b) subject to the paragraph (a) of this subsection, issue certificate of “No Objection” for Contract Award” within the prior review threshold for all procurements within the purview of this Act:

(c) from time to time stipulate to all procuring entities, the procedures and documentation pre-requisite for the issuance of Certificate of ‘No Objection’ under this Act;

**Comment:** In compliance with section 6 (1) (c), the Bureau has developed a handbook titled “*Procedures and Documentation Pre-requisite for the Issuance of a Certificate of ‘No Objection’ to MDAs*”. According to the Handbook, the documents required are letter of request/transmission of documents signed by the honourable minister or permanent secretary specifying the company or group of companies for which Due Process Certification of “No Objection” is to be granted, including the value of the project in Naira; evidence of advertisement/invitation for pre-qualification/approval for exemption/BPP “No Objection” to adopt restricted or direct procurement<sup>43</sup>; prequalification document submitted by contractors<sup>44</sup>; prequalification evaluation report<sup>45</sup> and letters of bid (contractors acknowledged copies only<sup>46</sup>). Other documents required include project designs and drawings/full specifications for goods<sup>47</sup>; bills of quantities/bill of engineering measurement and evaluation<sup>48</sup>; financial bids of pre-qualified contractors showing evidence of counter-signing of bills by competing firms; bid return sheet (duly signed by all pre-qualified bidders in attendance and representatives of the MDA/observers/professional organizations and NGOs<sup>49</sup>; copies of protest letters by

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<sup>43</sup> It should indicate whether there was advertisement for contractors pre-qualification and provide evidence thereof; copies of acknowledged correspondences of invitation to bid; evidence of “No Objection” certificate for sole sourcing and for advertisements incorporating combined technical and financial bids; contractors must be requested to submit bids in different envelopes to allow distinct evaluation.

<sup>44</sup> Indicate whether pre-qualification was conducted, and if not, whether post-qualification was provided for in the bidding documents and include copies of pre-qualification documents.

<sup>45</sup> Provide details of members of Bid Evaluation Committee indicating qualifications, designation and experience; provide the basis and criteria for evaluation of bids and indicate how the evaluation criteria were applied, and how successful bidder’s qualifications were verified. The procuring entity will also be required to provide copies of evaluation criteria and scores allocated by individual members of the evaluation committee and to state which BPP published standard bidding documents was used for the procurement and where a modified format or completely different standard is used, evidence of its prior approval by the BPP needs to be shown.

<sup>46</sup> Provide acknowledged copies of letters of invitation to bid to pre-qualified contractors and evidence of delivery of the letters to contractors.

<sup>47</sup> Indicate whether project designs and drawings have been prepared and whether by consultants or in-house; provide copies- this is especially important for building and engineering projects; provide full specification of goods or machinery to be supplied.

<sup>48</sup> Submit BOQ or BEME describing the quality and quantity of the works to be carried out and agreeing with the drawings; copies of the priced BOQ and BEME of all bidders including any correction carried out during evaluation showing evidence of counter-signing of bills by competing firms.

<sup>49</sup> Provide copies of Bid Return Sheets duly signed by representatives of contractors, private professional groups, NGOs. The Sheet should reflect original currencies of offer and indicate

bidders and responses and actions taken if any. Also, the documentation includes progress reports for ongoing projects requiring augmentation/latest interim statement/comparative bill of original revised works<sup>50</sup>; bid evaluation report in hard and soft copy; consultant's or in-house project estimate in hard and soft copy<sup>51</sup> and appropriation/source of fund which is the copy of the highlighted budget page.

(d) where a reason exist:

(i) cause to be inspected or reviewed any procurement transaction to ensure compliance with the provisions of this Act,

(ii) review and determine whether any procuring entity has violated any provision of this Act;

(e) debar any supplier, contractor or service provider that contravenes any provision of this Act and regulations made pursuant to this Act;

(f) maintain a national database of federal contractors and service providers and to the exclusion of all procuring entities prescribe classifications and categorisations for the companies on the register;

**Comment:** Recent advertisements by MDAs and procuring entities for special registration with the MDAs, subject to the payment of registration fees, as a basis for qualification to bid for procurements from these entities appears to run contrary to the foregoing provision. It is only the Bureau that has the power of classification and categorization. Registration by contractors and service providers on an MDA by MDA basis seems untenable under the present legal regime.

**Action:** CSOs should engage MDAs and the Bureau reminding them of the illegality of such calls for registration. Letters, advocacy visits, etc could be used.

(g) maintain a list of firms and persons that have been debarred from participating in public procurement activity and publish them in the procurement journal;

(h) call for such information, documents, records and reports in respect of any aspect of any procurement proceeding where a breach, wrongdoing, default, mismanagement and or collusion has been alleged, reported or proved against a procuring entity or service provider;

(i) recommend to the Council, where there are persistent or serious breaches of this Act or regulations or guidelines made under this Act for:

(i) the suspension of officers concerned with the procurement or disposal proceeding in issue;

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exchange rates as submitted by contractors and any discounts offered, values of bid securities with names of issuing banks and completion period.

<sup>50</sup> Progress report, evidence of site visit, financial statements, copies of variation orders, copies of each payment, original designs, designs used for construction, progress photographs, original contract documents, approval for contract commencement; comparative bill of original and revised works - status report highlighting reasons for the augmentation.

<sup>51</sup> Indicate whether cost is in line with the consultant's/engineers estimate; submit consultant or in-house estimate based on pricing of same and the documents of bidders in Microsoft Word and Excel formats and hard copies.

- (ii) the replacement of the head or any of the members of the procuring or disposal unit of any entity or the Chairperson of the Tenders Board as the case may be;
- (iii) the discipline of the Accounting Officer of any procuring entity;
- (iv) the temporary transfer of the procuring and disposal functions of a procuring and disposing entity to a third party procurement agency or consultant; or
- (v) any other sanction that the Bureau may consider appropriate;
- (j) call for the production of books of accounts, plans, documents, and examine persons or parties in connection with any procurement proceeding;
- (k) act upon complaints in accordance with the procedures set out in this Act;
- (l) nullify the whole or any part of any procurement proceeding or award which is in contravention of this Act;
- (m) do such other things as are necessary for the efficient performance of its functions under this Act.

**Comment:** The Act gives broad powers to the Bureau. It has powers to issue certificates of no objection to contract award and for payment. However, the exercise of these powers is not statutorily subject to time limitation. The time limitations appear to have been taken care of by the regulations of the Bureau. Under subsection 1 (d), the Bureau can review procurement transactions if there are reasons for such review. The reasons could be provided by CSO reports if the monitoring exercise reveals a violation of the rules. The power to debar contractors for contravening the Act, nullification in whole or a part of procurement proceedings are important powers for the maintenance of ethical standards. The word “debar” is defined in the interpretative section to mean the placing of a firm, company or natural person on a list of persons ineligible to participate in any procurement proceedings under this Act. The names of the debarred firms are to be published in the procurement journal. Some of the disciplinary actions to be meted by the Bureau are to be made on the approval of the Council and these include suspension of public officers, replacement of the head of a procuring entity, etc. However, sanctions can only be invoked after the adverse party has been given the opportunity to defend itself in accordance with the constitutional principles of fair hearing<sup>52</sup>.

Violations of the provisions of the Act should be broadly conceptualised by the Bureau. The year after year return of monies to the Treasury by procuring entities in an economy with grave infrastructure deficits and an impending failure to meet the MDGs should qualify as a gross violation of the Act which should attract sanctions for the accounting officer and the supervising minister. Pray, why do they earn salaries and allowances if they cannot implement the capital components of the annual budget? Their procurement functions should be temporarily transferred to a more competent MDA.

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<sup>52</sup> See section 36 of the Constitution.

Procuring entity is defined in the Act to mean any public body engaged in procurement and includes a Ministry, Extra-Ministerial office, government agency, parastatal and corporation.

**Action:** CSOs should forward information on violations of the Act based on their monitoring exercise to the Bureau, EFCC, ICPC and other relevant agencies. It will also be imperative for CSOs to help in publicising the list of debarred contractors and firms and to cross check during monitoring that the debarred firms are not allowed to participate in procurement proceedings. CSOs can also maintain a list of contractors and suppliers who have serially violated the rules of public procurement. CSOs should also maintain a list of MDAs that refuse to implement the capital components of their budget and perennially return money to the Treasury. The list should be published and used for advocacy for sanctions against the accounting officers and ministers.

(2) The Bureau shall serve as the Secretariat for the Council.

(3) The Bureau shall, subject to the approval of the Council, have power to:

(a) enter into contract or partnership with any company, firm or person which in its opinion will facilitate the discharge of its functions;

(b) request for and obtain from any procurement entity information including reports, memoranda and audited accounts and other information relevant to its functions under this Act; and

(c) liaise with relevant bodies or institutions, national and international for effective performance of its functions under this Act.

**Comment:** Subsections (2) and (3) further highlights the inextricable link between the Council and the Bureau. For the Bureau to be working without the Council is an absurdity. It is like a body moving without the head. It appears that contracts and partnerships so far entered by the Bureau in the absence of a Council run the risk of illegality.

**Action:** Earlier recommended actions for the constitution of the Council should be intensified.

7. (1) There shall be for the Bureau, a Director-General who shall be appointed by the President, on the recommendation of the Council after competitive selections.

Director-  
General  
and Staff of  
the Bureau.

(2) The Director- General shall be:

(a) the Chief Executive and accounting officer of the Bureau;

(b) responsible for the execution of the policy and day to day administration of the affairs of the Bureau; and

(c) a person who possesses the relevant and adequate professional qualification and shall have been so qualified for a period of not less than 15 years.

(3) The Director-General shall hold office:

(a) for a term of 4 years in the first instance and may be re-appointed for a further term of 4 years and no more; and

(b) on such terms and conditions as may be specified in his letter of appointment.

(4) Without prejudice to the provision of this Act, the Director-General of the Bureau may be removed from office at the instance of the President on the basis of gross misconduct of financial impropriety, fraud, and manifested incompetence proven by the Council.

**Comment:** The appointment of a Director-General without a Council in place questions the legality of the appointment. Moreover, the competitive selection demanded by the Act has been ignored. Further, since there is no Council, who will monitor the Director-General to be able to give the President a report on whether he is guilty of gross misconduct, fraud, manifested incompetence, etc?

The Act in subsection (2) (c) talked about “relevant and adequate professional qualification” but did not define what the term meant either in the body of the legislation or in the interpretative section. However, the National Assembly has enacted the Chartered Institute of Purchasing and Supply Management of Nigeria Act of 2007 (CISPMN Act) which details the qualifications necessary for anchoring the leadership of such a procurement body and it is the claim of the Institute that the leadership of the Bureau should be a person who had been examined and certified by the Institute. Specifically, the CISPMN Act in section 1 (c) mandates the Institute as follows:

*Providing for the training, education and examination of persons desiring to become professional procurers according to the provisions of this Act whether in Nigeria and abroad.*

Furthermore, section 11 (9) of the CIPSMN Act states that:

*A person shall not be entitled to be appointed or engaged to head any purchasing and supply chain management of any organization unless he is duly registered as a member of the Institute qualified by examination.*

It is imperative to state that the CIPSMN Act came into force on April 30, 2007 while the PPA came into force on June 4 2007. The astonishing thing is that no reference was made of the CIPSMN Act in the PPA.

For the Director General of the Bureau to hold office on such terms and conditions as may be specified in his letter of appointment reduces an appointment with a statutory flavor to the whims and caprices of the appointer. The decision about the renewal of the employment of the Director-General ought to have been based on the recommendation of Council considering that the Council is the authority that recommends her for hiring and dismissal.

**Action:** CSOs should seek the clarification of “relevant and adequate professional qualification” by advocacy for the subsequent amendment of the Act. Such advocacy should also seek to place the endorsement of the Director-General to continue in office after the first term as part of the duty of the Council. Advocacy for the constitution of the

Council is a duty for all CSOs. Reporting on the appointment of the Director General must also establish the competitive nature of the selection process. Legislative advocacy should point the way that the terms and conditions applicable to the Director General should as a minimum, be on such terms and conditions as are applicable to a Director General or Permanent Secretary in the Public Service.

8. (1) The Council shall appoint the principal officers for the Bureau after competitive selection process. Principal Officers of the Bureau

(2) The principal officers appointed under section 9 (1) of this section shall each have the requisite qualification and experience required for the effective performance of the functions of their respective Departments and the Bureau as specified under this Act.

(3) The Council shall have power to modify the operational structure of the Bureau as may be necessary to enhance the Bureau's duties and functions under this Act.

**Comment:** The centrality of the Council to the functioning of this Act is further highlighted by this section. Apart from the power of Council to appoint the principal officers of the Bureau, the power to modify the operational structure of the Bureau is far reaching and demonstrates the illegality of operating a Bureau without a Council. The reference in subsection (2) to section 9 (1) appears improper. It should have read section 8 (1).

**Action:** Whenever the Council is constituted, CSOs should review the current operational structure of the Bureau with a view to submitting recommendations to Council on the reform of the current structure.

9. (1) The Council may appoint such officers and other employees as it may, from time to time, deem necessary for the purposes of the Bureau. Other Staff of the Bureau.

(2) Subject to the Pension Reform Act, the terms and conditions of service (including remuneration, allowances, benefits and pensions) of officers and employees of the Bureau shall be as determined by the Council.

(3) Without prejudice to the generality of subsection 2 of this section, the Council shall have power to appoint either on transfer or on secondment from any public service in the Federation, such number of employees as may, be required to assist the Bureau in the discharge of any of its functions under the Act and persons so employed shall be remunerated (including allowances) as the Council may consider appropriate.

**Comment:** By this section, the relationship between the Council and Bureau is further cemented. The Council is to appoint staff, and subject to law determine remuneration, allowances, benefits and pensions and also has power to appoint staff from the Civil Service either on transfer or secondment. This provision gives Council the power to remove the pay structure from the normal poor remuneration of the civil service so as to attract qualified and committed professionals for its work.

10. (1) The Council may, subject to the provisions of this Act and within six months of the inauguration, make staff regulations relating generally Staff Regulations

to the conditions of service of the employees of the Bureau and without prejudice to the foregoing, such regulation may provide for:

- (a) the appointment, promotion and disciplinary control (including dismissal) of employees of the Bureau; and
  - (b) appeals by such employees against dismissal or other disciplinary measures.
- (2) Until such regulations are made, any instrument relating to the conditions of service of officers in the civil service of the Federation shall be applicable.

**Comment:** The Council has the power to make staff regulations and this further demonstrates the futility of running the Bureau without a Council.

**Action:** CSOs should through research develop model staff rules and regulations with which to engage the Council upon its constitution.

- 11.** Employees of the Bureau shall be entitled to pensions, and other retirement benefits as prescribed under the Pension Act. Pension Provisions.
- 12.** (1) The Bureau shall establish and maintain a Fund, to be approved by the Council into which shall be paid and credited: Funds of the Bureau
- (a) the sums appropriated by the National Assembly for the running of the Bureau;
  - (b) all subventions, fees and charges for services rendered or publications made by the Bureau; and
  - (c) all other assets which may from time to time, accrue to the Bureau.
- (2) The Bureau shall charge its fund to meet all its expenditure.
- (3) The Council may make regulations for the Bureau:
- (a) specifying the manner in which assets or the fund of the Bureau are to be held, and regulating the making of payment into and out of the fund; and
  - (b) requiring the keeping of proper accounts and records for the purposes of the fund in such form as may be specified in the rules.
- (4) The Bureau may, from time to time, apply the proceeds of the fund for:
- (a) the cost of administration of the Bureau;
  - (b) the payments of salaries, fees and other remuneration, employees of the Bureau or experts or professionals appointed by the Bureau;
  - (c) the maintenance of any property acquired by or vested in the Bureau; and

(d) any matter connected with all or any of the functions of the Bureau under this Act.

(e) the payments of salaries, fees and other remuneration, of employees of the Bureau or experts or professionals appointed by the Bureau; and

(f) any expenditure connected with all or any of the functions of the Bureau under this Act.

**Comment:** The absence of Council is manifesting in the usurpation of its powers by the Bureau and other authorities. Who approved the existing fund if any and any regulations for expenditure from the fund? It appears paragraphs (b) and (e) of subsection 4 above are one and the same.

**13.** (1) The financial year of the Bureau shall be the same as that of the Federal Government.

Financial  
Year,  
Budgeting  
and Annual  
Report.

(2) Not later than 6 months before the end of the financial year, the Bureau shall submit to the Council an estimate of its expenditure and projected income during the next succeeding year.

(3) The Bureau shall keep proper accounts and records of its receipts, payments, assets and liabilities and shall in respect of each financial year prepare a statement of account in such form as the Council may direct.

(4) The Bureau shall within 6 months after the end of the financial year to which the accounts relate cause the accounts to be audited in accordance with guidelines supplied by the Auditor-General of the Federation.

(5) The Bureau shall at the end of each financial year, prepare and submit to the Council a report in such form as shall accurately capture all the activities of the Bureau during the preceding year and shall include in the report a copy of the audited accounts of the Bureau for that year.

**Comment:** No Council has been constituted to receive the reports of the estimates of income and expenditure; or receive a report as anticipated in subsection (5) of this section. The financial year runs from January 1 to December 31 of every year<sup>53</sup>. Six months deadline to audit accounts appears to be a long time – this does not tally with proposed audit reforms in the Auditor General Bill which proposes three months<sup>54</sup>.

**14.** (1) Subject to the provisions of this Act, no suit shall be commenced against the Bureau before the expiration of 30 days after written notice of an intention to commence the suit shall have been served upon the Bureau by the intending plaintiff or his agent; and the notice shall clearly and explicitly state:

Legal  
Proceedings

(a) the cause of action;

<sup>53</sup> See the Financial Year Act, Cap F.27, Laws of the Federation of Nigeria, 2004.

<sup>54</sup> See the Auditor General for the Federation (Additional Powers and Functions) Bill, 2007.

- (b) the particulars of the claim;
- (c) the name and address of legal practitioner of the intending plaintiff;  
and
- (d) the relief being sought.

**Comment:** While this subsection requires 30 days pre-action notice of intention to commence suit to the Bureau, the Act in section 54 (7) as part of administrative review states that where the Bureau fails to render its decision within the stipulated time, or the bidder is not satisfied with the decision of the Bureau, the bidder may appeal to the Federal High court within 30 days after the receipt of the decision of the Bureau, or expiration of the time stipulated for the Bureau to deliver a decision. The two sections appear contradictory. The bidder must appeal within 30 days of the receipt of the Bureau's decision, yet he must give 30 days pre-action notice. There appears to be no need for the pre-action notice since the bidder has first stated his complaint to the Bureau, on the basis of which the Bureau reaches a decision which the complainant is dissatisfied with. And on the basis of his dissatisfaction with the decision, he seeks the intervention of the Federal High Court. Thus, the Bureau is already seized of the facts of the case and the nature of the remedies sought. It therefore goes to no purpose for the Act to demand pre-action notice in procurement proceedings. However, pre-action notice may be necessary if the cause of action did not emanate from procurement proceedings.

Considering the 30 day pre-action notice requirement, if time is of the essence and the subject matter of the dispute may be destroyed or overtaken within 30 days, it appears that a suit can lie without pre-action notice. This statement is supported by constitutional provisions on fair hearing and access to the courts for the resolution of disputes. Essentially, in the determination of his civil rights and obligations including any question or determination by or against any government or authority, pre-action notice shall not be employed to defeat the ends of justice.

The essence of pre-action notice is to enable the Bureau to decide what to do in the circumstances, to negotiate or reach a compromise or have another look at the matter in relation to the issues and decide whether it is more expedient to adopt a non adversarial approach to the issue<sup>55</sup>. Non service of pre-action notice where same is statutorily required renders the subsequent action incompetent<sup>56</sup>. However, what is required of the plaintiff once a notice has been given to the statutory body is substantial compliance, not necessarily a strict following of the requirements set out in the statutory body's enabling law<sup>57</sup>.

**Action:** After the Act has been tested, legislative advocacy by CSOs for the removal of pre-action notice in all matters arising from procurement proceedings will become imperative.

- (2) The Director-General of the Bureau, its officers, employees or agents shall not personally be subject to any action, claim or demand by, or liable to any person in respect of anything done or omitted to be done in exercise of any

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<sup>55</sup> *Mobil Producing (Nigeria) Unltd v LASEPA* (2003) FWLR (Part 137) 1029 and *Kalu Onuoha*, supra..

<sup>56</sup> *Nigericare Development Co. Ltd v Adamawa State Water Board* (2008) 2-3 SC (Part 11) 202; and *International Tobacco Co Plc v NAFDAC* (2007) FWLR (Part 382) 1981.

<sup>57</sup> *Amadi v NNPC* (2000) FWLR (Part 9) 1527.

functions or power conferred by this Act upon the Bureau, its Director-General, officers, employees or agents.

(3) A member of the Bureau or the Director-General or any officer or employee of the Bureau shall be indemnified out of the assets of the Bureau against any liability incurred by him in defending any proceeding, whether civil or criminal, if the proceeding is brought against him in his capacity as a member, Director-General, officer or other employee of the Bureau.

**Comment:** This is another way of stating that the provision of Public Officers Protection Act shall apply to the members of the Commission in the discharge of their functions under this Act. The Public Officers Protection Act<sup>58</sup> is made as a law to provide for protection against action of persons acting in the execution of public duties. However, the protection of the law does not extend to manifestly unlawful actions, abuse of office, acting *malafide* and outside the scope of duty<sup>59</sup>.

(4) A notice, summons or other documents required or authorized to be served upon the Bureau under the provisions of this Act or any other law or enactment may be served by delivering it to the Director-General or by sending it by registered post and addressed to the Director –General at the principal office of the Bureau.

### PART III-SCOPE OF APPLICATION

15. (1) The provisions of this Act shall apply to all procurement of goods, works and services carried out by:

Scope of Application.

(a) the Federal Government of Nigeria and all procurement entities;

(b) all entities outside the foregoing description which derive at least 35% of the funds appropriated or proposed to be appropriated for any type of procurement described in this Act from the Federation share of Consolidated Revenue Fund.

**Comment:** The words “Federation share of the Consolidated Revenue Fund” are misleading. The Constitution creates the Consolidated Revenue Fund of the Federation by section 80 and that of the States by section 120. It appears that the draftsman intended to say the “federal government’s share of the Federation Account” or the “Consolidated Revenue Fund of the Federation”<sup>60</sup>.

The implication of this provision is that where the Federal Government has a joint venture collaboration including the oil sector ventures that meets the 35% threshold, then the provisions of this Act will apply to the procurements of such joint venture body. This Act will also apply to the expenditure of the Niger Delta Development Commission, Education Trust Fund, etc.

<sup>58</sup> Cap.P41, Laws of the Federation of Nigeria, 2004

<sup>59</sup> . Per Ademola C.J.N. in *L.C.C. v Ogunbiyi* (1969) 6 N.S.C.C. 283 at 284; See also *Nwankwere v Adewunmi* (1966) 4 N.S.C.C. 140 at 143.

<sup>60</sup> See Kalu Onuoha in *Legal Issues in the Public Procurement Act*, being a paper presented at the capacity building workshop of CSJ.

**Action:** Confirm from the reports of MDAs, legislative committees, the Bureau if all agencies are obeying the law. Also, confirm from the Nigeria Extractive Industries Initiative, other oil industry reports, etc, if the joint ventures are employing the provisions of this Act for their procurement proceedings. Reports of violations could be sent to the Bureau, Auditor General for the Federation, legislative committees and the NEITI secretariat.

(2) The provisions of this Act shall not apply to the procurement of special goods, works and services involving national defence or national security unless the President's express approval has been first sought and obtained.

**Comment:** In the interpretative section 60, special purpose goods is defined to mean *any objects of armaments, ammunition, mechanical, electrical equipment or other thing as may be determined by the President needed by the Armed Forces or Police Force as well as the services incidental to the supply of these objects*. In subsection (2), there is nothing wrong in introducing competitive procurement processes to national defence and security operations. However, information about the proceedings may not be publicised or be made accessible to the public and may be classified. But it will still be subject to the Bureau's prior certification or post contract audit. Furthermore, there is the need to separate pure defence and national security procurements that need not be in the public domain and which can be classified from the routine procurement of standard goods, consumables and buildings that have nothing to do with national security. The latter category should be subject to due process certification and review. Otherwise, the implication of a literal interpretation will be that all contracts from the Ministry of Defence, the Police and other security formations will be out of the purview of due process certification and this Act.

# Chapter Three

## PARTS IV-V

### PART IV – FUNDAMENTAL PRINCIPLES FOR PROCUREMENTS

16. (1) Subject to any exemption allowed by this Act, all public procurement shall be conducted:

Fundamental  
Principles for  
Procurement.

(a) subject to the prior review thresholds as may from time to time be set by the Bureau pursuant to section 7 (1) (a)-(b):

(b) based only on procurement plans supported by prior budgetary appropriations and no procurement proceedings shall be formalized until the procuring entity has ensured that funds are available to meet the obligations and subject to the threshold in the regulations made by the Bureau, has obtained a “Certificate of ‘No Objection’ to Contract Award” from the Bureau;

(c) by open competitive bidding;

(d) in a manner which is transparent, timely, equitable for ensuring accountability and conformity with this Act and regulations deriving therefrom;

(e) with the aim of achieving value for money and fitness for purpose;

(f) in a manner which promotes competition, economy and efficiency; and

(g) in accordance with the procedures and timeline laid down in this Act and as may be specified by the Bureau from time to time.

**Comment:** In subsection (1) (a), the reference to section 7 (1) (a) and (b) is misleading. That cited section is on the appointment of the Director General of the Bureau and indeed has no paragraphs (a) and (b). The appropriate section is section 6 (1) (a) and (b) which is on powers of the Bureau and the thresholds. The implication of the above subsection is that committing government to projects in anticipatory approval by the authorities is no longer a procurement option. Apart from the need for prior budgetary provisions, the procurement must be cash backed. “Certificate Of ‘No Objection’ to Contract Award” in the interpretative section *means the document evidencing and authenticating that due process and the letters of this Act have been followed in the conduct of a procurement proceeding and allowing for the procuring entity to enter into contract or effect payments to contractors or suppliers from the Treasury.* There is also the central challenge of the procurement meeting fitness for purpose - to meet the ends for which the procurement was undertaken.

“Open Competitive Bidding” is defined in the interpretative section of the Act to mean the offer of prices by individuals or firms competing for a contract, privilege or right to supply specified goods, works, construction or services. It is also further defined in section 24 (2) of the Act as follows:

*Any reference to open competitive bidding in this Act means the process by which a procuring entity based on previously defined criteria, effects public procurement by offering to every interested bidder, equal simultaneous information and opportunity to offer the goods and works needed.*

Two provisions of the Independent Corrupt Practices and Other Related Offences Act should be considered as a guide to action: They are S.22 (3) and (4)

*(3) Any public officer who in the course of his official duties, inflates the price of any goods or services above the prevailing market price or professional standards shall be guilty of an offence under this Act and on conviction be liable to seven (7) years imprisonment and a fine of one million naira.*

*(4) Any public officer who in the discharge of his official duties awards or signs any contract, without budget provision, approval and cash backing, shall be guilty of an offence under this Act and on conviction be liable to three (3) years imprisonment and a fine of one hundred thousand naira..*

The Financial Regulations 2006 contain provisions on the proper exercise of public procurement<sup>61</sup>. The Financial Regulations requires all officers responsible for expenditure to exercise due economy and that money should not be spent merely because it has been budgeted<sup>62</sup>. This recognises the need for prudent management of budgeted resources. Treasury Circulars issued from time to time by the Office of the Accountant General of the Federation also emphasise the need for due process, value for money and meticulously following the Public Procurement Act in government commerce<sup>63</sup>.

It is also imperative to recall section 38 of the Fiscal Responsibility Act which states as follows:

*All contracts with regards to the execution of annual budget; shall comply with the rules and guidelines on-*

*(a) procurement and award of contracts; and*

*(b) due process and certification of contract.*

When you read this section in conjunction with S.51 of the Fiscal Responsibility Act ("FRA") which states that a person shall have legal capacity to enforce the provisions of the FRA by obtaining prerogative orders or other remedies at the Federal High Court, without having to show any special or particular interest, it would appear that the FRA has granted an indirect *locus standi* to CSOs and other persons to challenge infractions of the PPA through the FRA. The old law had been for the plaintiff to prove what he has personally suffered over and above the generality of the public as to entitle him to institute an action in court. The standard practice in our courts has been to ask petitioners to show personal and particular interests to ground his locus in the suit. Thus, the petitioner's legal rights and obligations must have been affected or threatened before he can approach the courts with his prayers. This has been the position in a long list of

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<sup>61</sup> Financial Regulations Nos. 808 (ii) and 513 i.e. no payment vouchers should be raised or cheques issued in respect of contracts yet to be executed.

<sup>62</sup> Financial Regulation No. 515.

<sup>63</sup> See Treasury Circular No. TRY/A7&B7/2008 on the Closure of Year 2008 Accounts.

decided cases including *Senator Adesanya v The President of Nigeria*<sup>64</sup>, *J.S. Olawoyin v Attorney General, Northern Region*<sup>65</sup>.

**Action:** Where open competitive bidding is demanded by law and the procuring entity acts in a manner contrary to statutory stipulations, CSOs should raise a red flag with the Bureau. If the CSO is so sure of its facts and the Bureau does not seem to go along with the law, then consider involving the media to use the power of public pressure to enforce the observance of the law. Finally and as a last resort, institute a suit in court to enforce the provisions of the Act. CSOs should also use the parameters of being timely, transparent, competitive, value for money, etc, to evaluate procurement proceedings.

(2) Where the Bureau has set prior review thresholds in the procurement regulations, no funds shall be disbursed from the Treasury or Federation Account or any bank account of any procuring entity for any 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 an award of contract duly issued by the Bureau.

(3) For all cases where the Bureau shall set a prior review threshold, the Bureau shall prescribe by regulation, guidelines and the conditions precedent to the award of Certificate of “No Objection” under this Act.

(4) Subject to the prior review thresholds as may be set by the Bureau, any procurement purported to be awarded without a “Certificate of ‘No Objection’ to Contract Award” duly issued by the Bureau shall be null and void.

**Comment:** The Bureau has purportedly, already set and revised the thresholds<sup>66</sup>. It has also set procedures and documentation pre-requisite for the issuance of a certificate of no objection to MDAs in a handbook published and distributed to MDAs and CSOs<sup>67</sup>. The word “purportedly” is used because the circular prescribing these thresholds emanated from the Office of the Secretary to the Government of the Federation. It is a circular with reference no. SGF/OP/I/S.3/VIII/57 dated March 11 2009 and signed by Mahmud Yayale Ahmed, the current Secretary to the Government of the Federation. Strictly speaking, the Secretary to the Government of the Federation is not an authority recognized by the Act to issue instructions and regulations for the purpose of implementing the PPA. The vacuum created by the absence of the Council is manifesting in this illegality. However, it appears that the reviewed thresholds were in reaction to the general MDA complaint that BPP’s procedures were slowing down budget implementation. However, it appears that in the process of fast tracking budget implementation, the prior review powers of the BPP have been whittled down and most of its powers confined to post mortem procurement reviews which suffer from the poverty of remedial justice. From Table 1 below, the bulk of government procurements do not require BPP’s no objection certificate. The major documentation on thresholds is as shown below.

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<sup>64</sup> Led by *Adesanya v The President* (1981) N.S.C.C., Vol. 12, 146.

<sup>65</sup> (1961) N.N.L.R. 84.

<sup>66</sup> See the *Approved Revised Thresholds for Service Wide Application and Special Thresholds for Procurement in Oil Sector*.

<sup>67</sup> The Bureau has developed a handbook titled “*Procedures and Documentation Pre-requisite for the Issuance of a Certificate of ‘No Objection’ to MDAs*”.

*Table 1: Procurement Approval Thresholds for Bureau of Public Procurement, Tenders Boards and Accounting Officers (PSs and CEOs) for All Ministries, Departments and Agencies*

<b>Approving Authority/ “No Objection” to award</b>	<b>Goods</b>	<b>Works</b>	<b>Non-Consultant Services</b>	<b>Consultant Services</b>
BPP issues “No Objection” to award/ FEC approves	N100 million and above	N1.0 billion and above	N100 million and above	N100 million and above
Ministerial Tenders Board	N5 million and above but less than N100 million	N10 million and above but less than N1.0 billion	N5 million and above but less than N100 million	N5 million and above but less than N100 million
Parastatal Tenders Board	N2.50 million and above but less than N50 million	N5 million and above but less than N250 million	N2.50 million and above but less than N50 million	N2.50 million and above but less than N50 million
Accounting Officer: Permanent Secretary	Less than N5 million	Less than N10 million	Less than N5 million	Less than N5 million
Accounting Officer: Director General/CEO	Less than N2.50 million	Less than N5 million	Less than N2.50 million	Less than N2.50 million

**Action:** CSOs should engage in advocacy for the lowering of the monetary thresholds so that the BPP can review a good part of capital budget implementation before contract award. The intention of the legislature in enacting the Act may be defeated by the current thresholds and the mischief in the law before the enactment of the Act would not have been cured. Further, the thresholds should be set by authorities recognized by the Act and not by the office of the Secretary to the Government of the Federation.

(5) A supplier, contractor or service provider may be a natural person, a legal person or a combination of the two. Suppliers, contractors or service providers acting jointly are jointly and severally liable for all obligations and or responsibility arising from this Act and the non-performance or improper performance of any contract awarded pursuant to this Act.

**Comment:** The first issue is that only a natural or juristic person can sue and be sued as a party to a suit<sup>68</sup>. The categories of persons to which the law ascribes juristic personality

<sup>68</sup> See *Shitta and Ors v Chief Ligali & Ors* (1941) 1 N.L.R. 23; *Noble v Parochial Committee, St John’s Church Aroloya* (1957) W.N.L.R 130.

include human beings, companies incorporated under the various Companies Acts, corporation sole with perpetual succession, trade unions, partnerships and friendly societies<sup>69</sup>.

Joint and several procurement liability implies that the contractors and service providers have the duty of individually or collectively fully performing the procurement obligation and the procuring entity can sue all or any of them upon breach of performance. A procurement liability is said to be joint and several when the procuring entity may demand performance from one of the entities separately or all of them together at its option<sup>70</sup>.

(6) All bidders in addition to requirements contained in any solicitation documents shall:

(a) possess the necessary:

(i) professional and technical qualifications to carry out particular procurements;

(ii) financial capability;

(iii) equipment and other relevant infrastructure;

(iv) shall have adequate personnel to perform the obligation of the procurement contracts.

(b) possess the legal capacity to enter into the procurement contract;

(c) not be in receivership, the subject of any form of insolvency or bankruptcy proceedings<sup>71</sup> or the subject of any form of winding up petition or proceedings;

(d) have fulfilled all its obligations to pay taxes, pensions and social security contributions;

(e) not have any director who has been convicted in any country for any criminal offence relating to fraud or financial impropriety or criminal misrepresentation or falsification of facts relating to any matter;

(f) accompany every bid with an affidavit disclosing whether or not any officer of the relevant committees of the procurement entity or Bureau is a former or present director, shareholder or has any pecuniary interest in the bidder and confirming that all information presented in its bid are true and correct in all particulars.

**Comment:** The possession of some of these qualifications by bidders may be difficult to monitor by CSOs. There is currently no publicly accessible electronic database of

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<sup>69</sup> Per Oputa J.C.A. in *Fawehinmi v NBA* (No.1) (1989) 2 N.W.L.R (Pt. 105) 558 at 645.

<sup>70</sup> Adapted from the definition of joint and several liability in the Blacks Law Dictionary, Centennial Edition at page 837.

<sup>71</sup> Bankruptcy proceedings are governed by the Bankruptcy Act, Cap.B2, Laws of the Federation 2004. It is a law to make provisions for declaring as bankrupt any person who cannot pay his debts of a specific amount and to disqualify him from holding certain elective and other public offices or from practicing any regulated profession (except as an employee).

companies who are up to date with taxes, pensions and social security contributions. These may have to be provided by the Federal Inland Revenue Services and related agencies in the future. Payment of taxes and social security obligations are evidence of good citizenship and it would be unfair to allow persons who have failed to contribute to the public Treasury to benefit from procurements funded from the Treasury.

There is also no electronic database of individuals convicted in Nigeria of fraud, financial impropriety or criminal misrepresentation or falsification. Possession of the financial capacity, infrastructure and relevant personnel may be proven by thorough evaluation and cross checking by officials of the procuring entity. However, modern developments such as equipment leasing ensure that what is needed is for the bidder to have access to equipments and infrastructure to do the work at the required time and not necessarily owning them.

The affidavit demanded in paragraph (f) ensures that all claims of the bidder are stated as averments in an affidavit which means that false information contained therein will amount to the offence of making false statement to a public officer with intent, which is punishable under section 215 of the Criminal Code<sup>72</sup> with one year imprisonment. Further, the Criminal Code provides in section 192 that:

*Any person who, on any occasion on which he is permitted or required by law to make a statement or declaration before any person authorized by law to permit it to be made before him, makes a statement or declaration before that person which, in any material particular, is to his knowledge false, is guilty of a felony, and is liable to imprisonment for three years.*

**Action:** Searches at the Corporate Affairs Commission will reveal whether a company is incorporated or not. It will also reveal the directors and shareholders of a company to determine relationships. Inquiries at the secretariat of professional associations can indicate whether claims to membership of a profession are true or false. When they are discovered to be false, the procuring entity's accounting officer should be informed with a view to taking corrective action. But where this fails, the Bureau should be informed. And if the Bureau fails to take action, using the media to expose the fraud and other remedies should be explored.

Legislative and policy advocacy should focus on the establishment of an electronic database by the Federal Inland Revenue Service in collaboration with other agencies, of companies that are up to date with taxes, pensions and social security contributions. This database should be accessible to the public. Advocacy should also move the Judiciary to consider the establishment of an electronic database containing information on criminal convictions in Nigeria with details of the offence and pictures of the convicts. Such a

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<sup>72</sup> Cap C.38, Laws of the Federation, 2004. "Any person who gives any information which he knows or believes to be false to any person employed in the public service with the intention of causing such person-

(a) to do or omit to do anything which such person ought not to do or ought not to omit to do if the true facts concerning the information given were known to such person;

(b) .....

*is guilty of an offence and liable to imprisonment for one year.*

database should also be accessible to the public. These databases should be updated regularly, preferably on a monthly basis.

(7) The procuring entity may require a bidder to provide documentary evidence or other information it considers necessary as proof that the bidder is qualified in accordance with this Act and the solicitation documents and for this purpose any such requirements shall apply equally to all bidders.

**Comment:** Once there is the need to ask for documentary evidence in proof of qualification, it applies across the board to all bidders.

(8) Whenever it is established by a procuring entity or the Bureau that any or a combination of the situations set out exists, a bidder may have its bid or tender excluded from any particular procurement proceeding if:

(a) there is verifiable evidence that any supplier, contractor or consultant has given or promised a gift of money or any tangible item, or has promised, offered or given employment or any other benefit, item or a service that can be quantified in monetary terms to a current or former employee of a procuring entity or the Bureau, in an attempt to influence any action, or decision making of any procurement activity;

(b) a supplier, contractor or consultant during the last three years prior to the commencement of the procurement proceedings in issue, failed to perform or to provide due care in performance of any public procurement;

(c) the bidder is in receivership or is the subject of any type of insolvency proceedings or if being a private company under the Companies and Allied Matters Act, is controlled by a person or persons who are subject to any bankruptcy proceedings or who have been declared bankrupt and or have made any compromises with their creditors within two calendar years prior to the initiation of the procurement proceeding;

(d) the bidder is in arrears regarding payment of due taxes, charges, pensions or social insurance contributions, unless such bidders have obtained a lawful permit with respect to allowance, deference of such outstanding payments thereof in installments;

(e) the bidder has been validly sentenced for a crime committed in connection with a procurement proceeding, or any other crime committed to gain financial profit;

(f) the bidder has in its management or is in any portion owned by any person that has been validly sentence for a crime committed in connection with a procurement proceeding, or other crime committed to gain financial profit; and

(g) the bidder fails to submit a statement regarding its dominating or subsidiary relationships with respect to other parties to the proceedings and persons acting on behalf of the procuring entity participating in same proceeding or who remains in subordinate relationship with other participants to the proceedings.

(9) In such cases the procuring entity shall inform the Bureau and person referred to in subsection (8) (a)-(g) of this section, in writing that the bid or tender in question has been excluded and the grounds for the exclusion and to keep a record of same in the file pertaining to the public procurement proceeding in question.

**Comment:** Some of the provisions of subsection (8) may be difficult to prove. It will take serious investigations to unravel giving a gift or promises of a gift, employment or offer of employment or any other benefit, item or a service that can be quantified in monetary terms. This is not even limited to current employees but to former employees of the procuring entity! Failure to perform or provide due care should be a ground for debarment and inclusion in a list of ineligible contractors and service providers to be published by the Bureau. For CSOs to know contractors and suppliers who have failed to perform, access to official information from MDAs and the Bureau is needed.

For paragraph (e), notorious and convicted companies such as Siemens and Halliburton would not qualify for procurement contracts in Nigeria. The fact of their conviction in other countries is a fact which the courts are bound to take judicial notice of by section 73 of the Evidence Act<sup>73</sup> upon the production of the relevant documentation.

In relation to paragraph (f), in a large publicly quoted company with thousands of shareholders and stock valued in billions of naira, it will be extremely difficult for the management or board of the company to know who among their shareholders have been sentenced for a crime in relation to procurement proceedings or for financial gain. Thus, under this provision, a shareholder who owns a hundred shares with such a record can *stricto sensu* disqualify the company. It would be better if the shareholder is a substantial owner of at least 10% of the total value of shares. It is public knowledge that shares of quoted companies easily change hands and the new shareholder is not by law or practice required to indicate in any form whether he is a convict or not, as a consideration for acquiring shares.

**Action:** CSOs should bring it to the attention of the authorities where any of these circumstances are proven and ensure that the bidder is excluded. They should also consider advocacy for amendment to add a proviso to paragraph (f) to read: "provided that for such a part owner convicted of a crime to be the basis for the disqualification of a company, he must own substantial interest amounting to not less than 10% of the total value of the company shares and had been a shareholder for at least one year prior to the time the company submitted the bid".

(10) All communications and documents issued by procuring entities and the Bureau shall be in English language.

(11) All communications regarding any matter deriving from this Act or proceedings of public procurement shall be in writing or such other form as may be stipulated by the Bureau.

**Comment:** English is the lingua franca of Nigeria and as such, it makes sense that procurement proceedings be recorded in English. The requirement for procurement proceedings to be in writing is for the purpose of obtaining a record which can be referred

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<sup>73</sup> Evidence Act, Cap. E14, Laws of the Federation, 2004.

to in the event of a dispute by the parties or by interested CSOs, professional groups or third parties monitoring the procurement.

(12) Every procuring entity shall maintain both file and electronic records of all procurement proceedings made within each financial year and the procurement records shall be maintained for a period of ten years from the date of the award.

(13) Copies of all procurement records shall be transmitted to the Bureau not later than 3 months after the end of the financial year and shall show:

- (a) information identifying the procuring entity and the contractors;
- (b) the date of the contract award;
- (c) the value of the contract; and
- (d) the detailed records of the procurement proceedings.

(14) All unclassified procurement records shall be open to inspection by the public at the cost of copying and certifying the documents plus an administrative charge as may be prescribed from time to time by the Bureau.

**Comment:** The maintenance of file and electronic copy of records for ten years by procuring entities, transmission to the Bureau within three months of the end of the year is imperative for transparency and accountability. It is a welcome development that the documents which are unclassified shall be open for inspection. But what will be the basis and grounds for classification considering that national security and defence contracts are by section 15 (2) excluded from the application of the provisions of the Act unless the express and prior consent of the President is obtained. No grounds have been stated in the Act thereby leaving the classification to the discretion of MDAs and the Bureau<sup>74</sup>.

Accessing procurement documentation at the cost of copying and certifying makes eminent sense. It appears however that the administrative charge permitted by the Act without guidelines on how the Bureau should arrive at the charge may leave the process open to abuse. Therefore access to these documents may be hampered by excessive administrative charges<sup>75</sup>.

**Action:** This subsection should be used by CSOs during preparation of reports and monitoring activities. In the event access to procurement documentation is denied by the MDAs, the CSO should resort to the Bureau and if the Bureau fails, then consideration should be given to legal action and the use of the media. CSOs should consider legislative advocacy for expunging the requirement of administrative charge in subsection (14) and the removal of the word “unclassified” in the first line of the same subsection.

(15) The criteria stipulated as the basis upon which suppliers or contractors would be evaluated shall not be changed in the course of any procurement proceeding.

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<sup>74</sup> See Edetaen Ojo in *Non State Actors and Procurement Watch in Nigeria*, pages 24 and 25.

<sup>75</sup> Supra

**Comment:** This is to ensure certainty in procurement proceedings and that the goal posts of a football field are not adjusted in the middle of a game after a goal has been scored. But for CSOs to get information relating to the above, they must create the opportunity to interact with contractors and service providers.

**Action:** If the stipulated criteria for evaluation changed midstream in the course of procurement proceedings, CSOs should raise the red flag to the Bureau and the public through the media.

(16) The burden of proving fulfillment of the requirements for participation in any procurement proceeding shall lie on the supplier or contractor.

**Comment:** This is in accordance with the normal evidential burden of proof that he who alleges proves. However, the opportunity to prove fulfillment of requirements is provided by the dispute resolution provisions of the Act.

(17) A contract shall be awarded to the lowest evaluated responsive bid from the bidders substantially responsive to the bid solicitation.

**Comment:** “Lowest evaluated responsive bid” is defined in the interpretative section of the Act as the lowest price bid amongst the bids that meets all the technical requirements and standards as contained in the tender document.

**Action:** If the lowest evaluated responsive bid is not awarded the contract, then seek clarification from the procuring entity and if dissatisfied with the explanation, approach the Bureau with a complaint.

(18) Notwithstanding subsection (16) of this section, the Bureau may refuse to issue a “Certificate of ‘No Objection’ to Contract Award” on the grounds that the price is excessive.

**Comment:** “Excessive price” has been defined by the Act to mean a monetary value proposed by a bidder for any procurement which is in the estimation of the Bureau unreasonable and injudicious after consideration of the actual value of the item in question plus all reasonable imputations of cost and profit. The maintenance of pricing standards and benchmarks through a price intelligence unit will facilitate the determination of whether a price is excessive or not. The reference in subsection (18) to subsection (16) appears misleading. The proper reference should be subsection (17) because it is the subsection that addresses prices while subsection (16) is on burden of proof.

**Action:** Using the Bureau’s published average prices as a basis for determination, confirm if approved contracts are not excessively priced. Draw the attention of the procuring entity and the Bureau to any anomalies. If the procured items are standard goods, enquiries can be made from manufacturers, distributors and bulk suppliers on the price of the goods; then add reasonable and foreseeable expenses and a reasonable margin of profit and the new price will reveal whether the price was excessive or not.

(19) Pursuant to subsection (17) of this section, the Bureau may direct either that the procurement proceedings be entirely cancelled or that the procuring entity conduct a re-tender.

(20) Pursuant to subsection (18) of this section, the Bureau may either direct that the procurement proceedings be entirely cancelled or that the procuring entity conduct a re-tender

(21) The accounting officer of a procuring entity and any officer to whom responsibility is delegated are responsible and accountable for any actions taken or omitted to be taken either in compliance with or in contravention of this Act.

**Comment:** “Accounting officer” means the person charged with line supervision of the conduct of all procurement processes. See the comment on section 20 of the Act. The responsibility here appears to be joint and several.

(22) The accounting officer of a procuring entity has the responsibility to ensure that the provisions of this Act and the regulations laid down by the Bureau are complied with, and concurrent approval by any Tenders Board shall not absolve the accounting officer from accountability for anything done in contravention of this Act or the regulations laid down hereunder.

(23) Procurement and disposal decisions of a procuring entity shall be taken in strict adherence to the provisions of this Act and any regulations as may from time to time be laid down by the Bureau.

(24) Persons who have been engaged in preparing for a procurement or part of the proceedings thereof may neither bid for the procurement in question or any part thereof either as main contractor or sub-contractor nor may they cooperate in any manner with bidders in the course of preparing their tenders.

**Comment:** The accounting officer is placed at the centre stage of public procurements of his MDA. Subsection 24 will help to prevent collusion and bid rigging because such a bidder will be operating with insider knowledge and information. Therefore, he will be advantaged from the beginning to the detriment of other bidders.

(25) A procuring entity shall not request or stipulate that a bidder should engage a particular subcontractor as a requirement for participating in any procurement proceedings.

**Comment:** This provision makes eminent sense considering that the contractor or service provider should be at liberty to select his men and materials and as such, takes full credit and blame for the success or failure of the works, goods and services supplied. Imposing a subcontractor may provide a perfect excuse for failure and avoidable disputations about who to blame for the said failure.

(26) All procurement contracts shall contain provisions for arbitral proceedings as the primary form of dispute resolution.

**Comment:** Arbitral proceeding is faster and cheaper than litigation and therefore is the preferred option in the event of a procurement dispute. Arbitration is governed by the Arbitration and Conciliation Act<sup>76</sup>. Litigation should be resorted to as a last option after all

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<sup>76</sup> Cap. A18, Laws of the Federation, 2004.

other methods of dispute resolution have failed. It is imperative to review the position of the courts on arbitration clauses in a contract.

In *United World Ltd Inc. v M.T.S Ltd*<sup>77</sup>, the Court stated:

*When an arbitration clause in a contract provides that, any dispute or difference in respect of or in regard to or under the contract shall be referred to arbitration and the parties are at one asserting that they entered into a binding contract, the clause will apply; a stay will therefore be granted even if the dispute involves an assertion by one party that circumstances have arisen, whether before or after the contract has been performed, which have the effect of discharging one or both of the parties from all subsequent liability under the contract.*

In *Kurubo v Zach-Motison (Nig) Ltd*<sup>78</sup>, the Court stated:

*However, before a Court of law can refuse jurisdiction, the arbitration clause must be mandatory, precise and unequivocal. And in this respect, the arbitration clause should contain the mandatory “shall” and not the permissive or discretionary “may”.*

(27) The values in procurement documents shall be stated in Nigerian currency and where stated in a foreign currency shall be converted to Nigerian currency using the exchange rate of the Central Bank of Nigeria valid on the day of opening a tender or bid.

**Comment:** The Nigerian legal tender is the naira. Thus, this provision is accordance with that dictates of the law.

(28) All procurement contracts shall contain warranties for durability of goods, exercise of requisite skills in service provision and use of genuine materials and inputs in execution.

**Comment:** A warranty is defined as an assurance by one party to the agreement (in this context, the contractor or service provider) of the existence of facts upon which the other party may rely. It is intended precisely to relieve the promisee (procuring entity) of any duty to ascertain facts for itself and amounts to a promise by the contractor to indemnify the promisee (procuring entity) for any loss if the fact warranted proves untrue<sup>79</sup>. Warranties can be express or implied and takes care of the challenge of the fitness of the procured goods and services for the purpose it was meant. It can also be full or limited. In a full warranty, the warrantor must remedy the defect within a reasonable time and without charge to the procuring entity after a notice of defect or malfunction<sup>80</sup>.

## PART V – ORGANISATION OF PROCUREMENTS

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;

Approving  
Authority.

<sup>77</sup> (1989) 10 N.W.L.R. (Pt.586) 106 at 115 per Pats Acholonu J.C.A.

<sup>78</sup> (1992) 5 N.W.L.R. (Pt.239) 102 at 117 per Tobi J.C.A., as he then was.

<sup>79</sup> Taken and adapted from Blacks Law Dictionary Centennial Edition, at pages 1586-1587; *Vasco Trucking Inc. v Parkhill Truck Co*, 6 Ill. App. 3d, 572, 268 N.E. 2d 383, 386.

<sup>80</sup> Blacks Law Dictionary, supra.

(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 Tenders Board.

**Comment:** According to the Procurement Procedures Manual for Public Procurement in Nigeria published by the Bureau<sup>81</sup> (“Bureau Manual”):

*12.1.1: The Accounting Officer, that is, the Permanent Secretary in the case of Ministries and the Director General in the case of Extra-Ministerial Departments and Corporations shall appoint the Ministerial Tenders’ Board (for Ministries) or the Parastatal Tenders’ Board (Extra-Ministerial Departments and Corporations) to handle procurement actions.*

*12.1.2: The Ministerial Tenders’ Board (for individual Ministry) and the Parastatal Tenders’ Board (for each Extra-Ministerial Departments or Agency) shall be the approving authority for the conduct of public procurement for their respective entities.*

*12.1.3: Subject to the approval of the National Council on Public Procurement, the Bureau of Public Procurement shall, from time to time, prescribe guidelines for the membership of the Tenders’ Board. However, best practice principle is to have the membership limited to five as follows:*

*(i) The Permanent Secretary or the Director General shall be the Chairperson*

*(ii) Other Heads of Department within the Ministry or the Parastatal*

*(iii) The Procurement Officer of the procuring entity shall be the non member secretary of the Tenders’ Board. If a procurement officer is unavailable, a senior officer from the Ministry or Parsatatal not below the rank of an Assistant Director (or equivalent) may serve as the non member secretary.*

*(iv) The chairperson of the Tenders’ Board shall be from amongst the members of the Tenders’ Board and shall participate as a non member at all meetings of the Procurement Tenders’ Board.*

*12.2: The Tenders’ Board shall be responsible for the award of procurement of goods, works and services within the stipulated thresholds as contained in the procurement regulations from time to time.*

“Approving authority” is defined by the interpretative section of the Act to mean the person charged with overall responsibility for the functioning of a ministry, extra-ministerial department or corporation. However, this definition of approving authority is close to the definition of Accounting Officer. The Act clearly defines approving authorities and this is

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<sup>81</sup> At pages 13 to 14.

based on the understanding of modern procurement reforms. The proposed amendments to the Act, stripping the Council of the power to determine the monetary and prior review thresholds and conferring it on the President smacks of a determination to turn what should be a purely administrative and economic decision guided by empirical indices into a political one which may be determined more by political than by other considerations. By proposing to amend section 17 without touching the powers of the Council in section 2, section 17 specifically contradicts section 2 (a) of the Act.

Also the proposal to make the Federal Executive Council an approving authority runs counter to best practices. Nigeria's Country Procurement Assessment Report June 2000 had warned against this. The Report had recommended inter alia 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 current practice of contract approval by the Federal Executive Council after a certain threshold runs contrary to extant law and the provisions of the Bureau Manual.

**Action:** CSOs should intensify advocacy for the Federal Executive Council to stop the perpetuation of the illegality by constituting themselves into an approving authority in defiance of the unambiguous provisions of the Act. CSOs should also mobilise through legislative advocacy against this proposed amendment to the Act. The media should be part of this advocacy; letters should be written to the Attorney General as the chief law officer of the country and the legislative committee exercising oversight over procurements and due process. Litigation against the President and the Federal Executive Council should be considered as a last resort.

- 18.** Subject to regulations as may from time to time be made by the Bureau under the direction of the Council, a procuring entity shall plan its procurement by: Procurement Planning.
- (a) preparing the needs assessment and evaluation;
  - (b) identifying the goods, works or services required;
  - (c) carrying out appropriate market and statistical surveys and on that basis prepare an analysis of the cost implications of the proposed procurement;
  - (d) aggregating its requirements whenever possible, both within the procuring entity and between procuring entities, to obtain economy of scale and reduce procurement cost;

- (e) integrating its procurement expenditure into its yearly budget;
- (f) prescribing any method for effecting the procurement subject to the necessary approval under this Act; and
- (g) ensuring that the procurement entity functions stipulated in this section shall be carried out by the Procurement Planning Committee.

**Comment:** Section 21 of the Act defines the membership of the Procurement Planning Committee with the Permanent Secretary or his representative as the chairperson. From the membership of the Procurement Planning Committee including planning, research and statistics, financial, technical and legal officers, it is expected that a detailed work plan that takes cognisance of all the practical challenges of meeting the procuring entity's objectives would be developed.

Since procurement planning includes integrating the procurement expenditure into the yearly budget, it appears the task may have to be undertaken before the passage of the budget and during the preparation of the Medium Term Sector Strategies of the procuring entity. The Procurement Planning Committee will identify and draw up a list of goods, works, services that will facilitate the achievement of the entity's goals and objectives. It will also draw up the schedule of implementation, time lines, etc. If the procuring entity has drawn up an Annual Cash Plan or has a copy of the Accountant General's Annual Cash Plan<sup>82</sup> and the Disbursement Schedule prepared by the Finance Minister<sup>83</sup>, then it becomes easier to determine financial releases to the entity and the scheduling of events and activities.

The price intelligence publications of the Bureau would help the procuring entity in its determination of cost implications. The duty to prescribe the appropriate method for effecting the procurement will involve an in-depth knowledge of the provisions of the Act and the practical application of theoretical perspectives. The Procurement Planning Committee will develop the tender, advertise and solicit for bids, receive and prepare any received bids for evaluation.

**Action:** CSOs should confirm that the Procurement Planning Committee is constituted as stipulated in section 21. CSOs should also confirm that the Committee is assigned the task stated above. Engage the accounting officer of the procuring entity if the above provision is not being respected. If the engagement produces no positive result, engage the Bureau. Budget reviews, immediately after the passage of the budget, to identify procurements of various MDAs that can be aggregated to obtain economy of scale and reduce costs should be undertaken. Engage the MDAs and the BPP with the results of such study.

- 19.** Subject to regulations as may from time to time be made by the Bureau under direction of Council, a procuring entity shall, in implementing its procurement plans:

Procurement  
Implementation

<sup>82</sup> Section 25 of the Fiscal Responsibility Act 2007; the Annual Cash Plan is drawn up before the beginning of the year but continually reviewed as circumstances change.

<sup>83</sup> Section 26 of the Fiscal Responsibility Act 2007; the Disbursement Schedule is prepared by the Finance Minister within 30 days of the coming into force of the Appropriation Act.

(a) advertise and solicit for bids in adherence to this Act and guidelines as may be issued by the Bureau from time to time;

**Comment:** The method and length of time of advertisement is stated in section 25 (2) of the Act. It is important to reproduce the Bureau's Manual position on Notice Board and website through which advertisement can be made<sup>84</sup>:

*7.1: A Notice Board located in a public area must be maintained for the public posting of procurement notices and solicitations. The following actions are posted on the Notice Board:*

- *Requests for proposals (RFPs) - RFPs must also be advertised in two national newspapers of general circulation - and the Federal Tenders' Journal.*
- *Invitation for Bids (IFB)*
- *Single source determinations and,*
- *Emergency determinations.*

*7.2: If the procuring entity maintains an internet website, that website should contain a page on which the above information is pasted.*

The Bureau Manual also indicated two kinds of procurement notices vis, the General Procurement Notice (GPN) and the Specific Procurement Notice (SPN).

*The GPN contains advance information on the major procurement packages being considered or approved for funding by the procuring entity. The information is intended to alert suppliers and contractors of International Competitive Procurement and consultants of upcoming opportunities. The information to be included in the GPN includes:*

- *the name of the procuring entity*
- *description of the entity's programme of activity*
- *the scope of procurement under International Competitive Bidding (ICB) and consulting assignments (i.e. technical services) estimated to cost US\$.....equivalent or more;*
- *if known, the schedule dates for availability of the tendering documents or, as appropriate, the prequalification documents<sup>85</sup>.*

SPN will then be issued for each of the major packages in the procurement plan either as prequalification invitation or as invitation for tenders<sup>86</sup>.

(b) to invite two credible persons as observers in every procurement process, one person each representing a recognised;

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<sup>84</sup> Procurement Procedures Manual for Public Procurement at page 9.

<sup>85</sup> Bureau Manual at page 30.

<sup>86</sup> Bureau Manual, supra.

(i) private sector professional organisation whose expertise is relevant to the particular goods or service being procured, and

(ii) non-governmental organisation working in transparency, accountability and anti-corruption areas, and the observers shall not intervene in the procurement process but shall have right to submit their observation report to any relevant agency or body including their own organisations or associations;

**Comment:** According to the regulations of the Bureau, invitations come to non-governmental organisations when bids are being opened and beyond that, NGOs are not allowed to observe any other part of the process. The poser is; what is the interpretation being given to the words “procurement process” (used in this paragraph) by the Bureau? The Act did not define “procurement process” but it defined the word “procurement” and “procurement proceeding”. By the provisions of the interpretative section 60 of the Act, procurement means acquisition. Thus, this would contextually mean the acquisition of goods, works and services as stipulated in the annual budget by procuring entities. Procurement proceedings have been defined in the Act to mean the initiation of the process of effecting a procurement up to award of a procurement contract. The Blacks Law Dictionary defines “process” as a mode, method or operation whereby a result is produced; a series of actions, motions or occurrences; progressive act or transactions<sup>87</sup>, etc. In view of these definitions, the Act has permitted CSOs to observe the procurement process which means the entire proceedings plus execution, indeed everything about public procurement. The current restriction by the BPP is not even to the entire procurement proceedings but a tiny portion of the procurement proceedings.

Despite the fact that CSOs have prepared a monitoring checklist and submitting same to the Bureau, the Bureau still insists in the limited and restrictive construction of a section of the law which is very clear and devoid of any controversy. CSOs are merely demanding to observe the process from conception to the award of contract in accordance with the letter and spirit of the law. Pray, do MDAs and the Bureau have something to hide? Why are they afraid of allowing proper observation of the procurement process?

Experience garnered in observing bid openings indicates that MDAs simply invite CSOs and professional groups as an afterthought or at the last minute. Averagely, invitations get to CSOs with less than five days to the bid opening. Sometimes, a day to the bid opening session and in other times, ridiculously a text message is sent some hours to the bid opening session for a CSO to attend and observe.

**Action:** CSOs should insist that the Bureau in accordance with the provisions of the Act open up the procurement process to the observation of civil society organisations as against the current practice of merely inviting civil society to watch the bid opening process. Letters should be written to the Bureau and when the Council is eventually set up, the matter should be taken up with the Council.

Even with the limited space, CSOs should demand and vet post mortem, the solicitation documents that have been used up to the time of opening of bids including procurement plans, call for tender, advertisements, report of pre-qualification proceedings, etc. CSOs

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<sup>87</sup> Blacks Law Dictionary, Centennial Edition at page, 1205.

are normally invited by letter to the bid opening sessions. Upon receipt of the invitation, they should follow up with a letter demanding the above information from the procuring entity before attending the bid opening ceremony. An analysis of the aforesaid documents will facilitate an understanding of the proceedings so far. Also, CSOs should prevail on the BPP to issue a standing instruction to MDAs to make these documents available to CSOs when they are sending out invitations for bid opening sessions.

It would facilitate the observation process if at least two weeks notice is extended to CSOs and professional groups to enable adequate preparation and follow up on the bid opening session. If CSOs get access to the documents listed above before the bid opening, then time is needed to study them to be able to reach conclusions whether due process has been followed. The BPP can facilitate this through instructions to MDAs.

- (c) receive, evaluate and make a selection of the bids received in adherence to this Act and guidelines as may be issued by the Bureau from time to time;
- (d) obtain approval of the approving authority before making an award;
- (e) debrief the bid losers on request;
- (f) resolve complaints and disputes if any;
- (g) obtain and confirm the validity of any performance guarantee;
- (h) obtain a "Certificate of 'No Objection' to Contract Award" from the Bureau within the prior review threshold as stipulated in section 3(a) of this Act;
- (i) execute all Contract Agreements; and
- (j) announce and publicize the award in the format stipulated by this Act and guidelines as may be issued by the Bureau from time to time.

**Comment:** It appears the reference in paragraph "h" above to section 3 (a) is mistaken. Section 3 is about the establishment of the Bureau. It should have been a reference to section 6 (1) or section 5 (c) of the Act. All the foregoing duties listed in section 19 are for the procuring entity under the guidance of the accounting officer.

- 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 cases of extra-ministerial departments and corporations, the Director-General or officer of coordinate responsibility;
- Accounting  
Officer.
- (2) The accounting officer of every procuring entity shall have overall responsibility for the planning of, organisation 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) constituting the Evaluation Committee;
- (g) liaising with the Bureau to ensure the implementation of its regulations.

**Comment:** Essentially, the accounting officer has the responsibility to ensure budget implementation which is the process of procuring works, goods and services that the government requires for actualising its development agenda. The accounting officer is also under obligation to ensure that officers involved in the procurement process are regularly trained to understand what they are doing and to treat all matters relating to procurement expeditiously<sup>88</sup>.

The foregoing provisions are in tandem with the conception of the accounting officer as the chief executive of his Ministry or Extra-Ministerial Department. According to the relevant portions of Regulation 106 and 107 of the Federal Government Financial Regulations, 2006:

106. (i) *The Term "Accounting Officer" means the Permanent Secretary of a Ministry or the Head of Extra-Ministerial Office and other Arms of Government who is in full control of, and is responsible for human, material and financial resources which are critical inputs in the management of the organization.*

(ii) *The Accounting Officer shall:*

*a) be responsible for safeguarding of public funds and the regularity and propriety of expenditure under his control;*

*b) observe and comply fully with the checks and balances spelt out in the existing Financial Regulations which govern receipts and disbursement of public funds and other assets entrusted to his care and shall be liable to any breach thereof;*

*c) note that his accountability does not cease by virtue of his leaving office and may be called upon at any time to account for his tenure as Accounting Officer.*

107. (i) *The functions of the Accounting Officer shall include:*

*a) ensuring that proper budgetary and accounting systems are established and maintained to enhance internal control, accountability and transparency.*

*b) ensuring that the essential management control tools are put in place to minimize waste and fraud.*

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<sup>88</sup> See BPP's Budget Implementation Handbook.

c) rendering monthly and other financial accounting returns and transcripts to the Accountant General of the Federation as required by the Financial Regulations.

d) ensuring the safety and proper maintenance of all government assets under his care.

.....

f) ensuring accurate collection and accounting for all public moneys received and expended.

g) ensuring prudence in the expenditure of public funds.

Procurement splitting is neither defined in the Act nor in the interpretative section. The following could provide a guide in avoiding reduction of values or splitting of procurements. Where procurement is split into lots, the value of such lots should be aggregated to calculate the total value of the transaction in order to determine the applicable procurement method. The threshold amount for goods should be calculated not as an amount per contract, but as the amount of the expenditure on goods of the same nature to be procured by the entity within the financial year. Where a procuring entity envisages supplementary procurements, such supplement shall be taken into consideration in calculating the value of the procurement<sup>89</sup>.

**Action:** The accounting officer should be the first port of call by CSOs in terms of clarifications, requests for the use of proper procurement procedures and the religious application of the Act.

**21.** (1) For each financial year, each procuring entity shall establish a Procurement Planning Committee.

Procurement  
Planning  
Committee.

(2) The Procurement Planning Committee shall consist of:

(a) the accounting officer of the procuring entity or his representative who shall chair the Committee;

(b) a representative of:

(i) the procurement unit of the procuring entity who shall be the Secretary,

(ii) the unit directly in requirement of the procurement,

(iii) the financial unit of the procuring entity,

(iv) the planning, research and statistics units of the procuring entity,

(v) technical personnel of the procuring entity with expertise in the subject matter for each particular procurement, and

(vi) the legal unit of the procuring entity.

**Comment:** The Budget Implementation Handbook states that all planning processes should be finalised within two months after the release of the budget, and the actual

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<sup>89</sup> See section 13 of the Government Procurement Reform Act 9184 of the Philippines.

award of contracts should be made not later than three months thereafter, i.e. not later than five months from the date of the release of budget. All requests for clarifications to MDAs by the BPP are expected to be responded to within two weeks<sup>90</sup>. The current practice whereby advertisements for bids are published in October and November runs contrary to the Handbook's stipulations. See further the comments on section 18 of the Act.

**Action:** Confirm the membership of the Procurement Planning Committee and compliance with the timeline provided in the Budget Implementation Handbook.

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")
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- (2) Subject to the approval of the Council, the Bureau shall, from time to time, prescribe guidelines for the membership of the Tenders Board.
- (3) The Tenders Board shall be responsible for the award of procurements of goods, works and services within the threshold set in the regulations.
- (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.
- (5) The decision of the Tenders Board shall be communicated to the Minister for implementation.

Tenders Board.

**Comment:** In accordance with section 17 of the Act, the Tenders Board is the approving authority for procurements and under subsection (5) of this section, its decisions are to be communicated to the Minister for implementation. It should be noted that in accordance with best practices, the Act did not give any role in the day to day procurement administration to political office holders and this is to enhance division of labour, avoid unnecessary corruption and speed up the procurement process. While elected public officers are to enact policy, its implementation is left to career civil servants although retaining overall supervisory powers to elected officers.

**Action:** CSOs should continue advocacy for the return of the functions of the Tenders Board to the Boards instead of the current usurpation by political authorities.

23. (1) Where a procuring entity has made a decision with respect to the minimum qualifications of suppliers, contractors or service providers by requesting interested persons to submit applications, to pre-qualify, it shall set out precise criteria upon which it seeks to give consideration to the applications and in reaching a decision as to which supplier, contractor or service provider qualifies, shall apply only the criteria set out in the prequalification documents and no more.
- (2) Procuring entities shall supply a set of prequalification documents to each supplier, contractor or consultant that request them, and the price that a procuring

Prequalification of Bidders.

<sup>90</sup> Page 8 of the Handbook.

entity may charge for the prequalification documents shall reflect only the cost of printing and provision to suppliers or contractors and consultants.

**Comment:** The requirement to apply only the criteria set out in pre-qualification documents is to ensure certainty of the terms of the prequalification. Pre-qualification proceedings are usually undertaken with a view to identifying qualified contractors and service providers prior to the submission of tenders<sup>91</sup>. These subsections also require the provision of uniform prequalification documentation to all bidders. The regulation of the price chargeable by procuring entities to the cost of printing and provision is to emphasize the pre-qualification proceedings is not revenue generating exercise.

It is imperative to point out that only projects in excess of N300 million for works and N100 million for goods qualify for prequalification. Essentially, MDAs should go straight to invite bids for tenders for projects costing less than N300 million for works and N100 million for goods<sup>92</sup>. Pre-qualification is generally not for basic common goods, it is a procedure adopted when procuring complex civil works and turnkey projects. The provisions of the Budget Implementation Handbook on pre-qualification needs to be emphasised<sup>93</sup>:

*Pre-qualification of contractors and tendering can be done at the same time so as to shorten the process, i.e. both technical and financial bids can be received together, after advertising the contract in both the Federal Tender Journal and at least 2 national dailies, as provided by extant laws. However, only the financial bids of pre-qualified contractors will be opened.*

Pre-qualification is project specific and should not be done to qualify contractors and vendors for procurement to be done over a period of time. Pre-qualification over a period of time has been stated to be unfair and negating the basic principles of competition since the moment a list is drawn up and approved by the procuring entity, it effectively excludes other members of the public from bidding for such jobs<sup>94</sup>.

**Action:** CSOs should monitor to confirm that the terms are not changed during the pre-qualification proceedings and that the cost of pre-qualification documents is not beyond the cost of printing and provision to contractors. The criteria for pre-qualification should also be evaluated for clarity and precision. CSOs should also ensure that the thresholds for pre-qualification are respected.

- (3) The prequalification document shall include;
- (a) instructions to prepare and submit prequalification application;
  - (b) a summary of the main terms and conditions required for the procurement contract to be entered into as a result of the procurement proceedings;
  - (c) any documentary evidence or other information that must be submitted by suppliers, contractors or consultants to demonstrate their qualifications;

<sup>91</sup> See article 7 of the United National Commission on International Trade Law Model Law on Procurement of Goods and Construction, 1993.

<sup>92</sup> Approved Revised Thresholds for Service Wide Application, supra.

<sup>93</sup> Page 8 of the Budget Implementation Handbook.

<sup>94</sup> Frank Ojadi in *Procurement Management in the Private Sector* in BPP's Public Procurement Journal, February- March 2009.

(d) the manner and place for the submission of applications to pre-qualify and the deadline for the submission, expressed as a specific date and time which allows sufficient time for suppliers, contractors or consultants to prepare and submit their applications, taking into account the reasonable need of the procuring entity; and

(e) any other requirement that may be established by the procuring entity in conformity with this Act and procurement regulations, relating to the preparation and submission of applications to pre-qualify and to the prequalification proceedings.

**Action:** Cross check the contents of the pre-qualification documents to determine if they conform to the above provisions.

(4) The procurement entity shall respond to any request by a supplier, contractor or consultant for clarification of the prequalification documents if the request is made at least ten days before the deadline for the submission of applications to pre-qualify.

(5) The response by the procuring entity shall be given within a reasonable time and in any event within a period of at most seven working days so as to enable the supplier, contractor or consultant to make a timely submission of its application to pre-qualify.

(6) The response to any request that might reasonably be expected to be of interest to other suppliers, contractors or consultants shall, without identifying the source of the request, be communicated to other suppliers or contractors or consultants provided with the prequalification documents by the procuring entity.

**Comment:** Clarifications may be necessary to explain unclear provisions in pre-qualification documents. Communicating the response to the clarification to every other bidder is for the purpose of equality of opportunity so that no one may be favoured or given information that will give him a head-start above other competitors.

**Action:** If there is any evidence that some contractors have been given relevant and material information and this information is not made available to others, this should be a good ground for demanding that the accounting officer or Bureau cancel the pre-qualification proceedings and conduct another one and possibly take administrative action against those responsible for the malfeasance.

(7) A procuring entity shall promptly notify each supplier, contractor or consultant which submitted an application to pre-qualify of whether or not it has been pre-qualified and shall make available to any member of the general public upon request, the names of the suppliers, contractors or consultants who have been pre-qualified.

(8) Suppliers, contractors or consultants who have been pre-qualified may participate further in the procurement proceedings.

(9) The procuring entity shall upon request communicate to suppliers, contractors or consultants who have not been pre-qualified, the grounds for disqualification.

**Comment:** This process in subsections (7) and (9) promotes transparency, openness and faith in the procurement system by providing information to those who failed in the pre-qualification proceedings of the reasons informing their failure. Making available to the public on demand, the names of contractors who have been pre-qualified also promotes transparency.

**Action:** The information available to contractors who have not been pre-qualified on the reasons for their disqualification should be reviewed on the basis of the criteria earlier set out by the procuring entity for objectivity and compliance with the spirit and letter of the Act.

(10) The procuring entity may require a supplier, contractor or service provider who has been pre-qualified to demonstrate its qualifications again in accordance with the same criteria used to pre-qualify the supplier, contractor or consultant.

(11) The procuring entity shall promptly notify each supplier, contractor or service provider requested to demonstrate its qualifications again whether or not the supplier, contractor or consultant has done so to the satisfaction of the procuring entity.

(12) The procuring entity shall disqualify any supplier, contractor or service provider who fails to demonstrate its qualification again if requested to do so.

**Comment:** Requesting pre-qualified contractors and service providers to demonstrate their qualifications again may be due to the time lag between the pre-qualification proceeding and the actual tender. This is particularly so if it is felt that the qualifications may be affected over a period of time or if there are un-cleared doubts about claims made by contractors.

# Chapter Four

## PART VI

### PART VI – PROCUREMENT METHODS (GOODS AND SERVICES)

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. Open  
Competitive  
Bidding.

(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.

**Comment:** The concept of open competitive bidding is based on the peremptory norm of non discrimination<sup>95</sup> and the principle of equality before the law, equal protection of the law and equality of opportunities, rights and obligations of natural and artificial persons<sup>96</sup>. Essentially, open competitive bidding is the procurement method preferred by the Act. Other methods are to be employed as an exception to the general rule, in which case, there must be adequate reasons and grounds for deviating from the general rule of open competitive bidding.

Goods as defined in the interpretative section means:

*objects of every kind and description including raw materials, products and equipment and objects in solid, liquid or gaseous form and electricity as well as services incidental to the supply of the goods.*

Works as defined in the interpretative section means:

*all works associated with the construction, reconstruction, demolition, repair or renovation of a building, structure or works such as site preparation, excavation, erection, building, installation of equipment or materials, decoration and finishing, as well as services incidental to construction such as drilling, mapping, satellite photography, seismic investigation and similar services provided pursuant to the procurement of contract, where the value of those services does not exceed that of the construction itself.*

**Action:** Scrutinise the reasons for deviation from open competitive bidding to determine if they are in agreement with the spirit and letter of the Act.

(3) The winning bid shall be that which is the lowest evaluated responsive bid which has been responsive to the bid with regards to work specification and standard.

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<sup>95</sup> See section 42 of the Constitution on the right to freedom from discrimination and article 2 of the African Charter on Human and Peoples' Rights, Cap A9, Laws of the Federation, 2004, etc.

<sup>96</sup> Article 3 of the African Charter on Human and Peoples' Rights, supra.

**Comment:** The “lowest evaluated responsive bid” is the lowest price bid amongst the bids that meets all the technical requirements and standards as contained in the tender document<sup>97</sup>.

25. (1) Invitation to bids may be either by way of National Competitive Bidding or International Competitive Bidding and the Bureau shall from time to time set the monetary thresholds for which procurements shall fall under either system. Invitations to Bid.

**Comment:** National Competitive Bidding (NCB) is defined in the Act as the solicitation of bids from domestic contractors and suppliers registered or incorporated to carry on business under Nigerian law. International Competitive Bidding (ICB) is defined to mean the solicitation of bids from both domestic and foreign contractors and suppliers. Resort to ICB may be imperative when the capacity of local contractors is limited or when donor funded projects demand ICB as the preferred procurement method. The need to build the capacity of local contractors and suppliers informs National Competitive Bidding. The current *Procurement Methods and Thresholds of Application* drawn up by the Bureau are as shown in Table 2<sup>98</sup>:

Procurement/ Selection Method and Pre- qualification	Goods	Works (N)	Non- Consultant Services (N)	Consultant Services (N)
International/ National Competitive Bidding	N100 million and above	N1 billion and above	N100 million and above	Not Applicable
National Competitive Bidding	N2.5 million and above but less than N100 million	N2.5 million and above but less than N1 billion	N2.5 million and above but less than N100 million	Not Applicable

**Action:** Confirm that the selected method is in accordance with the thresholds set by the Bureau

(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

<sup>97</sup> See the interpretation section of the Act.

<sup>98</sup> See Approved Revised Thresholds for Service Wide Application and Special Thresholds for Procurement in Oil Sector.

entity, any official websites of the procuring entity, at least two national newspapers, and in the procurement journal not less than six weeks before the deadline for submission of the bids for the goods and works.

**Comment:** This provision enables the contractors and suppliers adequate time to prepare their tenders and to respond adequately to the bid solicitation. One of the major areas of non compliance from observations of bid opening is the six weeks time required after advertisement in open competitive bidding before submission of bids. Some agencies claimed that the Bureau had by a circular shortened the advertisement time to facilitate capital budget implementation. If that is the true position, it is still a violation of the Act as the Bureau lacks the power to amend the Act without resort to the legislature. The word used in section 25 (2) that provides for the six weeks timeline is the mandatory “shall” and not the discretionary “may”.

**Action:** CSOs should confirm if there were advertisements and that the advertisements gave bidders the requisite length of time stated above.

26. (1) Subject to the monetary and prior review thresholds as may from time to time be set by the Bureau, all procurements valued in excess of the sums prescribed by the Bureau shall require a bid security in an amount not more than 2% of the bid price by way of a bank guarantee issued by a reputable bank acceptable to the procuring entity. Bid Security
- (2) The Bureau shall from time to time specify the principal terms and conditions of the required bid security in the tender documents.
- (3) When the procuring entity requires supplies or contractors submitting tenders to provide a bid security, the requirement shall apply to each supplier or contractor.

**Comment:** Bid security is defined in the interpretative section to mean a form of security assuring that the bidder shall not withdraw a bid within the period specified for acceptance and shall execute a written contract within the period specified in the bid. It is required to demonstrate the seriousness of a bidder and to guarantee that the bidder shall not withdraw from the tender after the deadline for submission of bids. By the Bureau’s regulations, all procurements valued at N50million and above must be accompanied by bid security.

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 authorised to bind the bidder to a contract and placed in a sealed envelope<sup>99</sup>. Submission of Bids.
- (2) All submitted bids shall be deposited in a secured tamper-proof box.
- (3) All bids submitted shall be in English language.
- (4) The procuring entity shall issue a receipt showing the date and time the bid was delivered.

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<sup>99</sup> A sealed bid is one submitted under seal and which is not to be opened until a specified time at which all bids are to be opened and compared. It is required to assure independence of bidding- see Blacks Law Dictionary, Centennial Edition at page 162.

(5) Any bid received after the deadline for the submission of bids shall not be opened and must be returned to the supplier or contractor which submitted it.

(6) No communication shall take place between procuring entities and any supplier or contractor after the publication of a bid solicitation other than as provided in this Act.

**Comment:** These provisions are to ensure fairness and equality of opportunity to every bidder. The Bureau Manual's position on transactions between collection of tender documents and submission of bids is apposite for reproduction hereunder:

*Any person may after collecting the tender documents, request for clarifications of matters contained in the tender documents. All such requests for clarifications shall be in writing addressed to the procuring entity no later than 2 weeks before the deadline for the submission of bids.*

*The response by the procuring entity shall provide a written response within a reasonable time and in any event not later than one week before the deadline for submission of bids so as to enable the supplier or contractor to make a timely submission of its bid.*

*The response to any request for clarification shall, without identifying the source of the request, be copied to all other prospective suppliers and contractors who had paid for and collected the tender documents.*

*At any time before the deadline for submission of bids, the procuring entity may modify the tender documents by issuing an addendum either in response to request for clarification or for any other reason. The addendum shall be sent in writing to all prospective suppliers and contractors who had obtained the tender documents.*

*A procuring entity may if it finds it expedient so to do convene a pre-tender conference for the suppliers and contractors in order to clarify all matters pertaining to the tender documents. All requests for clarifications and the responses provided during the conference shall be recorded in the minutes of the meeting without identifying the source of the request and the minutes shall be distributed to all suppliers and contractors.*

*In all cases where addendums have been issued, the procuring entity shall be obliged to extend the deadline by such length of time as would be reasonable to allow the suppliers and contractors to consider clarifications and, or addendums to the tender documents and make the appropriate inputs to their bids. Notice of extension shall be promptly dispatched to every supplier or contractor who had obtained the bid documents<sup>100</sup>.*

**Action:** Confirm through investigation including interaction with bidders if the section's provisions are not breached.

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<sup>100</sup> Page 34-35 of the Bureau Manual.

28. A procuring entity may:

Rejection of  
Bids.

(a) reject all bids at any time prior to the acceptance of a bid, without incurring thereby any liability to the bidders; and

(b) cancel the procurement proceedings in the public interest, without incurring any liability to the bidders.

**Comment:** The discretion to reject all bids or cancel the procurement proceeding must not be exercised capriciously, whimsically or maliciously. It is a serious decision that calls for the highest level of responsibility in the public interest. According to the Bureau Manual, this discretion can be exercised only in exceptional circumstances where there is lack of effective competition, or no substantially responsive bid is received; inadequate competition; all bids received had unreasonably high prices beyond the budget; bidding documents were found to be defective or the requirements of the procuring entity has changed<sup>101</sup>.

**Action:** When a bid is cancelled, confirm the reasons informing the cancellation - whether they comply with the above stipulations.

29. (1) The period of validity for a bid shall be the period specified in the tender documents.

Validity Period of  
Bids, Modification  
and Withdrawal of  
Tenders.

(2) A procuring entity may request suppliers or contractors to extend the period of validity for an additional specified period of time.

(3) A supplier or contractor may refuse the request for the extension of bid, in which case the effectiveness of its bid will terminate upon the expiration of the un-extended period of effectiveness.

(4) A supplier or contractor may modify or withdraw its bid prior to the deadline for the submission of bids.

(5) The modification or notice of withdrawal is effective if it is received by the procurement entity before the deadline for the submission of tenders.

**Comment:** Modification or withdrawal received after the deadline for the submission of bids is ineffective.

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:

Bid  
Opening.

(a) permit attendees to examine the envelopes in which the bids have been submitted to ascertain that the bids have not been tampered with;

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<sup>101</sup> Bureau Manual at page 36.

- (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 organisations 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.

**Comment:** This is the only stage where CSOs are currently allowed to observe the procurement process.

**Action:** CSOs should meticulously monitor to ensure that these provisions have been duly followed by procuring entities including the facts that bids are brought out from a tamper proof bid box; that they are signed by the appropriate officer, and sealed. CSOs should also determine whether the length of time between the deadline for the submission of tenders and the bid opening is reasonable. They should also observe and document the reaction and response of bidders when the call over of their names, addresses and amount of bid are made.

It is imperative that CSOs and professional groups be given access to the official minutes of the bid opening session containing all the documentation required by section 30 of the PPA. This will facilitate comparison between CSOs records and what was formally recorded by the Secretary of the Tenders Board. CSOs should engage the BPP to facilitate this through instructions to MDAs to make these records available to CSOs and professional groups within two days of the bid opening session.

- 31.** (1) All bids shall be first examined to determine if they: Examination of  
Bids.
- (a) meet the minimum eligibility requirement stipulated in the bidding documents;
  - (b) have been duly signed;
  - (c) are substantially responsive to the bidding documents; and
  - (d) are generally in order.
- (2) A procuring entity may ask a supplier or a contractor for clarification of its bid submission in order to assist in the examination, evaluation and comparison of bids.
- (3) The following shall not be sought, offered or permitted:
- (a) changes in prices;
  - (b) changes of substance in a bid; and

(c) changes to make an unresponsive bid responsive.

(4) Notwithstanding sub-section (3) of this section, the procuring entity may correct purely arithmetical errors that are discovered during the examination of tenders.

**Comment:** According to the Bureau Manual<sup>102</sup>, the correction of arithmetical errors should be done as follows:

*Where there is a discrepancy between the amounts in figures and the amount in words, the amount in words will prevail;*

*Where there is a discrepancy between the unit rate and the line item total resulting from multiplying the unit rate by the quantity, the unit rate as quoted will govern, unless in the opinion of the procuring entity, there is an obviously gross misplacement of the decimal point in the unit rate, in which case the line item total as quoted will govern and the unit rate will be corrected;*

*If the bid price changes by the above procedure, the amount stated in the Form of Bid shall be adjusted with the concurrence of the bidder and shall be considered as binding on the bidder.*

Value Added Tax (VAT), contingencies and provisional sum amounts are usually excluded from the bid price.

(5) The procuring entity shall give prompt notice of the correction to the supplier or contractor that submitted the tender.

(6) A major deviation shall result in a rejection of bid while a minor deviation shall be subject to clarification.

(7) The following shall be considered as major deviations:

(a) with respect to clauses in an offer;

(i) unacceptable sub-contracting.

(ii) unacceptable time schedule if time is of essence,

(ii) unacceptable alternative design, and

(iv) unacceptable price adjustment.

(b) with respect to the status of the bidder:

(i) the fact that he is ineligible or not pre-qualified, and

(ii) the fact that he is uninvited;

(c) with respect to bid documents an unsigned bid:

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<sup>102</sup> Page 50 - a detailed report of the adjustment is required in the Evaluation Report.

(d) with respect to time, date and location for submission:

(i) any bid received after the date and time for submission stipulated in the solicitation document,

(ii) any bid submitted at the wrong location.

(8) In cases of major deviations, bids shall not be considered any further and, where unopened, shall be returned as such to the bidder.

(9) In all cases of rejection, a letter stipulating the reasons for rejection shall be sent, and the bidder shall not be permitted to amend his bid to become compliant.

**Comment:** A major deviation will include one which has effect on the validity of the bid; has been specified in the bidding documents as a ground for the rejection of a bid; has effect in a substantial way on the scope, quality, functionality and performance of the procurement; limits in a substantial way the procuring entity's rights or bidders obligations; is a deviation from the terms or the technical specifications in the bidding documents whose effect on the bid price is substantial but cannot be given a monetary value<sup>103</sup>.

(10) Subject to any provision to the contrary, the following shall be considered as minor deviations:

(a) the use of codes:

(b) the difference in standards:

(c) the difference in materials;

(d) alternative design;

(e) alternative workmanship;

(f) modified liquidated damages;

(g) omission in minor items;

(h) discovery of arithmetical errors;

(i) sub-contracting that is unclear and questionable;

(j) different methods of construction:

(k) difference in final delivery date;

(l) difference in delivery schedule;

(m) completion period where these are not of essence;

(n) non-compliance with some technical local regulation;

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<sup>103</sup> Bureau Manual at page 44.

(o) payment terms; and

(p) any other condition that has little impact on the bid.

**Comment:** A minor deviation is one that has no effect on the validity of the bid; has no effect in a substantial way to the scope, quality, functionality, performance of the procurement; has no effect on the price, quality or delivery of the goods or services offered; will not in any substantial manner affect the procuring entity's rights or bidder's obligations; has such effect that the difference between the commercial terms or technical specifications in the bidding documents is such that it can be given a monetary value; or has not been specified in the bidding documents as a ground for rejection of bids, provided that the total amount of adjustments for such deviations does not exceed a previously determined percentage of the bid price<sup>104</sup>.

(11) In cases not mentioned above and where there exists a doubt as to whether a particular condition in a bid is a major or a minor deviation, the following rules shall apply:

(a) where the impact on the costs is major, it shall be regarded as a major deviation; and

(b) where the impact on the costs is minor, it shall be regarded as a minor deviation.

(12) In cases of minor deviations, written clarification may be obtained from the supplier or contractor and, where applicable, an offer made for the correction of the minor deviation.

(13) Where a supplier or contractor does not accept the correction of a minor deviation, his bid shall be rejected.

(14) At the stage of evaluation and comparison, all minor deviations shall be quantified in monetary terms.

(15) For the rejection of a bid, a written notice shall be given promptly to the supplier.

**Comment:** The following subsections of section 31 are meant to ensure that the proceedings are fair and offer equal opportunities based on predetermined criteria to all bidders. Apparently, it appears that the Act distinguishes between "examination" and "evaluation" of bids. Examination appears to be the preliminary evaluation to ensure that "all things are apparently in order" and the bid meets the general procedural requirements. It is difficult to get bids that are fully responsive to all the stipulations but examination will reveal bids that are substantially responsive that will now be penciled down for deeper evaluation.

**Action:** In the post mortem examination of the procurement proceedings, CSOs should peruse the procurement documentation to ensure that the earlier set criteria and the spirit and letter of the law has been followed.

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<sup>104</sup> Page 44 of the Bureau Manual.

32. (1) For the evaluation and comparison of bids that have been adjudged as valid for the purposes of evaluation, no other method or criteria shall be used except those stipulated in the solicitation documents. Evaluation of Bids.

(2) The objective of bid evaluation shall be to determine and select the lowest evaluated responsive bid from bidders that have responded to the bid solicitation.

(3) In the course of its determination of the lowest evaluated responsive bid from the bidders that have responded to the bid solicitation, the Tenders Board shall, in particular, undertake the following processes as applicable;

- (a) checking of deviations;
- (b) checking of omissions with quantification of same;
- (c) application of discounts, as applicable;
- (d) clarification with bidders of questionable minor deviations;
- (e) quantification in monetary terms of such questionable deviations;
- (f) conversion to common currency;
- (g) calculation and tabulation of bid amount with domestic preference where applicable;
- (h) determination of the lowest calculated prices in order of rank;
- (i) post-qualification of bidders, where applicable;
- (j) listing of rejection of bids, where applicable;
- (k) decision of rejection of all bids where justifiable;
- (l) recommendation for award; and
- (m) writing up of the bid evaluation report.

**Comment:** The Bureau Manual states as follows<sup>105</sup> on conversion to common currency:

*In order to minimize the foreign exchange risk for bidders in certain procurement especially in ICB procedures, the bidders are allowed to bid in foreign currencies. This results in bids being presented in a wide array of currencies which must be converted to a single common currency, generally to Nigerian Naira. These conversions are made using the mean selling rates established for similar transactions by the Central Bank of Nigeria on the specified date. In works contracts, the mostly used method is to specify that bidders should price their bid in Naira and to specify the percentages in different currencies.*

(4) All relevant factors, in addition to price, that will be considered for the purposes of bid evaluation and the manner in which such factors will be applied shall be stipulated in the solicitation documents.

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<sup>105</sup> Page 52.

(5) Such factors shall be calculated in monetary terms as stipulated in the solicitation documents and shall include:

(a) for goods, among others, costs of transportation and insurance, payment schedule, delivery time, operating costs, efficiency, compatibility of the equipment, availability of services and spare parts, related training, safety, environmental benefits or losses by damages;

(b) for works, in addition to factors stipulated in section 34 (1) of this Act, and subject to section 34 (2) of this Act, if time is a critical factor the value of early completion; and

(c) the value of early completion under section 35(2) of this Act shall not be taken into account unless, in conformity with criteria pre-set in the bidding documents, the conditions of contract provide for commensurate penalties in case of late delivery.

(6) When bid prices are expressed in two or more currencies, the prices of all bids shall be converted to Nigerian currency, according to the rate and date of rate specified in the solicitation documents.

(7) If suppliers were pre-qualified, verification of the information provided in the submission for pre-qualification shall be confirmed at the time of award of contract and award may be denied to a bidder who no longer has the capability or resources to successfully perform the contract.

(8) After opening of bids, information relating to the examination, clarification and evaluation of bids and recommendations concerning award shall not be disclosed to bidders or to persons not officially concerned with the evaluation process until the successful bidder is notified of the award.

**Comment:** The Act excludes persons who are not officially concerned with the evaluation process from having information on the examination, clarification and evaluation of bids. Could this be a ground for excluding civil society at this stage of the proceedings? However, both public officials and civil society observers are required to subscribe to an oath at the commencement of procurement proceedings. This oath includes the fact that they would not disclose information to bidders until the successful bidder is notified.

**Action:** Examination and evaluation are the most technical and material aspects of procurement and determines who wins the bid. CSOs should approach it with sound knowledge of procurement principles. The records of proceedings should be carefully studied before arriving at conclusions and recommendations. For now, based on the BPP's rules, CSOs can only intervene at the post mortem stage.

**33.** (1) The successful bid shall be that submitted by the lowest cost bidder from the bidders responsive as to the bid solicitation. Acceptance  
of Bids.

(2) Notwithstanding subsection 1 of this section, the selected bidder needs not be the lowest cost bidder provided the procuring entities can show good grounds derived from the provision of this Act to that effect.

(3) Notice of the acceptance of the bid shall immediately be given to the successful bidder.

**Comment:** The general rule of the lowest cost responsive bidder has been stated and exceptions to the lowest cost responsive bidder must be justified by other grounds derived from the Act. The term “Substantially Responsive” has been defined to mean the response to bid solicitations which virtually answers to all the needs of a procuring entity as stipulated in the bid solicitation documents.

The requirement of immediate notice to the successful bidder after evaluation may not make much meaning considering the current illegal practice of seeking ministerial and Federal Executive Council approval for the award of contract. If the contract is not approved by the minister or FEC, then the notice would have been in vain.

**34.** (1) A procuring entity may grant a margin of preference in the evaluation of tenders, when comparing tenders from domestic bidders with those from foreign bidders or when comparing tenders from domestic suppliers offering goods manufactured locally with those offering goods manufactured abroad. Domestic Preferences.

(2) Where a procuring entity intends to allow domestic preferences, the bidding documents shall clearly indicate any preference to be granted to domestic suppliers and contractors and the information required to establish the eligibility of a bid for such preference.

(3) Margins of preference shall apply only to tenders under international competitive bidding.

(4) The Bureau shall by regulation from time to time set the limits and the formulae for the computation of margins of preference and determine the contents of goods manufactured locally.

**Comment:** Margins of preference are meant to encourage local contractors and Nigeria/local content policy in procurement proceedings. A “Margin Of Preference” is defined to mean the extra mark up on price allowed any domestic contractor or supplier bidding under International Competitive Bidding without being otherwise disadvantageous to the bid in terms of price. The first part of subsection (1) that refers to when “comparing tenders from domestic bidders with those of international bidders” is about encouraging local contractors while the part on “when comparing tenders from domestic suppliers offering goods manufactured locally with those offering goods manufactured abroad” is about promotion of Nigerian content policy. The Act however gave with one hand and withdrew what it gave in another breadth. If margins of preference are applicable only under international competitive bidding, why did subsection (1) mention “when comparing tenders from domestic suppliers offering goods manufactured locally with those offering goods manufactured abroad”. The Nigerian content policy can also be applied under national competitive bidding to promote Nigerian products which have added value to the economy to encourage manufacturing and services industries located in Nigeria.

International competitive bidding may be used when local contractors and suppliers appear to lack the capacity to execute the procurement assignment or when donors or

foreign funders require international competitive bidding under the terms of the financing agreement.

A domestic firm for the purpose of consultancy services has been described as a business or professional organisation incorporated or otherwise organised in Nigeria; having its principal place of business located in Nigeria; having at least 50% of its equity held by Nigerians; not having its assets controlled by foreign nationals and organisations incorporated or organised outside Nigeria; with more than 50% of the persons who will perform the services under the contract, whether employed directly or by a subcontractor, being nationals of Nigeria<sup>106</sup>. Margins of preference are only used when they are explicitly stated in the bidding documents.

The Bureau Manual<sup>107</sup> states as follows on margin of preference for goods:

- *The goods being procured are “manufactured goods” involving assembly, fabrication, processing, etc, where a commercially recognized final product is substantially different from in basic characteristics of its components and raw materials.*
- *The goods qualified for domestic preference are identical or comparable to requirements given in the bidding documents with respect to quality, capacity and performance;*
- *Satisfying the minimum domestic values as specified in the bidding documents;*
- *The margin of price is added to the bid price of foreign products rather than subtracting from the domestic product.*

For works, the Bureau Manual states as follows<sup>108</sup>:

- *Satisfying the minimum domestic values as specified in the bidding documents;*
- *The margin of price is added to the bid price of foreign bidders rather than subtracting from the domestic bids.*

**Action:** Verify that the margins of preference are indicated in the solicitation documents and that the formula stated above has been strictly applied. When ICB is used, verify that conditions precedent to its use has been fulfilled.

- 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:

Mobilisation  
Fees

- (a) in the case of National Competitive Bidding – an unconditional bank guarantee or insurance bond issued by an institution acceptable to the procuring entity; and

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<sup>106</sup> See page B.526, Public Procurement Regulations for Consultancy Services, published by the BPP.

<sup>107</sup> Page 53.

<sup>108</sup> Page 53

(b) in the case of International Competitive Bidding – an unconditional bank guarantee issued by a banking institution acceptable to the procuring entity.

(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.

**Comment:** Nigeria’s procurement history fully justifies this limitation of mobilisation fees to 15% of the contract sum. The proposed amendment to the Act lifts the limitation on mobilisation fees from 15% of total contract sum to an amount prescribed in the bid document which could be higher than 15%. However, the Act in section 16 (6) (a) (ii) on the Fundamental Principles of Procurement states that bidders shall possess the necessary financial capacity. Accompanying the bid in accordance with section 16 (6) (f) is an affidavit that the information presented in the bid are true and correct in all particulars. If a bidder has financial capacity, why should he need more than 15% mobilisation fees? And this amendment is proposed in a country where contractors have been known to collect mobilisation fees and disappear from project sites. Giving procuring entities the discretion to fix mobilisation fees or increasing the quantum will incur more losses to the Treasury and encourage enhanced contract abandonment.

“Interim performance certificate” is defined in the interpretative section to mean evidence that a contractor or supplier has performed his obligations under a procurement contract up to a level stipulated by the contractor but not meaning completion.

**Action:** CSOs should intensify legislative advocacy to ensure that the provision of the Act on mobilisation fees are not amended.

**36.** The provision of a Performance Guarantee shall be a precondition for the award of any procurement contract upon which any mobilisation 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 mobilisation fee requested by the supplier or contractor-whichever is higher. Contract Performance Guarantee.

**Comment:** Performance is the fulfillment or accomplishment of a contract according to its terms thereby relieving the duty holder of all further obligations and liabilities under the contract. A Guarantee on the other hand is an undertaking by a guarantor assuming responsibilities for the performance of a particular contract<sup>109</sup>. It is like a performance bond which guarantees that the contractor will fully perform the contract and guarantees against breach of contract in the sum mobilised. This Performance Guarantee will be forfeited in the event the contractor fails to perform.

**Action:** Verify if a Performance Guarantee has been provided by a contractor who is paid mobilisation fees.

**37.** (1) Payment for the procurement of goods, works, and services shall be settled promptly and diligently. Interest on Delayed Payments.

<sup>109</sup> See Blacks Law Dictionary, Centennial Edition at pages 705, 1137 and 1138.

(2) Any payment due for more than sixty days from the date of the submission of the invoice, valuation certificate or confirmation or authentication by the Ministry, Extra-Ministerial Office, government agency, parastatal or corporation shall be deemed a delayed payment.

(3) All delayed payments shall attract interest at the rate specified in the contract document.

(4) All contracts shall include terms, specifying the interest for late payment of more than sixty days.

**Comment:** This provision enhances and facilitates contract administration considering the fact that payments to contractors have in the past been delayed by procuring entities to secure bribes and inducements from contractors. Contractors have been known to complain that they do not get their due payments until they have parted with bribes to civil servants and contract managers. This provision will therefore incur costs for MDAs who insist on doing things in the old way. If the contract has been cash backed and approvals and certifications have been obtained, then the officers responsible for payment will have to provide explanations to the Bureau and the authorities on the reasons for delaying payment beyond sixty days. The interest rate should have been at the Central Bank of Nigeria rate on the date of the bid opening or any other stipulated date. If it is left as an interest rate as stipulated in the contract document, then delays will attract different rates based on the contract documentation. It is pertinent to note that there is no longer a requirement for the Bureau to certify payments and release of funds by MDAs to contractors.

The Budget Implementation Handbook<sup>110</sup> identified delay in processing payments as a bottleneck in budget implementation. It states that authorisation for payment should be given by the Honourable Minister (for Ministries) or in his or her absence, the accounting officer and by the accounting officer (for Parastatals) once he is satisfied that all requirements for payment including certificate of valuation or job completion, stores receipt voucher, audit clarifications (where necessary), availability of funds have been met. Contractors are to be paid within two weeks from the time approval of payment is granted by the accounting officer and all payments should be by electronic transfer.

**Action:** CSOs should provide opportunities for interaction with contractors and service providers and in the process verify if due payments after the necessary documentation has been delayed for more than sixty days and the reasons informing such a delay. Violations of this provision should be taken up with the accounting officer and the Bureau.

**38.** (1) Every procuring entity shall maintain a record of the comprehensive procurement proceedings.

Record of Procurement Proceedings.

**Comment:** The comprehensive record expected here in accordance with the Bureau Manual<sup>111</sup> should include the Bid Evaluation Report and the following:

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<sup>110</sup> Prepared on the order of the Federal Executive Council following its meeting of Wednesday 23<sup>rd</sup> October 2008, page 7.

<sup>111</sup> Pages 55 to 56 and page 59.

- Key dates and steps in the bidding process (copy of the invitation to bid as advertised);
- Bid opening information (copy of the bid opening minutes should be attached);
- For all bidders, a table showing the bidders compliance with major commercial conditions (e.g. completeness, bid security, bid validity, delivery or completion period, payment terms);
- For all bidders, a table showing bidders compliance with key provisions of the technical criteria for example capacity, operating characteristics, etc;
- For all substantially responsive bids, table showing arithmetical errors, discounts and currency conversion;
- For all substantially responsive bids table showing additions and adjustments (indicating methods used in computing the adjustments);
- For all substantially responsive bids, table showing domestic preferences;
- For all substantially responsive bids, table showing various steps from bid price announced to evaluated bid price;
- Record of clarifications made from bidders;
- For lowest evaluated bidder; post qualification verification;
- Names of bidders rejected and reasons for rejection;
- The proposed contract award recommendation;
- Formal appeals by bidders and outcomes;
- Record of claims and dispute resolution;
- Record of time taken to complete the key processes;
- Any other narrative information to give a complete picture of the procurement transaction.

(2) The portion of the record referred to in this section shall, on request, be made available to:

(a) any person after a tender, proposal, offer or quotation has been accepted or after procurement proceedings have been terminated without resulting in a procurement contract; and

(b) suppliers, contractors or consultants that submitted tenders, proposals, offers or quotations, or applied for prequalification, after a tender, proposal,

offer or quotation has been accepted or procurement proceedings have been terminated without resulting in a procurement contract.

**Comment:** This subsection offers every citizen access to information on procurement proceedings after the conclusion of the proceedings. It is very vital for civil society interventions (although post mortem) on public procurements. Recall that under section 16 (14), access by the public to all unclassified procurement records at the cost of copying and certification plus an administrative charge is guaranteed. However, it did not specify the grounds for classification of procurement information. The provision for classification is particularly curious considering the fact that national defence and security procurements are excluded from the provisions of the Act.

**Action:** CSOs should make full use of the opportunity to access procurement information after the termination of procurement proceedings. It would make for continuity of the observation process if MDAs are required to communicate CSOs and professional groups observing the proceedings of the name and details of the bidder that was finally selected as the winner of the proceedings. Access to the contract documentation entered between the MDA and the contractor will also facilitate public monitoring of contract implementation. CSOs should engage the BPP to facilitate this through instructions to MDAs.

(3) A disclosure of procurement proceeding records, prior to award of contract may be ordered by a court, provided that when ordered to do so by a court, the procurement entity shall not disclose such information, if its disclosure would:

- (a) be contrary to law;
- (b) impede law enforcement; or
- (c) prejudice legitimate commercial interests of the parties;

**Comment:** This subsection recognises the powers of a court of law to order disclosure of procurement proceedings before award of contracts. However the wordings that when ordered to do so by the court, the procuring entity shall not disclose such information if its disclosure would be contrary to law, impede law enforcement and prejudice the legitimate commercial interest of the parties is repugnant to the judicial powers vested in the courts by section 6 of the Constitution<sup>112</sup>. It is therefore unconstitutional when considered against the supremacy clause of the Constitution<sup>113</sup>. At best, these grounds in (3) (a) to (c) should be issues that a court would consider in arriving at a decision whether to order disclosure or not.

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<sup>112</sup> S. (6) (6) “The judicial powers vested in accordance with the foregoing provisions of this section (a) shall extend, notwithstanding anything to the contrary in this Constitution, to all inherent powers and sanctions of a court of law; (b) shall extend to all matters between persons, or between government or authority and to any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person”.

<sup>113</sup> See section 1(3) of the Constitution: “If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail and that other law shall to the extent of its inconsistency be void”.

**Action:** CSO should use legislative advocacy to effect amendments to the Act or alternatively at the earliest possible opportunity, using contractors and service providers as plaintiffs and test the constitutionality of the subsection in court.

(4) The procuring entity shall not be liable to suppliers, contractors or service providers for damages owing solely to failure to maintain a record of the procurement proceedings in accordance with this section.

(5) The records and documents maintained by procuring entities on procurement shall be made available for inspection by the Bureau, an investigator appointed by the Bureau and the Auditor-General upon request and where donor funds have been used for the procurement, donor officials shall also have access upon request to procurement files for the purpose of audit and review.

**Comment:** It is not only these bodies and officers that may require access to procurement records, the Accountant General of the Federation may also require them and he needs to have free access to these documents in accordance with Financial Regulation 105. The Regulation provides:

*By virtue of the responsibilities and functions of the Accountant General and the Auditor General, the two officers or their representatives shall have free access, to all books, accounts and information at all reasonable times, to files, safes, documents, books and other records relating to the accounts of all Federal Ministries/Extra Ministerial Offices and other Arms of Government or Units. They shall also be entitled to require and receive from members of the public services such information, reports, explanations as they may deem necessary for the proper performance of their duties.*

# Chapter Five

## PARTS VII-VIII

### PART VII – SPECIAL AND RESTRICTED METHODS OF PROCUREMENT

39. (1) Notwithstanding the provisions of this Act, the Bureau may issue 'Certification of No Objection' upon conditions hereinafter prescribed: Two Stage  
Tendering.

(2) A procuring entity shall engage in procurement by two-stage tendering:

(a) where it is not feasible for the procuring entity to formulate detailed specifications for the goods or works or in the case of services, to identify their characteristics and where it seeks tenders, proposals or offers on various means of meeting its needs in order to obtain the most satisfactory solution to its procurement needs.

(b) where the character of the goods or works are subject to rapid technological advances; where the procuring entity seeks to enter into a contract for research, experiment, study or development, except where the contract includes the production of goods in sufficient quantities to establish their commercial viability or to recover research and development costs, where the procuring entity applies this Act to procurement concerned with national security and determines that the selected method is the most appropriate method of procurement; or

(c) where the tender proceedings have been utilised but were not successful or the tenders were rejected by the procuring entity under an open competitive bid procedure and the procuring entity considers that engaging in new tendering proceedings will not result in a procurement contract.

(3) The provisions of this Act as regards the process for open competitive bidding shall apply to two-stage tendering proceedings except to the extent that those provisions vary from this section.

**Comment:** Considering the heading for this part, this is a special and restricted method of tendering and should only be used if the one stage open competitive bidding will not produce results. In subsection (2) (a), the Procurement Planning Committee may not be in a position to formulate detailed specifications of the procurement. In subsection (2) (b), research, technological issues and national security may justify recourse to two stage tendering. It is also imperative to know that provisions on open competitive tendering are still applicable to this process except they are varied by this section. Where the contract includes the production of goods in sufficient quantities to establish their commercial viability or to recover research and development costs, it is the expectation of the Act that open competitive bidding will apply.

**Action:** CSOs should engage in a dispassionate analysis of the reasons informing the resort to two stage tendering and objectively evaluate whether one stage open competitive tendering would have produced results required by the procuring entity.

(4) The invitation documents:

(a) shall call upon suppliers or contractors to submit, in the first stage of two-stage tendering proceedings, initial tenders which contain their proposals without a tender price; and

(b) may solicit proposals that relate to technical, quality or other characteristics of the goods, works, or services as well as contractual terms and conditions of supply and may stipulate the professional competence and technical qualifications of the suppliers or contractors.

(5) The procuring entity may, in the first stage, engage in negotiations with any supplier or contractor whose tender has not been rejected under an open competitive bidding procedure with respect to any aspect of its tender.

**Comment:** The first stage is about the technical bid, specifications and competence of the contractors and suppliers. It has nothing to do with the financial aspect of the bid. Negotiations between the procuring entity and the contractors are permitted at this first stage. It is at this stage that the procuring entity arrives at the technical specifications which the Procurement Planning Committee could not draw up in the first instance. It has been stated of the advantages of the two stage tendering process as follows<sup>114</sup>:

*The advantages of the two-stage process include the ability of the procuring entity, during the first stage, to interact extensively on technical matters with bidders which are not permissible in a one stage process. In this way, an agency can learn from the market and adapt its requirements to maximize competition. In addition, a two-stage process allows a procuring entity, in the first stage to state its requirements in more general functional terms than the detailed functional and technical requirements necessary to carry out a one-stage process. By knowing the bidders and their technologies prior to the second stage, this reduces the burden of preparing detailed functional and technical requirements which are so comprehensive as to accommodate the entire universe of potential technical proposals.*

(6) In the second stage of the two tender proceedings the procuring entity:

(a) shall invite suppliers or contractors whose tenders have not been rejected to submit final tenders with prices on a single set of specifications;

(b) may, in formulating the specifications, delete or modify any aspect of the technical or quality characteristics of the goods, works or services to be procured together with any criterion originally set out in these documents, evaluate and compare tenders and ascertain the successful tender;

(c) may add new characteristics or criteria that conform with this Act;

(d) shall communicate to suppliers or contractors in the invitation to submit firm tenders, any deletion, modification or addition; and

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<sup>114</sup> Bureau Manual at page 66.

(e) may permit a supplier or contractor who does not wish to submit a final tender to withdraw from the tendering proceedings.

(7) The final tenders shall be evaluated and compared in order to ascertain the successful tender as defined in an open competitive bid.

**Comment:** At this second stage, a single set of specifications would have been selected by the procuring entity and on the basis of that, bidders whose tenders have not been rejected would be requested to submit technical and financial bids. New characteristics and criteria, in accordance with the Act, which were not there originally, may be added. Thus, this shows that the process is not linear but a bit iterative. The method of selection of the winning bid is in accordance with open competitive bidding.

**Action:** CSOs should verify that negotiations with contractors and service providers did not result in undue favour being given to certain contractors to the exclusion of others.

40. (1) Subject to the approval by the Bureau, a procuring entity may for reasons of economy and efficiency engage in procurement by means of restricted tendering if: Restricted Tendering.

(a) the goods, works or services are available only from a limited number of suppliers or contractors;

(b) the time and cost required to examine and evaluate a large number of tenders is disproportionate to the value of the goods, works or services to be procured; or

(c) the procedure is used as an exception rather than norm.

(2) where a procuring entity engages in restricted tendering on the basis that:

(a) the goods, works and services are available only from a limited number of suppliers or contractors, it shall invite tenders from all the suppliers and contractors who can provide the goods, works or services; and

(b) the time and cost required to examine and evaluate a large number of tenders is disproportionate to the value of the goods, works or services, it shall select in a non-discriminatory manner of the number of suppliers or contractors to ensure effective competition;

(3) For the purpose of subsection (2), of this section, the procuring entity shall cause a notice of the selected tendering proceedings to be published in the procurement journal.

(4) The provision of this Act regarding the open competitive bidding procedure shall apply to the selective tendering proceedings, except to the extent that those provisions are varied by this Section.

**Comment:** The first point is that restricted tendering needs the express approval of the Bureau. The second is that this special method is used to promote economy and efficiency. The conditions precedent to its use is about goods being available from a limited number of suppliers; the cost of launching a full open competitive bidding being disproportionate to the value of the goods, works and services to be procured and it is an exception rather than the norm. If the overall cost of using this method does not facilitate economy and efficiency, then this methodology should not be used. With the exception of the requirement of advertising, all other procedures of open competitive bidding are applicable to this restricted method.

**Action:** CSOs should verify that the conditions precedent to the employment of restricted tendering are as stipulated in the Act. Particularly, CSOs should verify the ground that the cost of launching a full scale open competitive bidding will be disproportionate to the cost of goods and services being procured are not as a result of tender splitting. Also, the procuring entity needs to demonstrate to the satisfaction of a reasonable person that the selection of bidders is based on a non-discriminatory manner.

41. (1) A procuring entity may carry out procurements by requesting for quotations from suppliers or contractors where the value of the goods or works to be procured does not exceed a sum that shall be set in the procurement regulation. Request for Quotations.
- (2) Generally quotations shall be obtained from at least 3 unrelated contractors or suppliers.
- (3) Each contractor or supplier from whom a quotation is requested shall:
- (a) be informed whether any factor other than the charges for the goods, works or services themselves, such as any applicable transportation and insurance charges, customs duties and taxes are to be included in the price; and
  - (b) give only one quotation and shall not be allowed to change or vary the quotation.
- (4) No negotiation shall take place between a procuring entity and a contractor or supplier with respect to a quotation.
- (5) The procurement shall be awarded to the qualified contractor or supplier that gives the lowest priced responsive quotation.
- (6) Where the total value of the procurement is not more than a sum that shall be set in the regulation, the procurement entity may not obtain the Bureau's approval.

**Comment:** The Bureau sets the threshold for the value of goods and works that can use requests for quotations which is otherwise referred to as "shopping". It also sets the threshold that does not require the Bureau's approval. Request for quotations are generally used for small value, readily available off the shelf goods. In this case, online

and email quotations are acceptable. Price and ability to meet required delivery requirements are usually the main selection consideration for shopping<sup>115</sup>.

The Bureau Manual<sup>116</sup> indicates that the procuring entity may:

- *Publish a notice for inviting applications for registration of suppliers; and after evaluating the past experience and other qualifications such as capacity of the applicant, by a committee consisting of not less than three members appointed by the Accounting Officer of the procuring entity, prepare a list comprising names of suppliers who are able to supply particular categories of goods and services such as stationery, electrical items, motor vehicle repairs, periodicals and publications.*
- *Remove any contractor or supplier who has not responded twice for an invitation to submit a quotation or performed unsatisfactorily under any contract previously awarded.*
- *The selection shall be based on comparison of price quotations obtained from several invited bidders appearing on the registry.*
- *When the appropriate authority is satisfied; in the case of supplies of goods, that sufficient number of reputed vendors are registered, quotations may be invited from those list.*
- *Requests for quotations shall be addressed to firms borne in a register of suppliers and shall indicate:*
  - (i) The description and quantity of the goods;*
  - (ii) Time and place of delivery; and*
  - (iii) Warranties.*

The contract is entered upon notification of award of contract and the list of registered suppliers is to be updated annually. The provisions of this section appear to depart from the duties of the Bureau in section 5 (h) of the Act to maintain a national database of the particulars, classification and categorisation of federal contractors and service providers.

**Action:** CSOs should verify (from the records of procurement proceedings) and through interactions with suppliers) the number of quotations; that negotiations did not take place between the procuring entity and suppliers and that suppliers submitted only one quotation and were not allowed to vary or change their quotation. They should also verify that the procurement was awarded to the lowest priced responsive bid.

**42.** (1) A procuring entity may carry out any emergency procurement where: Direct  
Procurement.

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<sup>115</sup> Bureau Manual at page 69.

<sup>116</sup> Page 68 of the Bureau Manual.

(a) goods, works or services are only available from a particular supplier or contractor, or if a particular supplier or contractor has exclusive rights in respect of the goods, works or services, and no reasonable alternative or substitute exist; or

(b) There is an urgent need for the goods, works or services and engaging in tender proceedings or any other method of procurement is impractical due to unforeseeable circumstances giving rise to the urgency which is not the result of dilatory conduct on the part of the procuring entity;

(c) owing to a catastrophic event, there is an urgent need for the goods, works or services, making it impractical to use other methods of procurement because of the time involved in using those methods;

(d) a procuring entity which has procured goods, equipment, technology or services from a supplier or contractor, determines that;

(i) additional supplies need to be procured from that supplier or contractor because of standardization,

(ii) there is a need for compatibility with existing goods, equipment, technology or services, taking into account the effectiveness of the original procurement in meeting the needs of the procurement entity;

(iii) the limited size of the proposed procurement in relation to the original procurement provides justification,

(iv) the reasonableness of the price and the unsuitability of alternatives to the goods or services in question merits the decision.

(e) the procuring entity seeks to enter into a contract with the supplier or contractor for research, experiment, study or development, except where the contract includes the production of goods in quantities to establish commercial viability or recover research and development costs; or

(f) the procuring entity applies this Act for procurement that concerns national security, and determines that single-source procurement is the most appropriate method of procurement.

(2) The procuring entity:

(a) may procure the goods works or services by inviting a proposal or price quotation from a single supplier or contractor.

(b) shall include in the record of procurement proceedings a statement of the grounds for its decision and the circumstances in justification of single source procurement.

**Comment:** The section is titled “direct procurement” while its opening line talks about “emergency procurement”. Some direct procurement may be based on an emergency while some are not based on any emergency. Essentially, it is a single source

procurement that needs to be employed as an exception to the general rule when any of these conditions listed above are fulfilled. The record of procurement proceedings should justify the use of this particular procurement method. However, this procurement method should not be used to discourage competition. In procuring goods, works and services under open competitive bidding, care should be taken so as not to lay a foundation for future single source procurement. When goods, equipment and technology are to be chosen, care must be taken to ensure that the ones chosen (if it meets other stipulated criteria) will be compatible and can be standardised with products from other companies and manufacturers. Once a product is chosen and other associated supplies can only work at optimum capacity with products of the same company, then the foundation for single source procurement is laid.

The dilatory conduct of officers of the procuring entity making direct procurement a *fait accompli* would vitiate the justification of the use of this procurement methodology.

**Action:** CSOs should verify that the condition(s) precedent to the use of single source procurement is present before it is used and that it was not deliberately contrived.

- 43.** (1) A procuring entity may for the purpose of this Act, carry out an emergency procurement where: Emergency Procurement.
- (a) the country is either seriously threatened by or actually confronted with a disaster, catastrophe, war, insurrection or Act of God;
  - (b) the condition or quality of goods, equipment, building or publicly owned capital goods may seriously deteriorate unless action is urgently and necessarily taken to maintain them in their actual value or usefulness; or
  - (c) a public project may be seriously delayed for want of an item of a minor value.
- (2) In an emergency situation, a procuring entity may engage in direct contracting of goods, works and services.
- (3) All procurements made under emergencies shall be handled with expedition but along principles of accountability, due consideration being given to the gravity of each emergency.
- (4) Immediately after the cessation of the situation warranting any emergency procurement, the procuring entity shall file a detailed report thereof with the Bureau which shall verify same and if appropriate issue a Certification of “No Objection”.

**Comment:** An emergency is defined as a sudden unexpected happening; an unforeseen occurrence or condition; perplexing contingency or complication of circumstances; a sudden or unexpected occasion for action; exigency, pressing necessity; it is an unforeseen combination of circumstances calling for immediate action without time for full deliberation<sup>117</sup>. Emergency situations are very well known and can be identified by a

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<sup>117</sup> Blacks Law Dictionary, Centennial Edition at pages 522-523.

reasonable person. Minor value is defined by the Act as a monetary value which is not in excess of the monetary thresholds set for any approving authority by the Bureau.

The Bureau Manual states as follows of emergency procurement procedures<sup>118</sup>:

- *The bidding documents will disclose an itemised priced Bills of Quantity based on the Engineer's/Consultant's estimate;*
- *All bidders who participate in bidding will be allowed to bid a percentage above or below the Engineer's/Consultant's estimate;*
- *The lowest bid price shall be selected as the winner provided the bid is substantially responsive otherwise;*
- *The bidding period may not be reduced to below three days in the case of limited bidding by invitation and seven days when open advertisement is used;*
- *Lump sum contracts shall be used wherever possible, with milestone payments identified at intermediate levels;*
- *Purchases from government institutions must be given preference.*

**Action:** CSOs should verify whether there was a contrived or real emergency and whether the procurement method used reasonably responded to the gravity of the emergency.

## **PART VIII – PROCUREMENT OF CONSULTANT (SERVICES)**

**44.** Where a procuring entity wishes to procure services for its needs which are precise and ascertainable:

Expression of Interest to Provide Services for Ascertained Needs.

(a) it shall solicit for expression of interest or applications to pre-qualify to provide the services by publishing a notice to that effect in at least 2 national newspapers and the procurement journal;

(b) where the value of the services to be procured is less than one million naira, or with the approval of the Bureau, of such a low value that only national consultants would be interested, the procuring entity may without placing any notice request at least 3 and not more than 10 consultants or service providers to make proposals for the provision of the services in a format stipulating;

(i) a statement of qualifications of the consultant to provide the service;

(i) a statement of understanding of the procuring entity's needs;

(iii) the methodology for providing the service;

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<sup>118</sup> Bureau Manual at page 71.

(iv) the time frame for providing the service; and

(v) the cost or fee for the service.

**Comment:** The general thrust of the framework is to ensure some level of competition in the procurement of services for ascertained needs. Procuring without advertisements may be done for services for a value less than one million naira only. "Services" is defined in the Act as the rendering by a contractor or supplier of his time and effort and includes any object of procurement other than goods, works or construction.

The procurement of consultancy services usually includes the following; preparation of terms of reference and cost estimate, determination of choice of selection method, advertisement for expression of interest, preparation of a shortlist of consultants on the basis of expressions of interest received, issue of request for proposals, evaluation of the technical proposals, public opening of the financial proposals, evaluation of the financial proposals, selection of best ranking proposal, negotiations and award of contract to selected firms<sup>119</sup>.

As a general rule, the participation of government-owned agencies, universities or research centres in contracts for the procurement of consulting services is not precluded. Civil and public servants may only participate in or be hired under consulting contracts, either as individuals or as members of a team of consultants, if they are acting in their capacities as employees of a government owned agency, university or research centre, on leave of absence without pay and where their participation does not lead to any conflict of interest<sup>120</sup>.

**45.** (1) A procuring entity wishing to procure services for its needs may do so by requesting for proposals when it intends to enter into a contract for the purpose of research, experiment, study or development, except where the contract includes the production of goods in quantities sufficient to establish their commercial viability or to recover research and development cost.

Request for Proposals to Provide Services for Unascertained Needs.

(2) The procuring entity shall procure the services of consultants by soliciting for expressions of interest by publishing a notice to that effect in 2 national newspapers and the procurement journal.

(3) A procuring entity may make direct requests to a limited number of consultants, requesting proposals for the provision of a service if:

(a) the services are only available from no more than 3 consultants;

(b) the time and cost required to examine and evaluate a large number of proposals would be disproportionate to the value of the services to be performed, provided that it invites enough consultants to ensure transparent competition; or

<sup>119</sup> Bureau Manual, pages 73-74 and page B 539 of Public Procurement Regulations for Consultancy Services of the BPP.

<sup>120</sup> Page B 527, Public Procurement Regulations for Consultancy Services of the BPP.

(c) it is in the interest of national defence and security or similar reason of confidentiality.

**Comment:** Earlier comments in this Manual on time and costs of competitive tendering being disproportionate to the value of services are applicable here. The Request for Proposals (RfP) has to comply with the requirements of section 46 below. RfP is usually issued after a pre-qualification process through a request for Expression of Interest (Eoi). The Eoi is used to prepare a shortlist of consultants who are then requested to prepare and submit a proposal<sup>121</sup>. In the production of goods in quantities sufficient to establish their commercial viability or to recover research and development cost, it is expected that open competitive bidding shall apply.

In a request for proposals to provide consulting services for unascertained needs, the terms of reference may allow consultants to propose suitable approaches and methodology to meet the needs, objectives and aims of the procuring entity. A procuring entity is permitted by the rules to engage a specialist to prepare a TOR for complex assignments where it does not have the capacity<sup>122</sup>.

**46. (1) Request for proposals shall include:**

Content of  
the  
Request  
for  
Proposals.

- (a) the name and address of the procuring entity;
- (b) a requirement that the proposals are to be prepared in the English language;
- (c) the manner, place and deadline for the submission of proposals;
- (d) a statement to the effect that the procuring entity reserves the right to reject proposals<sup>123</sup>;
- (e) the criteria and procedures for the evaluation of the qualifications of the consultants;
- (f) the requirements on documentary evidence or other information that shall be submitted by consultants to demonstrate their qualifications;
- (g) the nature and required characteristics of the services to be procured including the location where the services are to be provided and the time when the services are to be provided;
- (h) whether the procuring entity is seeking proposals on various possible ways of meeting its needs;

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<sup>121</sup> The Bureau has prepared Standard Request for Proposals for the selection of consulting firms in small assignments lump sum, small assignments time based, selection of individual consultants, selection of consulting firms, complex time based selection of consulting firms, etc.

<sup>122</sup> Page B 540 of the Public Procurement Regulations for Consultancy Services.

<sup>123</sup> All proposals may be rejected on the grounds that they do not meet the objects of the TOR, are below the minimum qualifying mark for technical quality or that the financial proposals exceeded the budget estimate. The prior approval of the BPP is necessary before the procuring entity proceeds to inform all the consultants.

(i) a requirement that the proposal price is to be expressed in Nigerian currency;

(j) the manner in which the proposal price is to be expressed, including a statement on whether the price covers elements apart from the cost of services, such as reimbursement for transportation, lodging, insurance, use of equipment, duties or taxes;

(k) whether the procedure to ascertain the successful proposal shall be based on the lowest cost or quality and cost or a combination of the lowest cost, quality and criteria other than cost but stipulated in the request for proposals; and

(l) a short list to be made of only national consultants for consulting assignment contract within a set threshold in the procurement regulation provided that national consultants possess such requisite skills.

(2) The procuring entity shall provide the same information to every consultant requested to submit proposals.

**Action:** Examine documentation on requests for proposal and determine whether they conform to the above specifications.

47. (1) A consultant shall be allowed to request for clarification on the request from the procuring entity and such request may be made within a reasonable time to be specified.

Clarification  
and  
Modification  
of Requests  
for  
Proposals.

(2) A procuring entity may, whether on its initiative or as a result of a request for clarification by a consultant, modify the request for proposals by issuing an addendum at any time prior to the deadline for submission of proposals.

(3) The addendum shall be communicated promptly before the deadline for the submission of proposals to the short listed consultants to whom the procuring entity has provided the request for proposals and shall be binding on those consultants.

(4) If the procuring entity convenes a meeting of consultants, it shall prepare minutes of the meeting containing the issues submitted at the meeting for clarification of the request for proposal and its responses to those issues, without identifying the source of the request for clarifications.

(5) The minutes shall be provided promptly before the deadline for the submission of proposals to the consultants participating in the selection proceedings to enable them take the minutes into account in preparing their proposal.

**Comment:** Request for clarifications are permitted and it takes the procedure of clarifications in open competitive bidding. Clarifications are necessary to clear ambiguous provisions of Requests for Proposals. If clarifications are sought more than 14 days before the deadline for the submission of proposals, the procuring entity shall respond within 7 working days. But if sought less than 14 days to the deadline for the submission of proposals, the procuring entity shall respond promptly and early enough to allow

consultants take the clarification into consideration in preparing their proposals. The clarifications are to be sent to all the shortlisted consultants without identifying the source of the request of clarification.

**Action:** CSOs should confirm if the provision has been respected. Did the procuring entity grant the request for clarification? Was there an addendum? And if the answer is in the affirmative, did all shortlisted consultants get the clarification? If a meeting was convened, did the minutes go round to all shortlisted consultants? Did any party to the procurement proceedings gain an undue advantage arising from the way and manner the clarifications were undertaken?

48. (1) The procuring entity shall allow sufficient time for the preparation and submission of the requested proposals but shall in no case give less than 30 days between the issue of the notice or request and the deadline for submission.

Submission  
of  
Proposals.

(2) The technical and financial proposals shall be submitted simultaneously but in separate envelopes.

(3) A proposal received after the deadline for submission of proposals shall be returned to the sender unopened.

(4) Immediately after the deadline for submission of proposals, the technical proposals shall be opened for evaluation whilst the financial proposals shall remain sealed and kept in a secure bid-box until they are opened publicly.

(5) The technical evaluation committee shall not have access to or insights to the financial proposals until the evaluations including any Tender Boards review are concluded.

**Comment:** This section insists on the need to separate technical and financial proposals; although submitted simultaneously but in separate envelopes; to be opened separately and the technical evaluation committee not to have access to the financial bids until the technical evaluations are concluded. This process allows for a proper evaluation of the proposals uninfluenced by extraneous factors. However:

*If only one shortlisted firm has responded or remains as the only responsive firm among the proposals received, it may still be considered that a competitive procedure has taken place. The procuring entity may evaluate the sole consultant's proposals, and if satisfactory, invite it for contract negotiations, or continue with the one remaining candidate to negotiations and contract award<sup>124</sup>.*

**Action:** CSOs should confirm if the above provision has been observed in compliance or in the breach - the 30 day rule, separate envelopes for technical and financial bids, separate opening and evaluation of the technical and financial proposal, return of submissions after the deadline, time of opening the technical bid, etc.

49. (1) The procuring entity shall establish criteria to evaluate the

Criteria for  
Evaluation of  
Proposals.

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<sup>124</sup> Page B 551 of the Public Procurement Regulations for Consultancy Services.

proposals and prescribe the relative weight to be accorded to each criterion and the manner in which they are to be applied in the evaluation of:

- (a) the qualification, experience, reliability, professional and managerial competence of the consultant or service provider and of the personnel to be involved in providing the services;
- (b) the effectiveness of the proposal submitted by the consultant or service provider in meeting the needs of the procuring entity;
- (c) the proposal price, including any ancillary or related cost;
- (d) the effect that the acceptance of the proposal will have on the balance of payments position and foreign reserves of the government, the extent of participation by local personnel, the economic development potential offered by the proposal, including domestic investment or other business activity, the encouragement of employment, the transfer of technology, the development of managerial, scientific and operational skills and the counter trade arrangements offered by consultant or service providers; and
- (e) national defence and security considerations.

(2) A procuring entity may accord a margin of preference for domestic consultants or service providers, which shall be calculated in accordance with the regulations and guidelines as issued from time to time by the Bureau and shall be reflected in the record of the procurement proceedings.

**Comment:** The foregoing criteria must have been indicated as those to be used in the evaluation in the Request for Proposals.

**50.** (1) The procuring entity shall select the successful proposal by either choosing the proposal with:

General  
Selection  
Procedure  
(Services).

- (i) the lowest evaluated price, or
- (ii) the best combined evaluation in terms of the general criteria set out in the request for proposals and the price quoted.

(2) The procuring entity shall include in the record of procurement a statement of the grounds and circumstances on which it relied to select either of the procedures in subsection (1) of this section.

(3) Nothing in this section shall prevent the procuring entity from resorting to the use of any impartial panel of experts to make the selection.

**Comment:** Two general selection procedures are listed and the procuring entity is under obligation to justify the use of either procedure in the record of procurement proceedings. The general technical *indicative weighting of evaluation criteria* for consultant services is as shown in the box below<sup>125</sup>:

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<sup>125</sup> See page 77 of the Bureau Manual.

*Box 1: Indicative Weighting of Evaluation Criteria for Consultant Services*

Specific relevant experience	5 -10 points
Response to the TOR and methodology proposed	20- 50 points
Key personnel	30-60 points
Training	0-10 points
Participation by nationals	0-10 points
Total	100 points

**51.** (1) Where the procuring entity elects to choose the successful proposal based on technical and price factors, it shall establish a weight with respect to quality and technical price factors of the proposals in accordance with the criteria other than price as might have been set out in the request for proposals and rate each proposal in accordance with such criteria and the relative weight and manner of application of the criteria as stipulated in the request for proposals; and then

Procedure for Selection of Proposal where Price is a Factor.

(2) The procuring entity shall compare the prices of those proposals that have attained a rating at or above the threshold;

(3) The procuring entity shall notify the consultants whose proposals did not meet the minimum qualifying mark or were non responsive to the invitation for proposals and terms of reference after the evaluation of quality is completed within a period of 14 working days after the decision has been taken by the procurement entity;

(4) The name of the qualifying consultants, the quality scores for the technical component of the proposal shall be read aloud and recorded alongside the price proposed by each consultant or service provider when the financial proposals are opened;

(5) The procuring entity shall prepare the minutes of public opening of financial proposals which shall be part of the evaluation report and shall retain this record.

(6) The successful proposals shall be:

(a) the proposals with the best combined evaluation in terms of the criteria established under subsection (1) of this section from price in the case of quality and cost-based selection;

(b) the proposals with the lowest price in the case of least-cost selection; or

(c) the highest ranked technical proposal within the budget.

(7) The consultants with the winning proposal shall be invited for negotiations, which shall focus mainly on the technical proposals.

(8) The proposed unit rates for staff-months and reimbursable shall not be negotiated unless there are exceptional reasons.

**Comment:** It has been stated of quality and cost based selection (which is a selection based on technical quality with price considerations) as follows<sup>126</sup>:

*Using this method, quality and price factors are combined and weighted in varying proportions depending on the importance of quality versus price. The weight given to price in the overall ranking of the consultants shall depend on the technical complexity of the assignment and the nature of the project. Careful consideration shall be given to evaluations to assure that price considerations do not compromise quality. Generally, proportional weights shall be set at 80 points for quality and 20 points for price, but could be 70 and 30 points, respectively, for assignments of standard or routine nature, or conversely 90 and 10 points respectively, for assignments where technical quality is of critical importance. Only the technical proposals which have passed the minimum technical mark set in the RfP will proceed to the financial evaluation. The required methodology shall be explained in the RfP.*

In least cost selection, the proposal with the lowest cost but meets the technical evaluation criteria will be selected. But in fixed budget selection, the proposal selection is based on a fixed budget and this is for simple assignments - the highest ranked technical proposal within the budget. It is worthy of note that:

*Government officials and civil servants cannot be hired under consulting contract financed by public funds since the principle of transparency would be compromised and the opportunity for abuse heightened. This applies regardless of their being on leave, with or without pay, or secondment. University professors or scientists from research institutes can, however, be contracted individually provided that they have full time employment contract with their institutions and have regularly exercised their function for a year or more before they are contracted<sup>127</sup>.*

**52.** (1) Where the procuring entity elects to make a quality-based selection, based on consultant's qualifications or single-source selection, it shall engage in negotiation with consultants in accordance with this section.

Selection Procedure where Price is not a Factor.

(2) The procurement entity shall:

- (i) establish a weight with respect to quality and price of the proposals;
- (ii) invite for negotiation on the price of its proposal, the consultant that has attained the best rating in accordance with subsection (1) of this section;
- (iii) inform the consultant that attained ratings above the weight that may be considered for negotiations if the negotiation with the consultant with the best rating do not result in a procurement contract; and
- (iv) inform the consultant with the best rating, that it is terminating the negotiation if it becomes apparent to the procuring entity that the negotiation with that consultant invited under subsection (b) will not result in a procurement contract.

<sup>126</sup> See page B 541 of the Public Procurement Regulations for Consultancy Services.

<sup>127</sup> Page 80 of the Bureau Manual.

(3) The procuring entity shall, if negotiations with the consultant with the best rating fail, invite the consultant that obtained the second best rating, and if the negotiations with that consultant do not result in a procurement contract, the procuring entity shall invite the other suppliers or contractors for negotiations on the basis of their rating until it arrives at a contract or rejects the remaining proposals.

(4) The procuring entity shall treat proposals and any negotiations on selection procedure as confidential and avoid the disclosure of their contents to competing consultants.

**Action:** Verify if the above procedures were followed.

# Chapter Six

## PARTS IX-XIII

### PART IX – PROCUREMENT SURVEILLANCE AND REVIEW

53. (1) The Bureau may review and recommend for investigation by any relevant authority any matter related to the conduct of procurement proceedings by a procuring entity, or the conclusion or operation of a procurement contract if it considers that a criminal investigation is necessary or desirable to prevent or detect a contravention of this Act.

Bureau to  
Recommend  
Investigation.

**Comment:** “Relevant authority” is defined in the interpretative section of the Act to include Economic and Financial Crimes Commission and Independent Corrupt Practices Commission. Since the word used is “includes”, the implication is that there would be other relevant authorities to whom a case for investigation could be forwarded and this should include the Police. The recommendation to a relevant authority relates to criminal investigation for the prevention or detection of crime.

(2) The relevant authority may in the course of investigation:

(a) require an officer, employee or agent of the procuring entity or bidder, supplier, contractor or consultant to produce any books, records, accounts or documents;

(b) search premises for any books, records, accounts or documents;

(c) examine and make extracts from and copies of books, records, accounts or documents of any procuring entity, bidder, supplier, contractor or consultant;

(d) remove books, records, accounts or documents of the procuring entity, bidder, supplier, contractor or consultant for as long as may be necessary to examine them or make extracts from or copies of them but the investigator shall give a detailed receipt for the books, records, accounts or documents removed;

(e) require an officer, employee or agent of the procurement entity or bidder, supplier, or contractor or consultant;

(i) to explain an entry in the books, records, accounts or documents;

(ii) to provide the investigator with information concerning the management or activities of the procurement entity or bidders as may be reasonably required;

(f) explain an entry in the books, records, accounts or documents; and

(g) provide the investigator with information concerning the management or activities of the procurement entity or bidders as may be reasonably required.

**Comment:** The Act invests the relevant authorities with broad sweeping powers to enable them conduct effective investigation. However, most of these powers are already provided for in their enabling laws<sup>128</sup>.

(3) The Bureau may, pursuant to the advice of the procuring entity, results of its review of a procurement or report of investigation by a relevant government agency issue a variation order requiring a contractor at his own expense to repair, replace, or to do anything in his or her contract left undone or found to have been carried out with inferior or defective materials or with less skill and expertise than required by the contract of award.

**Comment:** This is a form of restitution demanded from a contractor or service provider who attempts to shortchange the government. However, considering the general dispute resolution provisions of this Act, it is imperative that before such an order is made, the adverse party must be given the opportunity to be heard and to make a defence for himself.

(4) The Bureau shall, if satisfied that there has been a contravention of this Act or any regulations in relation to procurement proceedings or procurement contracts, take action to rectify the contravention which action shall include:

- (a) nullification of the procurement proceedings;
- (b) cancellation of the procurement contract;
- (c) ratification of anything done in relation to the proceedings; or
- (d) a declaration consistent with any relevant provision of this Act.

(5) On completion of the investigation, the relevant authority shall if an offence is disclosed, take all necessary steps to commence prosecution and inform the Bureau and the procurement entity accordingly, but where no offence is disclosed, the file shall be closed and the Bureau and procuring entity shall be duly informed.

**Comment:** It is mandatory for the relevant authority to prosecute defaulters if investigations disclose an offence.

**54.** (1) 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.

Administrative  
Review

(2) A complaint by a bidder against a procuring or disposing entity shall first be submitted in writing to the accounting officer who shall:

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<sup>128</sup> See sections 6 and 7 of the Economic and Financial Crimes Commission Act, Cap.E1, Laws of the Federation of Nigeria, 2004; Corrupt Practices and Other Related Offences Act, Cap.C31, Laws of the Federation of Nigeria, 2004.

(a) within fifteen working days from the date the bidder first became aware of the circumstances giving rise to the complaint or should have become aware of the circumstances, whichever is earlier;

(b) on reviewing a complaint, the accounting officer shall make a decision in writing within 15 working days indicating the corrective measures to be taken if any, including the suspension of the proceedings where he deems it necessary and giving reasons for his decision; or

**Comment:** A learned commentator<sup>129</sup> has stated of the submission of complaints to Accounting Officers as follows:

*Submission of the complaint to the Accounting Officer presumes her independence and impartiality. But this might not be the reality in practice as the Accounting Officers are usually participants in the process sought to be impugned by the complainant. The Act defines an Accounting Officer as the person charged with the overall supervision or conduct of all procurement processes. In particular, section 20 (2) of the PPA provides that the Accounting Officer shall be responsible for planning, organization and evaluation of tenders. It is the Accounting Officer that constitutes the procurement committee of her procuring entity, therefore there is always the likelihood that she may have taken a fixed position on some of the issues she is being called upon to review.*

*Gordon has noted that having the contracting agency whose procurement is being protested decide the protest has the advantage of efficiency; because the information about the procurement resides within the contracting agency, typically the agency can decide the protest faster and at a lower expense. But he was quick to point out also that the disadvantage is the appearance of lack of independence and impartiality as the protesting vendors may fear that the contracting agency will not be willing to admit that the procurement was not properly handled<sup>130</sup>. Admission of impropriety on the part of the Accounting Officer is most unlikely, because such an officer would also be admitting participation in a crime, because every contravention of the act amounts to a criminal offence<sup>131</sup>.*

*Nemo iudex in causa sua is a fundamental principle of natural justice. It is in the overriding interest of justice that, no man should be a judge in his own cause. Accordingly, a review of procurement proceedings by an Accounting Officer who supervised or conducted the proceedings is fraught with the perception of injustice.*

The saving grace to this perception of non independence is that there is still a further appeal mechanism to the Bureau and the courts. The reference to working days in this section excludes Saturdays, Sundays and public holidays<sup>132</sup>. Further, it has been stated that<sup>133</sup>:

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<sup>129</sup> Kalu Onuoha in *Legal Issues in the PPA*, supra.

<sup>130</sup> Daniel I. Gordon: *Constructing a Bid Protest Process - Choices Every Procurement Challenge System Must Make*; 35 Public Contract Law Journal (No.3) The George Washington University Law School, Public Law and Legal Theory working paper No. 200.

<sup>131</sup> See section 58 (5) of the PPA.

<sup>132</sup> See the Interpretation Act, Cap 123, Laws of the Federation of Nigeria 2004.

<sup>133</sup> Kalu Onuoha, supra.

*The right to complain becomes extinguished after 15 working days of the accrual of the right to protest, and the right to protest arises as soon as the potential complainant becomes aware of the irregularities being complained against or 15 working days after the complainant should have become aware of the circumstances, whichever is earlier. The implication of this is that there could be actual or constructive awareness of the circumstances that could give rise to complaint. Even where a complainant was not actually aware of the circumstances, she would be deemed to be constructively aware of the circumstances if she ought to be aware.*

(c) where the accounting officer does not make a decision within the period specified in sub-section (2)(b).

(3) The bidder is not satisfied with the decision of the accounting officer, the bidder may make a complaint to the Bureau within 10 working days from the date of communication of the decision of the accounting officer.

(4) Upon receipt of a complaint, the Bureau shall promptly;

(a) give notice of the complaint to the respective procuring or disposing entity and suspend any further action by the procuring or disposing entity until the Bureau has settled the matter;

(b) unless it dismisses the complaint;

(i) prohibit a procuring or disposing entity from taking any further action;

(ii) nullify in whole or in part an unlawful act or decision made by the procuring or disposing entity;

(iii) declare the rules or principles that govern the subject matter of the complaint; and

(iv) revise an improper decision by the procuring or disposing entity or substitute its own decision for such a decision.

(5) Before taking any decision on a complaint, the Bureau shall notify all interested bidders of the complaint and may take into account representations from the bidders and from the respective procuring or disposing entity.

(6) The Bureau shall make its decision within twenty-one working days after receiving the complaint, stating the reasons for its decisions and remedies granted, if any.

(7) Where the Bureau fails to render its decision within the stipulated time, or the bidder is not satisfied with decision of the Bureau, the bidder may appeal to the Federal High Court within 30 days after the receipt of the decision of the Bureau, or expiration of the time stipulated for the Bureau to deliver a decision.

**Comment:** This Recourse Mechanism is available only before the entry into force of the procurement contract. The Bureau in its “Complaints Procedure under the Public Procurement Act” elaborated the procedures stated in the Act in 9 Steps. However, in its Step 9, it states that after appeals to the Federal High Court, “the decision of the Federal High Court shall be final on the matter and no further appeals shall lie”. Although this rule appears expedient to ensure that contract awards for the implementation of the budget are not unnecessarily delayed, this rule appears to be of doubtful constitutional validity considering the right of appeal through the chain of the courts guaranteed by the Constitution. Such a right of appeal cannot be removed by a mere regulation made under the powers granted by ordinary statute<sup>134</sup>.

Considering the lengthy nature of court proceedings in Nigeria, it appears there is the need for special fast track rules of court to govern procurement proceedings at the Federal High Court. Otherwise litigation may cripple the implementation of the capital budget if the ordinary rules of court are used.

Subsection 7 refers to the “bidder”- is it only the bidder that can sue on a decision by the Bureau? A learned commentator proffers an opinion which appears to be the true position of the law on the subject matter<sup>135</sup>.

*Even if the “bidder” is construed liberally to include other bidders; there is still the question of whether other interested parties could apply to be joined as parties to the proceedings at the Federal High Court. The implication of seeking to limit standing to the bidder who is not satisfied with the decision of the Bureau is that only bidders could initiate an appeal against the decision of the Bureau. Does this section preclude the procuring entity and non-bidders from participating in the appeal process? We think not. It would seem that other interested persons may apply to be joined as parties to the appeal process, if they establish an interest or strong connection with the subject matter of the procurement contract. In SGBN v Afekoro,<sup>136</sup> the Supreme Court held that the expression “person having interest” is synonymous with “person aggrieved”, and that a person aggrieved is a person who has suffered a legal grievance, a person against whom a decision has been given which deprived him of something or affected his right or title to something. A person interested must show in what manner the judgement he seeks to question would or did affect his interest. Representatives of a host community would certainly qualify as persons interested in the outcome of an appeal in a procurement proceedings review; so would civil society activists working in the area of anti-corruption and public expenditure management.*

**Action:** CSOs should consider advocacy for special fast track rules of court to govern judicial procurement proceedings. Members of the legal profession should take a front position in this enterprise. Engaging the Chief Judge of the Federal High Court and the judicial authorities will facilitate the process. CSOs should also test the waters and seek to be joined as a person interested in the legal challenge to procurement proceedings where they think the interest of justice would be better served by the jurisprudence they would provide before the courts.

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<sup>134</sup> See sections 233 and 241 of the Constitution.

<sup>135</sup> Kalu Onuoha, supra.

<sup>136</sup> (1999) 7 SCNJ 171 at 187.

## PART X – DISPOSAL OF PUBLIC PROPERTY

55. (1) This section shall apply subject to the Public Enterprises (Privatisation and Commercialisation) Act 1999. Disposal of  
Public  
Property
- (2) For the purposes of this Act every procuring entity shall also be disposing entity.
- (3) The open competitive bidding shall be the primary source of receiving offers for the purchase of any public property offered for sale.
- (4) The Bureau shall, with the approval of the Council:
- (a) determine the applicable policies and practices in relation to the disposal of all public property;
  - (b) issue guidelines detailing operational principles and organisational modalities to be adopted by all procuring entities engaged in the disposal of public property; and
  - (c) issue standardised documents, monitor implementation, enforce compliance and set reporting standards that shall be used by all procuring entities involved in the disposal of public property.

**Comment:** The relationship between privatisation and disposal of public property is brought to the fore in this section. Open competitive bidding is designated as the primary source of disposing government property. The primacy of the Council in the scheme of this Act is once more demonstrated by the fact that all policies and practices of the Bureau on disposal of public property are to be approved by the Council. The absence of the Council is a disservice to the proper implementation of the Act.

- (5) For the purposes of this Act, public property is defined as resources in the form of tangible and non-tangible assets (ranging from serviceable to the unserviceable):
- (a) created through public expenditure;
  - (b) acquired as a gift or through deeds;
  - (c) acquired in respect of intellectual or proprietary rights;
  - (d) acquired on financial instruments (including shares, stocks, bonds, etc); and
  - (e) acquired by good will and any other gifts of the Federal Government.
- (6) The means of the disposal of public assets shall include:
- (a) sale and rental;
  - (b) lease and hire purchase;

- (c) licenses and tenancies;
- (d) franchise and auction;
- (e) transfers from one government department to another with or without financial adjustment; and
- (f) offer to the public at an authorised variation.

**Comment:** The foregoing is not exhaustive of all disposal methods since the words used are “shall include”. Government property could be sold by sealed bid and the award is made to the highest bidder; it may be sold through negotiated sale where public auction and sealed bid did not produce a buyer at the right price. It may also be sold to other government agencies where the selling agency has property in surplus of its needs. A trade-in can also be the disposal methodology where property may be traded in to acquire similar property. Where the estimated value of the new property being purchased (without the trade-in) exceeds the amount for which competitive quotations must be solicited, the following rules shall apply - the procurement must be competitive, items to be purchased and the one to be traded in will be listed separately in the solicitation documents and the lower bid is arrived at by subtracting the price offered on the trade in from the price of the new property<sup>137</sup>.

- 56.** (1) Before slating any public property for disposal, the accounting officer (whether acting in his own authority or at the direction of any superior or other authority) in charge of any public property set for disposal shall authorise the preparation of a valuation report for such property by an independent Evaluator, or such professional with the appropriate competence to carry out the valuation. Planning of Disposals.
- (2) The disposal of assets whether or not listed in the Assets Register for a procuring entity shall be planned and integrated into the income and expenditure budget projection of the procuring entity.
- (3) The disposal of assets referred to in subsection (2) of this section shall be timed to take place when the most advantageous returns can be obtained for the asset in order to maximize revenue accruing to the government.
- (4) All procuring entities shall distribute responsibilities for the disposal of public property between the procurement unit and the Tenders Board.

**Comment:** The central objective of these provisions is to ensure that the assets are disposed of in a transparent and value for money manner that ensures the highest possible returns to the Treasury. Disposals are also to be integrated into the budget process of the MDA.

**Action:** CSOs should confirm that there is an evaluation report by a professional valuer before the sale and the sale price should be compared with the price in the evaluation report. The sale price should further be compared with the open market price and the price schedule for the particular item provided by the Price Intelligence Unit of the Bureau.

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<sup>137</sup> Bureau Manual at page 91.

## PART XI – CODE OF CONDUCT

57. (1) The Bureau shall, with the approval of the Council, stipulate a Code of Conduct for all public officers, suppliers, contractors and service providers with regards to their standards of conduct acceptable in matters involving the procurement and disposal of public assets. Code of  
Conduct for  
Public  
Procurement
- (2) The conduct of all persons involved with public procurement, whether as official of the Bureau, a procuring entity, supplier, contractor or service provider shall at all times be governed by principles of honesty, accountability, transparency, fairness and equity.
- (3) All officers of the Bureau, members of Tenders Boards and other persons that may come to act regarding the conduct of public procurements shall subscribe to an oath as approved by Council.
- (4) All persons in whose hands public funds may be entrusted for whatever purpose should bear in mind that its utilization should be judicious.
- (5) Where a transaction involves the disposal of assets, principles of honesty, accountability, transparency, fairness and equity shall continue to apply to the same extent as where it involves procurement.
- (6) These principles shall apply at all times, particularly when:
- (a) making requisition for or planning of procurements;
  - (b) preparing solicitation documents;
  - (c) receiving offers in response to any form of solicitation towards a procurement or disposal;
  - (d) evaluating and comparing offers confidentially and in complete neutrality;
  - (e) protecting the interest of all parties without fear or favor; and
  - (f) obviating all situations likely to render an officer vulnerable to embarrassment or undue influence.
- (7) All public officers shall handle public procurement and disposal of assets by:
- (a) ensuring adequate time for preparing offers;
  - (b) complying with this Act and all derivative regulations; and
  - (c) maintaining strict confidentiality until completion of a contract.

(8) All public officers involved in public procurement and disposal of assets shall maintain the highest standards of ethics in their relationships with persons real or corporate who seek government commerce whether as a bidder, supplier, contractor or service provider by developing transparent, honest and professional relationships with such persons.

(9) Every public officer involved directly or indirectly in matters of public procurement and disposal of assets shall:

(a) divest himself of any interest or relationships which are actually or potentially inimical or detrimental to the best interest of government and the underlining principles of this Act; and

(b) not engage or participate in any commercial transaction involving the federal government, its ministries, extra-ministerial departments, corporations where his capacity as public officer is likely to confer any unfair advantage – pecuniary or otherwise on him or any person directly related to him.

(10) Any person engaged in the public procurement and disposal of assets who has assumed, or is about to assume, a financial or other business outside business relationship that might involve a conflict of interest, must immediately declare to the authorities any actual or potential interest.

(11) Such a declaration shall be given such consideration at the relevant level as is necessary so that, where it is seen that remedial action is taken, a conflict of interest is present.

(12) A conflict of interest exists where a person:

(a) possesses an interest outside his official duties that materially encroaches on the time or attention which should otherwise be devoted to affairs of government;

(b) possesses a direct or indirect interest in or relationship with a bidder, supplier, contractor or service provider that is inherently unethical or that may be implied or constructed to be, or make possible personal gain due to the person's ability to influence dealings;

(c) entertains relationships which are unethical, rendering his attitude partial toward the outsider for personal reasons or otherwise inhibit the impartiality of the person's business judgments;

(d) places by acts or omissions the procuring entity he represents or the Government in an equivocal, embarrassing or ethically questionable position;

(e) entertains relationships compromising the reputation or integrity of the procuring entity he represents or the Government;

(f) receives benefits by taking personal advantage of an opportunity that properly belongs to the procuring entity he represents or the Government;

(g) creates a source of personal revenue or advantage by using public property which comes into his hands either in course of his work or otherwise; and

(h) discloses confidential information being either the property of his procuring entity, the Government or to a supplier, contractor or service provider or to unauthorized persons.

(13) A person involved in the disposal of assets, shall not either by a third party or by himself be interested in any manner in buying directly or indirectly these assets and shall not have or obtain any type of advantage or revenue from the disposal for a period of three years after the disposal.

**Comment:** The Code of Conduct stipulated in this section appears comprehensive to guide all public officers who are to engage in procurement proceedings. The Bureau has also expanded the Code of Conduct as shown below:

### **Code of Conduct for Public Officers Involved with Procurement**

*Part XI, Section 57 Sub-Section (2) of the Public Procurement Act, 2007 provides that all Public Officers involved in Public Procurement must be governed by principles of honesty, accountability, transparency, fairness and equity and shall by Sub-Section (3) of the same Section subscribe to an Oath.*

*All Public Officers are therefore expected to perform their duties in strict compliance with the following Code of Conduct:*

- 1. They shall wear their identity cards at all times while executing their functions.*
- 2. They shall comply with lawful directives issued by the Accounting Officer, Chairperson of the Tenders Board or any relevant authority or its representative.*
- 3. Public Officers shall not grant press interviews or comments on any procurement proceedings unless where it is essential and with the approval of the Accounting Officer or Chairperson of the Tenders Board.*
- 4. No Public Officer shall wear any apparel which:*
  - (a) Reflects affiliation with a Bidder or Service Provider partaking in the procurement proceedings.*
  - (b) In any way canvasses for a Bidder or Service Provider to win the procurement proceedings.*
- 5. No Public Officer shall participate in any function or activity that could lead to the perception of a leaning or being favourably disposed towards a Bidder or Service Provider.*
- 6. A Public Officer shall not accept any gift, offer of employment, favour or any other benefit, item or service that can be quantified in monetary terms from any Bidder, Service Provider, or any person involved in the procurement proceedings.*

7. *Public Officers shall display strict impartiality in the course of discharging their duties in the procurement proceedings and shall at no time indicate or express any statement capable of public incitement.*
8. *Public Officers shall desist from doing anything that compromises the integrity of the procurement proceeding.*
9. *A Public Officer shall decline in serving in a procurement process if any of the Bidders or Service Providers engaged in the procurement proceedings is related to him by blood, marriage or grant relationship or where the success of a particular Bidder or Service Provider in the proceedings will confer a pecuniary or other advantage on him.*
10. *Public Officers shall not create a source of personal or organizational revenue or advantage by inordinately using public knowledge which comes to him in the course of discharging his duties.*
11. *All Public Officers shall take reasonable steps to be factual and substantiate information to be used in their procurement report.*
12. *A breach of this Code of Conduct of Ethics may amount to a violation of the Public Procurement Act, 2007.*

The Bureau has also designed an oath of allegiance for public servants involved in public procurement proceedings as follows:

### **Oath of Allegiance for Public Officers involved with Procurement**

*I ..... do solemnly swear/ affirm that I will in the discharge of my duties be governed at all times by the principles of honesty, accountability, transparency, fairness and equity. I will use the best of my abilities and endeavours to discharge my responsibilities in a way and manner that promotes the objectives of the Public Procurement Act 2007, policies and regulations made there under and the Constitution of the Federal Republic of Nigeria 1999 and other laws in that regard, that I shall not take advantage of any information that comes to me for any personal gain or extort money or blackmail a party/bidder to the procurement proceedings.*

*So help me God.*

## **PART XII – OFFENCES**

- 58.** (1) Any natural person not being a public officer who contravenes any provision of this Act commits an offence and is liable on conviction to a term of imprisonment not less than 5 calendar years but not exceeding 10 calendar years without an option of fine.
- Offences  
Relating to  
Public  
Procurement.

**Comment:** The Act considers violations serious enough as to attract imprisonment without option of fine. The above punishment is for natural persons who are not public officers.

(2) Any offence in contravention of this Act shall be tried by the Federal High Court.

(3) Prosecution of offences under this Act shall be instituted in the name of the Federal Republic of Nigeria by the Attorney General of the Federation or such other officer of the Federal Ministry of Justice as he may authorise so to do, and in addition, without prejudice to the Constitution of the Federal Republic of Nigeria 1999, he may:

(a) after consultation with the Attorney General of any state of the Federation, authorize the Attorney General or any other officer of the Ministry of Justice of that state; or

(b) if the relevant authority so requests, authorise any legal practitioner in Nigeria to undertake such prosecution directly or assist therein.

**Comment:** Relevant authority here includes the Economic and Financial Crimes Commission (EFCC) and the Independent Corrupt Practices Commission (ICPC). The Act also provides for instructions by the Attorney General to private legal practitioners to prosecute offences upon the request of the EFCC or the ICPC. However, two things are missing in this section. The first is the equivalent of section 51 of the Fiscal Responsibility Act which empowers every person to seek the enforcement of the provisions of the Act without showing any particular or specific interest. This would have created a street army of procurement enthusiasts ready and willing to enforce the Act in the event the authorities refuse to perform their statutory duties. Essentially, it would have conferred a statutory *locus standi* on all Nigerians for the enforcement of the Act.

The second is the failure of the Act to confer prosecutorial powers on the Bureau and the vesting of same on the Attorney General of the Federation who is more of a politician than a chief law officer. The implication is that the decision to prosecute instead of being a legal decision will become a political decision which may defeat the ends of justice. Thus, high ranking officers of state, members of the ruling party who subvert the provisions of this Act may escape prosecution. Although, by section 53 (5), the relevant agency on conclusion of investigations shall if an offence is disclosed, take all necessary steps to commence prosecution and inform the Bureau, the implication of the foregoing provision is that the permission or the fiat of the Attorney General of the Federation is required before the EFCC or ICPC can undertake prosecution of offences under this Act.

(4) The following shall also constitute offences under this Act:

(a) entering or attempting to enter into a collusive agreement, whether enforceable or not, with a supplier, contractor or consultant where the prices quoted in their respective tenders, proposals or quotations are or would be higher than would have been the case had there not been collusion between the persons concerned;

**Comment:** In accordance with section 58 (9), collusion shall be presumed from a set of acts from which it can be assumed that there was an understanding, implicit, formal or informal, overt or covert under which each person involved reasonably expected that the other would adopt a particular course of action which would interfere with the faithful and proper application of the provisions of this Act. This also covers collusion among bidders

to reduce or increase their prices and where a public procurement officer reveals the reserve price to a bidder who takes advantage of the information to bring his bid within an acceptable price margin.

(b) conducting or attempting to conduct procurement fraud by means of fraudulent and corrupt acts, unlawful influence, undue interest, favor, agreement, bribery or corruption;

**Comment:** This forbids any act calculated to confer unmerited advantage on any party to the procurement process. It is intended that procurement officers should be allowed to perform their duties without the meddlesomeness of politicians and other interested parties who may seek to subvert the process.

(c) directly, indirectly or attempting to influence in any manner the procurement process to obtain an unfair advantage in the award of a procurement contract;

(d) splitting of tenders to enable the evasion of monetary thresholds set;

(e) bid-rigging;

**Comment:** Bid rigging is defined in section 58 (10) to mean where offers submitted have been pre-arranged between the parties or their conduct has the effect of directly or indirectly restricting free and open competition, distorting the competitiveness of the procurement process and leading to an escalation or increase in cost or loss of value to the national treasury.

(f) altering any procurement document with intent to influence the outcome of a tender proceeding;

**Comment:** The offence includes [per section 58 (8) of the Act] insertion of documents such as bid security or tax clearance certificate which were not submitted at bid opening and request for clarification in a manner not permitted under the Act. While insertion of documents makes sense as alteration, requests for clarifications from bidders are subject to review by the procuring entity and a response will be given if the procuring entity is of the view that it is a matter that can be clarified. What this provision establishes is that a mere request for clarification if it is considered improper can become an offence. This appears too draconian.

(g) uttering or using fake documents or encouraging their use; and

**Comment:** By section 465 of the Criminal Code Act<sup>138</sup>, any person who makes false documents or writing knowing it to be false and with intent that it may in any way be used or acted upon as genuine, to the prejudice of any person, or with intent that any person may, in the belief that it is genuine be induced to do or refrain from doing any act, is said to forge that document. The term “make a false documents or writing” includes altering genuine documents or writing in any material part, either by erasure, obliteration,, removal or otherwise; and making any material addition to the body of a genuine document or writing, and adding to a genuine document or writing any false date, attestation, seal or

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<sup>138</sup> Cap C38, Laws of the Federation of Nigeria, 2004.

other material. Essentially, presenting forged documents to a procuring entity is criminalized by this provision.

(h) willful refusal to allow the Bureau or its officers to have access to any procurement records.

(5) Any person who while carrying out his duties as an officer of the Bureau, or any procuring entity who contravenes any provision of this Act commits an offence and is liable on conviction to a cumulative punishment of:

(a) a term of imprisonment of not less than 5 calendar year without any option of fine; and

(b) summary dismissal from government services.

**Comment:** This penalty is for public officers. It however appears too harsh. The likelihood of prosecution and conviction when a statute's penal provisions are very stringent may be remote. Tender splitting is not defined in the Act.

It is also imperative to review other offences that relate to public procurement which are not stated in the Act but are provided in other laws for example the Criminal Code Act:

*98 (1) Any public official who -*

*(a) corruptly asks for, receives or obtains any property or benefit of any kind for himself or any other person; or*

*(b) corruptly agrees or attempts to receive or obtain any property or benefit of any kind for himself or any other person,*

*on account of-*

*(i) anything already done or omitted, or any favour or disfavor already shown to any person, by himself in the discharge of his official duties or in relation to any matter connected with the functions, affairs or business of a Government department, public body or other organization or institution in which he is serving as a public official, or*

*(ii) anything to be afterwards done or omitted, or any favour or disfavor to be afterwards shown to any person, by himself in the discharge of his official duties or in relation to any such matter as aforesaid*

*is guilty of the felony of official corruption and is liable to imprisonment for seven years<sup>139</sup>.*

*99. Any person who, being in employed in the public service, takes or accepts from any person, for the performance of his duty as such officer, any reward beyond his proper pay and emoluments, or any promise of such reward, is guilty of a felony, and is liable to imprisonment for three years.*

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<sup>139</sup> Other provisions of section 98 of the Criminal Code include S.98 (A) on official corruption; persons giving bribes, etc, on account of actions of public official: 98(B)-person inviting bribes, etc, on account of actions of public official.

101. Any person who, being employed in the public service, knowingly acquires or holds, directly or indirectly, otherwise than as a member of a registered joint stock company consisting of more than twenty persons, a private interest in any contract or agreement which is made on account of the public service with respect to any matter concerning the department of the service in which he is employed, is guilty of a felony, and is liable to imprisonment for three years, and be fined at the discretion of the court.

(6) Any legal person that contravenes any provision of this Act commits an offence and is liable on conviction 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.

**Comment:** This penalty is for companies and artificial persons.

(7) Where any legal person shall be convicted pursuant to subsection (4) of this section, every director of the company as listed on its records at the Corporate Affairs Commission shall be guilty of an offence and is liable on conviction to a term of imprisonment not less than 3 calendar years but not exceeding 5 calendar years without an option of fine.

**Comment:** This penalty is for the directors of companies and other artificial persons. This penalty appears too drastic considering that there are non executive directors of companies who are not involved in the day to day management and who may not be *strict sensu* parties pre and post the violations and did not participate in any meeting where the decisions to violate the law took place. Debarring the company, the 25% fine, punishing the officers and directors directly involved in the violation would have been enough unless there is evidence to prove that the violation was as a result of a board of director's decision. For a board to approve that a company bids in a federal contract without more would not be enough to make all the directors guilty in strict criminal law sense of the guilty mind and the guilty conduct.

(8) An alternation pursuant to subsection 4(f) shall include:

(b) insertion of documents such as bid security or tax clearance certificate which were not submitted at bid opening; and

(c) request for clarification in a manner not permitted under this Act.

(9) Collusion shall be presumed from a set of acts from which it can be assumed that there was an understanding, implicit, formal or informal, overt or covert under which each person involved reasonably expected that the other would adopt a particular course of action which would interfere with the faithful and proper application of the provisions of this Act.

(10) Bid-rigging pursuant to subsection 4(e) means an agreement between persons whereby;

(a) offers submitted have been pre-arranged between them; or

(b) their conduct has had the effect of directly or indirectly restricting free and open competition, distorting the competitiveness of the procurement process and leading to an escalation or increase in costs or loss of value to the national treasury.

(11) For the purposes of the presumption under section 51(7) of this section, consideration shall be given to a suspect's ability to control the procurement proceedings or to control a solicitation or the conditions of the contract in question, whether total or partial.

(12) For the purposes of section 59(5) of this section, it shall be sufficient to prove that a reasonable business person should have known that his action would result in his company or firm having an undue advantage over other bidders to the detriment of the national treasury.

**Comment:** This Act does not have a section 59 (5) as stated in subsection (12) above and section 51 (7) referred to in subsection (11) above has nothing on penalties and offences. It is rather the procedure for selection of proposal where price is a factor. The reference in subsection (11) should properly be to section 58 (9) which provides that "*collusion shall be presumed.*" while for subsection (12), the reference should properly be to section 58 (4) (e) and subsection (10) on bid rigging.

### PART XIII – MISCELLANEOUS

59. (1) The fixing of the seal of the Bureau shall be authenticated by the signature of the Chairman, the Director-General or of any other person authorised generally or specially to act for that purpose by the Council. Miscellaneous

(2) Any contract or instrument which, if made or executed by a person not being a body corporate, would not be required to be under seal may be made or executed on behalf of the Bureau by the Director-General or any person generally or specially authorised to act for that purpose by the Council.

(3) Any document purporting to be a document duly executed under the seal of the Bureau shall be received in evidence and shall unless and until the contrary is proved, be presumed to be so executed.

(4) The validity of any proceeding of Council or of a committee thereof shall not be adversely affected by any vacancy in the membership of the Council or committee, or by any defect in the appointment of a member of the Council or of a Committee, or by reason that a person not entitled to do so took part in the proceedings of the Council or Committee.

60. In this Act: Interpretation.  
"Accounting officer" means the person charged with line supervision of the conduct of all procurement processes;

“Approving authority” means the person charged with overall responsibility for the functioning of a ministry, extra-ministerial department or corporation;

“Assets” includes tangible and intangible things which have been or may be sold or procured for consideration;

“Bid security” means a form of security assuring the bidder shall not withdraw a bid within the period specified for acceptance and shall execute a written contract within the time specified in the bid;

“Debar” means the placing of a firm, company or natural person on a list of persons ineligible to participate in any procurement proceedings under this Act;

“Certificate Of No Objection” means the document evidencing and authenticating that due process and the letters of this Act have been followed in the conduct of a procurement proceeding and allowing for the procuring entity to enter into contract or effect payments to contractors or suppliers from the Treasury;

“Contract” means an agreement entered in writing;

“Contractor or supplier” means any potential party to a procurement contract with the procuring entity and includes any corporation, partnership, individual, sole proprietor, joint stock company, joint venture or any other legal entity through which business is conducted;

“Excessive price” means a monetary value proposed by a bidder for any procurement which is in the estimation of the Bureau unreasonable and injudicious after consideration of the actual value of the item in question plus all reasonable imputations of cost and profit;

“Goods” means objects of every kind and description including raw materials, products and equipment and objects in solid, liquid or gaseous form and electricity as well as services incidental to the supply of the goods;

“Interim Performance Certificates” means evidence that a contractor or supplier has performed its obligations under a procurement contract up to a level stipulated by the contractor but not meaning completion;

“International Competitive Bidding” means the solicitation of bids from both domestic and foreign contractors and suppliers;

“Lowest evaluated responsive bid” is the lowest price bid amongst the bids that meets all the technical requirements and standards as contained in the tender document.

“Margin Of Preference” means the extra mark up on price allowed any domestic contractor or supplier bidding under International Competitive Bidding without being otherwise disadvantageous to the bid in terms of price;

“Minor Value” means a monetary value which is not in excess of the monetary thresholds set for any approving authority by the Bureau;

“Monetary Threshold” means the value limit in Naira set by the Bureau outside of which an approving authority may not award a procurement contract;

“National Competitive Bidding” means the solicitation of bids from domestic contractors and suppliers registered or incorporated to carry on business under Nigeria Law;

“Negotiation” means discussions to determine the terms and conditions of a contract or procurement;

“Open Competitive Bidding” means the offer of prices by individuals or firms competing for a contract, privilege or right to supply specified goods, works, construction or services;

“Procurement” means acquisition;

“Procurement proceedings” means the initiation of the process of effecting a procurement up to award of a procurement contract;

“Procuring entity” means any public body engaged in procurement and includes a Ministry, Extra-Ministerial office, government agency, parastatal and corporation;

“Public Procurement” means the acquisition by any means of goods, works or services by the government;

“Relevant authority” includes Economic and Financial Crimes Commission and Independent Corrupt Practices Commission;

“Services” means the rendering by a contractor or supplier of his time and effort and includes any object of procurement other than goods, works or construction;

“Solicitation Documents” means the bid solicitation documents or any other documents for solicitation of offers, proposals or quotations;

“Special Purpose Goods” means any objects of armaments, ammunition, mechanical, electrical equipment or other thing as may be determined by the President needed by the Armed Forces or Police Force as well as the service incidental to the supply of the objects;

“Substantially Responsive” means the response to bid solicitations which virtually answers to all the needs of a procuring entity as stipulated in the bid solicitation documents;

“Supplier” means a real or legal person that provides supply of goods, contracting of works or consultants;

“Threshold” refers only to the approving and not the actual process of award;

“Validity Period” means the period during which a bidder agrees not to increase the cost of its bid or to remove any components of the bid;

“Works” means all works associated with the construction, reconstruction, demolition, repair or renovation of a building, structure or works such as site preparation, excavation, erection, building, installation of equipment or materials, decoration and finishing, as well as services incidental to construction such as drilling, mapping, satellite photography, seismic investigation and similar services provided pursuant to the procurement of contract, where the value of those services does not exceed that of the construction itself;

**61.** This Act may be cited as the Public Procurement Act, 2007

Short Title.

### **EXPLANATORY MEMORANDUM**

This Act establishes the National Council on Public Procurement and the Bureau of Public Procurement as the regulatory authorities responsible for the monitoring and oversight of public procurement, harmonising the existing government policies and practices by regulating, setting standards and developing the legal framework and professional capacity for Public Procurement in Nigeria.

# Appendix One

## **PUBLIC PROCUREMENT ACT 2007**

SECTION:

### ARRANGEMENT OF SECTIONS

#### **PART 1 – ESTABLISHMENT OF NATIONAL COUNCIL ON PUBLIC PROCUREMENT**

1. Establishment of the National Council on Public Procurement and its membership
2. Functions of the Council.

#### **PART II – ESTABLISHMENT OF THE BUREAU OF PUBLIC PROCUREMENT**

3. The Establishment of the Bureau of Public Procurement.
4. Objectives of the Bureau.
5. Functions of the Bureau.
6. Powers of the Bureau.
7. Director-General and Staff of the Bureau.
8. Principal Officers of the Bureau
9. Other Staff of the Bureau.
10. Staff Regulations.
11. Pension Provisions.
12. Funds of the Bureau
13. Financial Year, Budgeting and Annual Report.
14. Legal Proceedings.

#### **PART III – SCOPE OF APPLICATION**

15. Scope of Application.

#### **PART IV- FUNDAMENTAL PRINCIPLES FOR PROCUREMENTS**

16. Fundamental Principles for Procurement.

#### **PART V – ORGANISATION OF PROCUREMENTS**

17. Approving Authority
18. Procurement Planning.
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20. Accounting Officer.
21. Procurement Planning Committee.
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23. Prequalification of Bidders.
24. Open Competitive Bidding.

#### **PART VI – PROCUREMENT METHODS (GOODS AND SERVICES)**

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25. Bid Security.
27. Submission of Bids
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30. Bid Opening.
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50. General Selection Procedure (Services).
51. Procedure for Selection of Proposal where Price is a Factor
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#### **PART IX- PROCUREMENT SURVEILLANCE AND REVIEW**

53. Bureau to Recommend Investigation.
54. Administrative Review.

#### **PART X -DISPOSAL OF PUBLIC PROPERTY**

55. Disposal of Public Property.
56. Planning of Disposals.

#### **PART XI - CODE OF CONDUCT**

57. Code of Conduct for Public Procurement.

#### **PART XII - OFFENCES**

58. Offences Relating to Public Procurement.

#### **PART XIII - MISCELLANEOUS**

59. Miscellaneous.
60. Interpretation.
61. Short Title.

## PUBLIC PROCUREMENT ACT, 2007

**AN ACT TO ESTABLISH THE NATIONAL COUNCIL ON PUBLIC PROCUREMENT AND THE BUREAU OF PUBLIC PROCUREMENT AS THE REGULATORY AUTHORITIES RESPONSIBLE FOR THE MONITORING AND OVERSIGHT OF PUBLIC PROCUREMENT, HARMONIZING THE EXISTING GOVERNMENT POLICIES AND PRACTICES BY REGULATING, SETTING STANDARDS AND DEVELOPING THE LEGAL FRAMEWORK AND PROFESSIONAL CAPACITY FOR PUBLIC PROCUREMENT IN NIGERIA; AND FOR RELATED MATTERS.**

[4<sup>th</sup> Day of June, 2007]

Enacted by the National Assembly of the Federal Republic of Nigeria

Commencement

### **PART 1 - ESTABLISHMENT OF NATIONAL COUNCIL ON PUBLIC PROCUREMENT**

1. (1) There is established the National Council on Public Procurement (in this Act referred to as "the Council").

Establishment of the National Council on Public Procurement and its Membership.

(2) The Council shall consist of:

- (a) the Minister of Finance as Chairman;
- (b) the Attorney-General and Minister of Justice of the Federation;
- (c) the Secretary to the Government of the Federation;
- (d) the Head of Service of the Federation;
- (e) the Economic Adviser to the President;
- f) Six part-time members to represent;
  - (i) Nigeria Institute of Purchasing and Supply Management;
  - (ii) Nigeria Bar Association;
  - (iii) Nigeria Association of Chambers of Commerce, Industry, Mines and Agriculture;
  - (iv) Nigeria Society of Engineers;
  - (v) Civil Society;
  - (vi) the Media and
- (g) the Director-General of the Bureau who shall be the Secretary of the Council.

(3) Notwithstanding the provisions of subsection (2), the Council may co-opt any person to attend its meeting but the person so co-opted shall not have a casting vote or be counted towards quorum.

(4) The Chairman and other members of the Council shall be appointed by the President.

- (5) Subject to subsection (2) of this section, a member of the Council being:
- (a) the holder of an elective office under the Constitution of Nigeria, shall hold office for a period he remains so elected and no more; and
  - (b) the Director-General of the Bureau shall hold office on such terms and conditions as may be specified in his letter of appointment.

**2. The Council shall:**

Functions of the Council.

- (a) consider, approve and amend the monetary and prior review thresholds for the application of the provisions of this Act by procuring entities;
- (b) consider and approve policies on public procurement;
- (c) approve the appointment of the Directors of the Bureau;
- (d) receive and consider, for approval, the audited accounts of the Bureau of Public Procurement; and
- (e) approve changes in the procurement process to adapt to improvements in modern technology;
- (f) give such other directives and perform such other functions as may be necessary to achieve the objectives of this Act.

**PART II- ESTABLISHMENT OF THE BUREAU OF PUBLIC PROCUREMENT**

**3. (1) There is established an agency to be known as the Bureau of Public Procurement in this Act referred to as "the Bureau".**

The Establishment of the Bureau of Public Procurement

**(2) The Bureau:**

- (a) shall be a body corporate with perpetual succession and a common seal;
- (b) may sue and be sued in its corporate name; and
- (c) may acquire, hold or dispose of any property, movable or immovable for the purpose of carrying out any of its functions under this Act.

**4. The objectives of the Bureau are:**

Objectives of the Bureau

- (a) the harmonization of existing government policies and practices on public procurement and ensuring probity, accountability and transparency in the procurement process;
- (b) the establishment of pricing standards and benchmarks;
- (c) ensuring the application of fair, competitive, transparent, value-for money standards and practices for the procurement and disposal of public assets and services; and
- (d) the attainment of transparency, competitiveness, cost effectiveness and professionalism in the public sector procurement system.

5. The Bureau shall:
- (a) formulate the general policies and guidelines relating to public sector procurement for the approval of the Council;
  - (b) publicize and explain the provisions of this Act;
  - (c) subject to thresholds as may be set by the Council, certify Federal procurement prior to the award of contract;
  - (d) supervise the implementation of established procurement policies;
  - (e) monitor the prices of tendered items and keep a national database of standard prices;
  - (f) publish the details of major contracts in the procurement journal;
  - (g) publish paper and electronic editions of the procurement journal and maintain an archival system for the procurement journal;
  - (h) maintain a national database of the particulars and classification and categorization of federal contractors and service providers;
  - (i) collate and maintain in an archival system, all federal procurement plans and information;
  - (j) undertake procurement research and surveys;
  - (k) organize training and development programmes for procurement professionals;
  - (l) periodically review the socio-economic effect of the policies on procurement and advise the Council accordingly;
  - (m) prepare and update standard bidding and contract documents;
  - (n) prevent fraudulent and unfair procurement and where necessary apply administrative sanctions;
  - (o) review the procurement and award of contract procedure of every entity to which this Act applies;
  - (p) perform procurement audits and submit such report to the National Assembly bi-annually;
  - (q) introduce, develop, update and maintain related database and technology;
  - (r) establish a single internet portal that shall, subject to section 16 (21) to this Act serve as a primary and definitive source of all information on government procurement containing and displaying all public sector procurement information at all times; and
  - (s) coordinate relevant training programs to build institutional capacity.

6. (1) The Bureau shall have the power to:
- (a) enforce the monetary and prior review thresholds set by the Council for the application of the provisions of this Act by the procuring entities;
  - (b) subject to the paragraph (a) of this subsection, issue certificate of “No Objection” for Contract Award” within the prior review threshold for all procurements within the purview of this Act;
  - (c) from time to time stipulate to all procuring entities, the procedures and documentation pre-requisite for the issuance of Certificate of ‘No Objection’ under this Act;
  - (d) where a reason exist:
    - (i) cause to be inspected or reviewed any procurement transaction to ensure compliance with the provisions of this Act,
    - (ii) review and determine whether any procuring entity has violated any provision of this Act;
  - (e) debar any supplier, contractor or service provider that contravenes any provision of this Act and regulations made pursuant to this Act;
  - (f) maintain a national database of federal contractors and service providers and to the exclusion of all procuring entities prescribe classifications and categorizations for the companies on the register;
  - (g) maintain a list of firms and persons that have been debarred from participating in public procurement activity and publish them in the procurement journal;
  - (h) call for such information, documents, records and reports in respect of any aspect of any procurement proceeding where a breach, wrongdoing, default, mismanagement and or collusion has been alleged, reported or proved against a procuring entity or service provider;
  - (i) recommend to the Council, where there are persistent or serious breaches of this Act or regulations or guidelines made under this Act for:
    - (i) the suspension of officers concerned with the procurement or disposal proceeding in issue,
    - (ii) the replacement of the head or any of the members of the procuring or disposal unit of any entity or the Chairperson of the Tenders Board as the case may be,
    - (iii) the discipline of the Accounting Officer of any procuring entity,
    - (iv) the temporary transfer of the procuring and disposal functions of a procuring and disposing entity to a third party procurement agency or consultant, or
    - (v) any other sanction that the Bureau may consider appropriate;
  - (j) call for the production of books of accounts, plans, documents, and examine persons or parties in connection with any procurement proceeding;
  - (k) act upon complaints in accordance with the procedures set out in this Act;

(l) nullify the whole or any part of any procurement proceeding or award which is in contravention of this Act;

(m) do such other things as are necessary for the efficient performance of its functions under this Act.

(2) The Bureau shall serve as the Secretariat for the Council.

(3) The Bureau shall, subject to the approval of the Council, have power to:

(a) enter into contract or partnership with any company, firm or person which in its opinion will facilitate the discharge of its functions;

(b) request for and obtain from any procurement entity information including reports, memoranda and audited accounts and other information relevant to its functions under this Act; and

(c) liaise with relevant bodies or institutions, national and international for effective performance of its functions under this Act.

7. (1) There shall be for the Bureau, a Director-General who shall be appointed by the President, on the recommendation of the Council after competitive selections. Director-General and Staff of the Bureau.

(2) The Director- General shall be:

(a) the Chief Executive and accounting officer of the Bureau;

(b) responsible for the execution of the policy and day to day administration of the affairs of the Bureau; and

(c) a person who possesses the relevant and adequate professional qualification and shall have been so qualified for a period of not less than 15 years.

(3) The Director-General shall hold office:

(a) for a term of 4 years in the first instance and may be re-appointed for a further term of 4 years and no more; and

(b) on such terms and conditions as may be specified in his letter of appointment.

(4) Without prejudice to the provision of this Act, the Director-General of the Bureau may be removed from office at the instance of the President on the basis of gross misconduct of financial impropriety, fraud, and manifested incompetence proven by the Council.

8. (1) The Council shall appoint the principal officers for the Bureau after competitive selection process. Principal Officers of the Bureau.

(2) The principal officers appointed under section 8(1) of this section shall each have the requisite qualification and experience required for the effective performance of the functions of their respective Departments and the Bureau as specified under this Act.

- (3) The Council shall have power to modify the operational structure of the Bureau as may be necessary to enhance the Bureau's duties and functions under this Act.
9. (1) The Council may appoint such officers and other employees as it may, Other Staff of  
the Bureau.  
time to time, deem necessary for the purposes of the Bureau.
- (2) Subject to the Pension Reform Act, the terms and conditions of service (including remuneration, allowances, benefits and pensions) of officers and employees of the Bureau shall be as determined by the Council.
- (3) Without prejudice to the generality of subsection 2 of this section, the Council shall have power to appoint either on transfer or on secondment from any public service in the Federation, such number of employees as may, be required to assist the Bureau in the discharge of any of its functions under the Act and persons so employed shall be remunerated (including allowances) as the Council may consider appropriate.
10. (1) The Council may, subject to the provisions of this Act and within six Staff  
Regulations.  
months of the inauguration, make staff regulations relating generally to the conditions of service of the employees of the Bureau and without prejudice to the foregoing, such regulation may provide for:
- (a) the appointment, promotion and disciplinary control (including dismissal) of employees of the Bureau; and
- (b) appeals by such employees against dismissal or other disciplinary measures.
- (2) Until such regulations are made, any instrument relating to the conditions of service of officers in the civil service of the Federation shall be applicable.
11. Employees of the Bureau shall be entitled to pensions, and other retirement Pension  
Provisions.  
benefits as prescribed under the Pension Act.
- 12 . (1) The Bureau shall establish and maintain a Fund, to be approved by the Funds of the  
Bureau.  
Council into which shall be paid and credited:
- (a) the sums appropriated by the National Assembly for the running of the Bureau;
- (b) all subventions, fees and charges for services rendered or publications made by the Bureau; and
- (c) all other assets which may; from time to time, accrue to the Bureau.
- (2) The Bureau shall charge its fund to meet all its expenditure.
- (3) The Council may make regulations for the Bureau:
- (a) specifying the manner in which assets or the fund of the Bureau are to be held, and regulating the making of payment into and out of the fund; and
- (b) requiring the keeping of proper accounts and records for the purposes of the fund in such form as may be specified in the rules.
- (4) The Bureau may, from time to time, apply the proceeds of the fund for:



(3) A member of the Bureau or the Director-General or any officer or employee of the Bureau shall be indemnified out of the assets of the Bureau against any liability incurred by him in defending any proceeding, whether civil or criminal, if the proceeding is brought against him in his capacity as a member, Director-General, officer or other employee of the Bureau.

(4) A notice, summons or other documents required or authorized to be served upon the Bureau under the provisions of this Act or any other law or enactment may be served by delivering it to the Director-General or by sending it by registered post and addressed to the Director-General at the principal office of the Bureau.

### **PART III-SCOPE OF APPLICATION**

- 15.** (1) The provisions of this Act shall apply to all procurement of goods, works and services carried out by: Scope of Application.
- (a) the Federal Government of Nigeria and all procurement entities;
  - (b) all entities outside the foregoing description which derive at least 35% of the funds appropriated or proposed to be appropriated for any type of procurement described in this Act from the Federation share of Consolidated Revenue Fund.
- (2) The provisions of this Act shall not apply to the procurement of special goods, works and services involving national defence or national security unless the President's express approval has been first sought and obtained.

### **PART IV – FUNDAMENTAL PRINCIPLES FOR PROCUREMENTS**

- 16.** (1) Subject to any exemption allowed by this Act, all public procurement shall be conducted: Fundamental Principles for Procurement.
- (a) subject to the prior review thresholds as may from time to time be set by the Bureau pursuant to section 6(1) (a)-(b):
    - (b) based only on procurement plans supported by prior budgetary appropriations and no procurement proceedings shall be formalized until the procuring entity has ensured that funds are available to meet the obligations and subject to the threshold in the regulations made by the Bureau, has obtained a "Certificate of 'No Objection' to Contract Award" from the Bureau;
  - (c) by open competitive bidding;
  - (d) in a manner which is transparent, timely, equitable for ensuring accountability and conformity with this Act and regulations deriving therefrom;
  - (e) with the aim of achieving value for money and fitness for purpose;
  - (f) in a manner which promotes competition, economy and efficiency; and
  - (g) in accordance with the procedures and timeline laid down in this Act and as may be specified by the Bureau from time to time.

(2) Where the Bureau has set prior review thresholds in the procurement regulations, no funds shall be disbursed from the Treasury or Federation Account or any bank account of any procuring entity for any 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 an award of contract duly issued by the Bureau.

(3) For all cases where the Bureau shall set a prior review threshold, the Bureau shall prescribe by regulation, guidelines and the conditions precedent to the award of Certificate of "No Objection" under this Act.

(4) Subject to the prior review thresholds as may be set by the Bureau, any procurement purported to be awarded without a "Certificate of 'No Objection' to Contract Award" duly issued by the Bureau shall be null and void.

(5) A supplier, contractor or service provider may be a natural person, a legal person or a combination of the two. Suppliers, contractors or service providers acting jointly are jointly and severally liable for all obligations and or responsibility arising from this Act and the non-performance or improper performance of any contract awarded pursuant to this Act.

(6) All bidders in addition to requirements contained in any solicitation documents shall:

(a) possess the necessary:

(i) professional and technical qualifications to carry out particular procurements;

(ii) financial capability;

(iii) equipment and other relevant infrastructure;

(iv) shall have adequate personnel to perform the obligation of the procurement contracts.

(b) possess the legal capacity to enter into the procurement contract;

(c) not be in receivership, the subject of any form of insolvency or bankruptcy proceedings or the subject of any form of winding up petition or proceedings;

(d) have fulfilled all its obligations to pay taxes, pensions and social security contributions;

(e) not have any director who has been convicted in any country for any criminal offence relating to fraud or financial impropriety or criminal misrepresentation or falsification of facts relating to any matter;

(f) accompany every bid with an affidavit disclosing whether or not any officer of the relevant committees of the procurement entity or Bureau is a former or present director, shareholder or has any pecuniary interest in the bidder and confirming that all information presented in its bid are true and correct in all particulars.

(7) The procuring entity may require a bidder to provide documentary evidence or other information it considers necessary as proof that the bidder is qualified in accordance with this Act and the solicitation documents and for this purpose any such requirements shall apply equally to all bidders.

(8) Whenever it is established by a procuring entity or the Bureau that any or a combination of the situations set out exists, a bidder may have its bid or tender excluded from any particular procurement proceeding if:

(a) there is verifiable evidence that any supplier, contractor or consultant has given or promised a gift of money or any tangible item, or has promised, offered or given employment or any other benefit, item or a service that can be quantified in monetary terms to a current or former employee of a procuring entity or the Bureau, in an attempt to influence any action, or decision making of any procurement activity;

(b) a supplier, contractor or consultant during the last three years prior to the commencement of the procurement proceedings in issue, failed to perform or to provide due care in performance of any public procurement;

(c) the bidder is in receivership or is the subject of any type of insolvency proceedings or if being a private company under the Companies and Allied Matters Act, is controlled by a person or persons who are subject to any bankruptcy proceedings or who have been declared bankrupt and or have made any compromises with their creditors within two calendar years prior to the initiation of the procurement proceeding;

(d) the bidder is in arrears regarding payment of due taxes, charges, pensions or social insurance contributions, unless such bidders have obtained a lawful permit with respect to allowance, deference of such outstanding payments thereof in installments;

(e) the bidder has been validly sentenced for a crime committed in connection with a procurement proceeding, or any other crime committed to gain financial profit;

(f) the bidder has in its management or is in any portion owned by any person that has been validly sentence for a crime committed in connection with a procurement proceeding, or other crime committed to gain financial profit; and

(g) the bidder fails to submit a statement regarding its dominating or subsidiary relationships with respect to other parties to the proceedings and persons acting on behalf of the procuring entity participating in same proceedings or whom remains in subordinate relationship with other participants to the proceedings.

(9) In such cases the procuring entity shall inform the Bureau and person referred to in subsection (8) (a)-(g) of the Section, in writing that the bid or tender in question has been excluded and the grounds for the exclusion and to keep a record of same in the file pertaining to the public procurement proceeding in question.

(10) All communications and documents issued by procuring entities and the Bureau shall be in English language.

(11) All communications regarding any matter deriving from this Act or proceedings of public procurement shall be in writing or such other form as may be stipulated by the Bureau.

(12) Every procuring entity shall maintain both file and electronic records of all procurement proceedings made within each financial year and the procurement records shall be maintained for a period of ten years from the date of the award.

(13) Copies of all procurement records shall be transmitted to the Bureau not later than 3 months after the end of the financial year and shall show:

- (a) information identifying the procuring entity and the contractors;
- (b) the date of the contract award;
- (c) the value of the contract; and
- (d) the detailed records of the procurement proceedings.

(14) All unclassified procurement records shall be open to inspection by the public at the cost of copying and certifying the documents plus an administrative charge as may be prescribed from time to time by the Bureau.

(15) The criteria stipulated as the basis upon which suppliers or contractors would be evaluated shall not be changed in the course of any procurement proceeding.

(16) The burden of proving fulfillment of the requirements for participation in any procurement proceeding shall lie on the supplier or contractor.

(17) A contract shall be awarded to the lowest evaluated responsive bid from the bidders substantially responsive to the bid solicitation.

(18) Notwithstanding subsection (16) of this section, the Bureau may refuse to issue a "Certificate of 'No Objection' to Contract Award" on the grounds that the price is excessive.

(19) Pursuant to subsection (17) of this section, the Bureau may direct either that the procurement proceedings be entirely cancelled or that the procuring entity conduct a re-tender.

(20) Pursuant to subsection (18) of this section, the Bureau may either direct that the procurement proceedings be entirely cancelled or that the procuring entity conduct a re-tender.

(21) The accounting officer of a procuring entity and any officer to whom responsibility is delegated are responsible and accountable for any actions taken or omitted to be taken either in compliance with or in contravention of this Act.

(22) The accounting officer of a procuring entity has the responsibility to ensure that the provisions of this Act and the regulations laid down by the Bureau are complied with, and concurrent approval by any Tenders Board shall not absolve the accounting officer from accountability for anything done in contravention of this Act or the regulations laid down hereunder.

(23) Procurement and disposal decisions of a procuring entity shall be taken in strict adherence to the provisions of this Act and any regulations as may from time to time be laid down by the Bureau.

(24) Persons who have been engaged in preparing for a procurement or part of the proceedings thereof may neither bid for the procurement in question or any part thereof either as main contractor or sub-contractor nor may they cooperate in any manner with bidders in the course of preparing their tenders.

(25) A procuring entity shall not request or stipulate that a bidder should engage a particular subcontractor as a requirement for participating in any procurement proceedings.

(26) All procurement contracts shall contain provision for arbitral proceedings as the primary forms of dispute resolution.

(27) The values in procurement documents shall be stated in Nigerian currency and where stated in a foreign currency shall be converted to Nigerian currency using the exchange rate of the Central Bank of Nigeria valid on the day of opening a tender or bid.

(28) All procurement contracts shall contain warranties for durability of goods, exercise of requisite skills in service provision and use of genuine materials and inputs in execution.

## **PART V – ORGANISATION OF PROCUREMENTS**

- 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;
- Approving Authority.
- (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 Tenders Board.
- 18.** Subject to regulations as may from time to time be made by the Bureau under the direction of the Council, a procuring entity shall plan its procurement by:
- Procurement Planning.
- (a) preparing the needs assessment and evaluation;
  - (b) identifying the goods, works or services required;
  - (c) carrying out appropriate market and statistical surveys and on that basis prepare an analysis of the cost implications of the proposed procurement;
  - (d) aggregating its requirements whenever possible, both within the procuring entity and between procuring entities, to obtain economy of scale and reduce procurement cost;
  - (e) integrating its procurement expenditure into its yearly budget;

(f) prescribing any method for effecting the procurement subject to the necessary approval under this Act; and

(g) ensuring that the procurement entity functions stipulated in this section shall be carried out by the Procurement Planning Committee.

- 19.** Subject to regulations as may from time to time be made by the Bureau under direction of Council, a procuring entity shall, in implementing its procurement plans: Procurement Implementation

(a) advertise and solicit for bids in adherence to this Act and guidelines as may be issued by the Bureau from time to time;

(b) to invite two credible persons as observers in every procurement process, one person each representing a recognized;

(i) private sector professional organization whose expertise is relevant to the particular goods or service being procured, and

(ii) non-governmental organization working in transparency, accountability and anti-corruption areas, and the observers shall not intervene in the procurement process but shall have right to submit their observation report to any relevant agency or body including their own organizations or associations;

(c) receive, evaluate and make a selection of the bids received in adherence to this Act and guidelines as may be issued by the Bureau from time to time;

(d) obtain approval of the approving authority before making an award;

(e) debrief the bid losers on request;

(f) resolve complaints and disputes if any;

(g) obtain and confirm the validity of any performance guarantee;

(h) obtain a "Certificate of 'No Objection' to Contract Award" from the Bureau within the prior review threshold as stipulated in section 6 (1)(a) of this Act:

(i) execute all Contract Agreements; and

(j) announce and publicize the award in the format stipulated by this Act and guidelines as may be issued by the Bureau from time to time.

- 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 cases of extra-ministerial departments and corporations the Director-General or officers of coordinate responsibility. Accounting Officer.

(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) constituting the Evaluation Committee;

(g) liaising with the Bureau to ensure the implementation of its regulations.

**21.** (1) For each financial year each procuring entity shall establish a Procurement Planning Committee.

Procurement  
Planning  
Committee.

(2) The Procurement Planning Committee shall consist of:

(a) the accounting officer of the procuring entity or his representative who shall chair the Committee;

(b) a representative of:

(i) the procurement unit of the procuring entity who shall be the Secretary,

(ii) the unit directly in requirement of the procurement,

(iii) the financial unit of the procuring entity,

(iv) the planning, research and statistics units of the procuring entity,

(v) technical personnel of the procuring entity with expertise in the subject matter for each particular procurement, and

(vi) the legal unit of the procuring entity.

**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")

Tenders  
Board.

(2) Subject to the approval of the Council, the Bureau shall, from time to time, prescribe guidelines for the membership of the Tenders Board.

(3) The Tenders Board shall be responsible for the award of procurements of goods, works and services within the threshold set in the regulations.

(4) In all cases where there is a need for pre-qualification, the Chairman of the Tenders Board shall constitute a technical evaluation subcommittee 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.

(5) The decision of the Tenders Board shall be communicated to the Minister for implementation.

**23.** (1) Where a procuring entity has made a decision with respect to the minimum qualifications of suppliers, contractors or service providers by requesting interested persons to submit applications, to pre-qualify, it shall set out precise criteria upon which it seeks to give consideration to the applications and in reaching a decision as to which supplier, contractor or service provider qualifies, shall apply only the criteria set out in the prequalification documents and no more.

Prequalifi-  
cation of  
bidders.

(2) Procuring entities shall supply a set of prequalification documents to each supplier, contractor or consultant that request them, and the price that a procuring entity may charge for the prequalification documents shall reflect only the cost of printing and provision to suppliers or contractors and consultants.

(3) The prequalification document shall include;

(a) instructions to prepare and submit prequalification application;

(b) a summary of the main terms and conditions required for the procurement contract to be entered into as a result of the procurement proceedings;

(c) any documentary evidence or other information that must be submitted by suppliers, contractors or consultants to demonstrate their qualifications;

(d) the manner and place for the submission of applications to pre-qualify and the deadline for the submission, expressed as a specific date and time which allows sufficient time for suppliers, contractors or consultants to prepare and submit their applications, taking into account the reasonable need of the procuring entity; and

(e) any other requirement that may be established by the procuring entity in conformity with this Act and procurement regulations, relating to the preparation and submission of applications to pre-qualify and to the prequalification proceedings.

(4) The procurement entity shall respond to any request by a supplier, contractor or consultant for clarification of the prequalification documents if the request is made at least ten days before the deadline for the submission of applications to pre-qualify.

(5) The response by the procuring entity shall be given within a reasonable time and in any event within a period of at most seven working days so as to enable the supplier, contractor or consultant to make a timely submission of its application to pre-qualify.

(6) The response to any request that might reasonably be expected to be of interest to other suppliers, contractors or consultants shall, without identifying the source of the request, be communicated to other suppliers or contractors or consultants provided with the prequalification documents by the procuring entity.

(7) A procuring entity shall promptly notify each supplier, contractor or consultant which submitted an application to pre-qualify of whether or not it has been pre-qualified and shall make available to any member of the general public upon request, the names of the suppliers, contractors or consultants who have been pre-qualified.

(8) Suppliers, contractors or consultants who have been pre-qualified may participate further in the procurement proceedings.

(9) The procuring entity shall upon request communicate to suppliers, contractors or consultants who have not been pre-qualified, the grounds for disqualification.

(10) The procuring entity may require a supplier, contractor or service provider who has been pre-qualified to demonstrate its qualifications again in accordance with the same criteria used to pre-qualify the supplier, contractor or consultant.

(11) The procuring entity shall promptly notify each supplier, contractor or service provider requested to demonstrate its qualifications again whether or not the supplier, contractor or consultant has done so to the satisfaction of the procuring entity.

(12) The procuring entity shall disqualify any supplier, contractor or service provider who fails to demonstrate its qualification again if requested to do so.

## **PART VI – PROCUREMENT METHODS (GOODS AND SERVICES}**

- 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. Open Competitive Bidding.
- (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.
- (3) The winning bid shall be that which is the lowest evaluated responsive bid which has been responsive to the bid with regards to work specification and standard.
- 25.** (1) Invitation to bid may be either by way of National Competitive Bidding or International Competitive Bidding and the Bureau shall from time to time set the monetary thresholds for which procurements shall fall under either system. Invitations to Bid.
- (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 recognized 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 websites of the procuring entity, at least two national newspapers, and in the procurement journal not less than six weeks before the deadline for submission of the bids for the goods and works.
- 26.** (1) Subject to the monetary and prior review thresholds as may from time to time be set by the Bureau all procurements valued in excess of the sums prescribed by the Bureau shall require a bid security in an amount not more than 2% of the bid price by way of a bank guarantee issued by a reputable bank acceptable to the procuring entity. Bid Security

- (2) The Bureau shall from time to time specify the principal terms and conditions of the required bid security in the tender documents.
- (3) When the procuring entity requires supplies or contractors submitting tenders to provide a bid security, the requirement shall apply to each supplier or contractor.
- 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. Submission of Bids.
- (2) All submitted bids shall be deposited in a secured tamper-proof bid box.
- (3) All bids submitted shall be in English language.
- (4) The procuring entity shall issue a receipt showing the date and time the bid was delivered.
- (5) Any bid received after the deadline for the submission of bids shall not be opened and must be returned to the supplier or contractor which submitted it.
- (6) No communication shall take place between procuring entities and any supplier or contractor after the publication of a bid solicitation other than as provided in this Act.
- 28.** A procuring entity may: Rejection of Bids.
- (a) reject all bids at any time prior to the acceptance of a bid, without incurring thereby any liability to the bidders; and
- (b) cancel the procurement proceedings in the public interest, without incurring any liability to the bidders.
- 29.** (1) The period of validity for a bid shall be the period specified in the tender documents Validity Period of Bids, Modification and Withdrawal of Tenders.
- (2) A procuring entity may request suppliers or contractors to extend the period of validity for an additional specified period of time.
- (3) A supplier or contractor may refuse the request for the extension of bid, in which case the effectiveness of its bid will terminate upon the expiration of the unextended period of effectiveness.
- (4) A supplier or contractor may modify or withdraw its bid prior to the deadline for the submission of bids.
- (5) The modification or notice of withdrawal is effective if it is received by the procurement entity before the deadline for the submission of tenders.
- 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: Bid Opening.
- (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.

31. (1) All bids shall be first examined to determine if they: Examination  
of Bids.

(a) meet the minimum eligibility requirement stipulated in the bidding documents;

(b) have been duly signed

(c) are substantially responsive to the bidding documents; and

(d) are generally in order.

(2) A procuring entity may ask a supplier or a contractor for clarification of its bid submission in order to assist in the examination, evaluation and comparison of bids.

(3) The following shall not be sought, offered or permitted:

(a) changes in prices;

(b) changes of substance in a bid; and

(c) changes to make an unresponsive bid responsive.

(4) Notwithstanding sub-section (3) of this section, the procuring entity may correct purely arithmetical errors that are discovered during the examination of tenders.

(5) The procuring entity shall give prompt notice of the correction to the supplier or contractor that submitted the tender.

(6) A major deviation shall result in a rejection of bid while a minor deviation shall be subject to clarification.

(7) The following shall be considered as major deviations:

(a) with respect to clauses in an offer;

(i) unacceptable sub-contracting.

(ii) unacceptable time schedule if time is of essence,

(ii) unacceptable alternative design, and

(iv) unacceptable price adjustment.

(b) with respect to the status of the bidder:

- (i) the fact that he is ineligible or not pre-qualified, and
  - (ii) the fact that he is uninvited;
- (c) with respect to bid documents, an unsigned bid:
- (d) with respect to time, date and location for submission:
- (i) any bid received after the date and time for submission stipulated in the solicitation document,
  - (ii) any bid submitted at the wrong location.

(8) In cases of major deviations, bids shall not be considered any further and, where unopened, shall be returned as such to the bidder.

(9) In all cases of rejection, a letter stipulating the reasons for rejection shall be sent, and the bidder shall not be permitted to amend his bid to become compliant.

(10) Subject to any provision to the contrary, the following shall be considered as minor deviations:

- (a) the use of codes:
- (b) the difference in standards:
- (c) the difference in materials;
- (d) alternative design;
- (e) alternative workmanship;
- (f) modified liquidated damages;
- (g) omission in minor items;
- (h) discovery of arithmetical errors;
- (i) sub-contracting that is unclear and questionable;
- (j) different methods of construction:
- (k) difference in final delivery date;
- (l) difference in delivery schedule;
- (m) completion period where these are not of essence;
- (n) non-compliance with some technical local regulation;
- (o) payment terms; and
- (p) any other condition that has little impact on the bid.

(11) In cases not mentioned above and where there exists a doubt as to whether a particular condition in a bid is a major or a minor deviation, the following rules shall apply:

- (a) where the impact on the costs is major, it shall be regarded as a major deviation; and

(b) where the impact on the costs is minor, it shall be regarded as a minor deviation.

(12) In cases of minor deviations, written clarification may be obtained from the supplier or contractor and, where applicable, an offer made for the correction of the minor deviation.

(13) Where a supplier or contractor does not accept the correction of a minor deviation, his bid shall be rejected.

(14) At the stage of evaluation and comparison, all minor deviations shall be quantified in monetary terms.

(15) For the rejection of a bid, a written notice shall be given promptly to the supplier.

**32.** (1) For the evaluation and comparison of bids that have been adjudged as valid for the purposes of evaluation, no other method or criteria shall be used except those stipulated in the solicitation documents. Evaluation of Bids.

(2) The objective of bid evaluation shall be to determine and select the lowest evaluated responsive bid from bidders that have responded to the bid solicitation.

(3) In the course of its determination of the lowest evaluated responsive bid from the bidders that have responded to the bid solicitation, the Tenders Board shall, in particular, undertake the following processes as applicable;

- (a) checking of deviations;
- (b) checking of omissions with quantification of same;
- (c) application of discounts, as applicable;
- (d) clarification with bidders of questionable minor deviations;
- (e) quantification in monetary terms of such questionable deviations;
- (f) conversion to common currency;
- (g) calculation and tabulation of bid amount with domestic preference where applicable;
- (h) determination of the lowest calculated prices in order of rank;
- (i) post-qualification of bidders, where applicable;
- (j) listing of rejection of bids, where applicable;
- (k) decision of rejection of all bids where justifiable;
- (l) recommendation for award; and
- (m) writing up of the bid evaluation report.

(4) All relevant factors, in addition to price, that will be considered for the purposes of bid evaluation and the manner in which such factors will be applied shall be stipulated in the solicitation documents.

(5) Such factors shall be calculated in monetary terms as stipulated in the solicitation documents and shall include:

(a) for goods, among others, costs of transportation and insurance, payment schedule, delivery time, operating costs, efficiency, compatibility of the equipment, availability of services and spare parts, related training, safety, environmental benefits or losses by damages;

(b) for works, in addition to factors stipulated in section 34 (1) of this Act, and subject to section 34 (2) of this Act, if time is a critical factor the value of early completion; and

(c) the value of early completion under section 35 (2) of this Act shall not be taken into account unless, in conformity with criteria pre-set in the bidding documents, the conditions of contract provide for commensurate penalties in case of late delivery.

(6) When bid prices are expressed in two or more currencies, the prices of all bids shall be converted to Nigerian currency, according to the rate and date of rate specified in the solicitation documents.

(7) If suppliers were pre-qualified, verification of the information provided in the submission for pre-qualification shall be confirmed at the time of award of contract and award may be denied to a bidder who no longer has the capability or resources to successfully perform the contract.

(8) After opening of bids, information relating to the examination, clarification and evaluation of bids and recommendations concerning award shall not be disclosed to bidders or to persons not officially concerned with the evaluation process until the successful bidder is notified of the award.

**33.** (1) The successful bid shall be that submitted by the lowest cost bidder from the bidders responsive as to the bid solicitation.

Acceptance  
of Bids.

(2) Notwithstanding subsection 1 of this section, the selected bidder needs not be the lowest cost bidder provided the procuring entities can show good grounds derived from the provision of this Act to that effect.

(3) Notice of the acceptance of the bid shall immediately be given to the successful bidder.

**34.** (1) A procuring entity may grant a margin of preference in the evaluation of tenders, when comparing tenders from domestic bidders with those from foreign bidders or when comparing tenders from domestic suppliers offering goods manufactured locally with those offering goods manufactured abroad.

Domestic  
Preferences.

(2) Where a procuring entity intends to allow domestic preferences, the bidding documents shall clearly indicate any preference to be granted to domestic suppliers and contractors and the information required to establish the eligibility of a bid for such preference.

- (3) Margins of preference shall apply only to tenders under international competitive bidding.
- (4) The Bureau shall by regulation from time to time set the limits and the formulae for the computation of margins of preference and determine the contents of goods manufactured locally.
- 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:
- Mobilization Fees.
- (a) in the case of National Competitive Bidding – an unconditional bank guarantee or insurance bond issued by an institution acceptable to the procuring entity; and
- (b) in the case of International Competitive Bidding – an unconditional bank guarantee issued by a banking institution acceptable to the procuring entity.
- (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.
- 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.
- Contract Performance Guarantee.
- 37.** (1) Payment for the procurement of goods, works, and services shall be settled promptly and diligently.
- Interest on Delayed Payments.
- (2) Any payment due for more than sixty days from the date of the submission of the invoice, valuation certificate or confirmation or authentication by the Ministry, Extra-Ministerial Office, government agency, parastatal or corporation shall be deemed a delayed payment.
- (3) All delayed payments shall attract interest at the rate specified in the contract document.
- (4) All contracts shall include terms, specifying the interest for late payment of more than sixty days.
- 38.** (1) Every procuring entity shall maintain a record of the comprehensive procurement proceedings.
- Record of Procurement Proceedings.
- (2) The portion of the record referred to in this section shall, on request, be made available to:
- (a) any person after a tender, proposal, offer or quotation has been accepted or after procurement proceedings have been terminated without resulting in a procurement contract; and
- (b) suppliers, contractors or consultants that submitted tenders, proposals, offers or quotations, or applied for prequalification, after a tender, proposal, offer or quotation has been accepted or procurement proceedings have been terminated without resulting in a procurement contract.

(3) A disclosure of procurement proceeding records, prior to award of contract may be ordered by a court, provided that when ordered to do so by a court, the procurement entity shall not disclose such information, if its disclosure would:

- (a) be contrary to law;
- (b) impede law enforcement; or
- (c) prejudice legitimate commercial interests of the parties;

(4) The procuring entity shall not be liable to suppliers, contractors or service providers for damages owing solely to failure to maintain a record of the procurement proceedings in accordance with this section.

(5) The records and documents maintained by procuring entities on procurement shall be made available for inspection by the Bureau, an investigator appointed by the Bureau and the Auditor-General upon request, and where donor funds have been used for the procurement, donor officials shall also have access upon request to procurement files for the purpose of audit and review.

## **PART VII – SPECIAL AND RESTRICTED METHODS OF PROCUREMENT**

**39.** (1) Notwithstanding the provisions of this Act, the Bureau may issue 'Certification of No Objection' upon conditions hereinafter prescribed: Two Stage Tendering.

(2) A procuring entity shall engage in procurement by two-stage tendering:

(a) where it is not feasible for the procuring entity to formulate detailed specifications for the goods or works or in the case of services, to identify their characteristics and where it seeks tenders, proposals or offers on various means of meeting its needs in order to obtain the most satisfactory solution to its procurement needs.

(b) where the character of the goods or works are subject to rapid technological advances; where the procuring entity seeks to enter into a contract for research, experiment, study or development, except where the contract includes the production of goods in sufficient quantities to establish their commercial viability or to recover research and development costs, where the procuring entity applies this Act to procurement concerned with national security and determines that the selected method is the most appropriate method of procurement; or

(c) where the tender proceedings have been utilized but were not successful or the tenders were rejected by the procuring entity under an open competitive bid procedure and the procuring entity considers that engaging in new tendering proceedings will not result in a procurement contract.

(3) The provisions of this Act as regards the process for open competitive bidding shall apply to two-stage tendering proceedings except to the extent that those provisions vary from this section.

(4) The invitation documents:

(a) shall call upon suppliers or contractors to submit, in the first stage of two-stage tendering proceedings, initial tenders which contain their proposals without a tender price; and

(b) may solicit proposals that relate to technical, quality or other characteristics of the goods, works, or services as well as contractual terms and conditions of supply and may stipulate the professional competence and technical qualifications of the suppliers or contractors.

(5) The procuring entity may, in the first stage, engage in negotiations with any supplier or contractor whose tender has not been rejected under an open competitive bidding procedure with respect to any aspect of its tender.

(6) In the second stage of the two tender proceedings the procuring entity:

(a) shall invite suppliers or contractors whose tenders have not been rejected to submit final tenders with prices on a single set of specifications;

(b) may, in formulating the specifications, delete or modify any aspect of the technical or quality characteristics of the goods, works or services to be procured together with any criterion originally set out in these documents, evaluate and compare tenders and ascertain the successful tender;

(c) may add new characteristics or criteria that conform with this Act;

(d) shall communicate to suppliers or contractors in the invitation to submit firm tenders, any deletion, modification or addition, and

(e) may permit a supplier or contractor who does not wish to submit a final tender to withdraw from the tendering proceedings.

(7) The final tenders shall be evaluated and compared in order to ascertain the successful tender as defined in an open competitive bid.

**40.** (1) Subject to the approval by the Bureau, a procuring entity may for reasons of economy and efficiency engage in procurement by means of restricted tendering if:

Restricted  
Tendering.

(a) the goods, works or services are available only from a limited number of suppliers or contractors;

(b) the time and cost required to examine and evaluate a large number of tenders is disproportionate to the value of the goods, works or services to be procured; or

(c) the procedure is used as an exception rather than norm.

(2) where a procuring entity engages in restricted tendering on the basis that:

(a) the goods, works and services are available only from a limited number of suppliers or contractors, it shall invite tenders from all the suppliers and contractors who can provide the goods, works or services; and

(b) the time and cost required to examine and evaluate a large number of tenders is disproportionate to the value of the goods, works or services, it shall select in a non-discriminatory manner of the number of suppliers or contractors to ensure effective competition;

(3) For the purpose of subsection (2), of this section, the procuring entity shall cause a notice of the selected tendering proceedings to be published in the procurement journal.

(4) The provision of this Act regarding to open competitive bidding procedure shall apply to the selective tendering proceedings, except to the extent that those provisions are varied by this Section.

41. (1) A procuring entity may carry out procurements by requesting for quotations from suppliers or contractors where the value of the goods or works to be procured does not exceed a sum that shall be set in the procurement regulation. Request for Quotations.
- (2) Generally quotations shall be obtained from at least 3 unrelated contractors or suppliers.
- (3) Each contractor or supplier from whom a quotation is requested shall:
- (a) be informed whether any factor other than the charges for the goods, works or services themselves, such as any applicable transportation and insurance charges, customs duties and taxes are to be included in the price; and
  - (b) give only one quotation and shall not be allowed to change or vary the quotation.
- (4) No negotiation shall take place between a procuring entity and a contractor or supplier with respect to a quotation.
- (5) The procurement shall be awarded to the qualified contractor or supplier that gives the lowest priced responsive quotation.
- (6) Where the total value of the procurement is not more than a sum that shall be set in the regulation, the procurement entity may not obtain the Bureau's approval.
42. (1) A procuring entity may carry out any emergency procurement where: Direct Procurement.
- (a) goods, works or services are only available from a particular supplier or contractor, or if a particular supplier or contractor has exclusive rights in respect of the goods, works or services, and no reasonable alternative or substitute exist; or
  - (b) there is an urgent need for the goods, works or services and engaging in tender proceedings or any other method of procurement is impractical due to unforeseeable circumstances giving rise to the urgency which is not the result of dilatory conduct on the part of the procuring entity;
  - (c) owing to a catastrophic event, there is an urgent need for the goods, works or services, making it impractical to use other methods of procurement because of the time involved in using those methods;
  - (d) a procuring entity which has procured goods, equipment, technology or services from a supplier or contractor, determines that:
    - (i) additional supplies need to be procured from that supplier or contractor because of standardization,
    - (ii) there is a need for compatibility with existing goods, equipment, technology or services, taking into account the effectiveness of the original procurement in meeting the needs of the procurement entity;
    - (iii) the limited size of the proposed procurement in relation to the original procurement provides justification,

(iv) the reasonableness of the price and the unsuitability of alternatives to the goods or services in question merits the decision.

(e) the procuring entity seeks to enter into a contract with the supplier or contractor for research, experiment, study or development, except where the contract includes the production of goods in quantities to establish commercial viability or recover research and development costs; or

(f) the procuring entity applies this Act for procurement that concerns national security, and determines that single-source procurement is the most appropriate method of procurement.

(2) The procuring entity:

(a) may procure the goods works or services by inviting a proposal or price quotation from a single supplier or contractor;

(b) shall include in the record of procurement proceedings a statement of the grounds for its decision and the circumstances in justification of single source procurement.

43. (1) A procuring entity may for the purpose of this Act, carry out an emergency procurement where: Emergency Procurement.

(a) the country is either seriously threatened by or actually confronted with a disaster, catastrophe, war, insurrection or Act of God;

(b) the condition or quality of goods, equipment, building or publicly owned capital goods may seriously deteriorate unless action is urgently and necessarily taken to maintain them in their actual value or usefulness; or

(c) a public project may be seriously delayed for want of an item of a minor value.

(2) In an emergency situation, a procuring entity may engage in direct contracting of goods, works and services.

(3) All procurements made under emergencies shall be handled with expedition but along principles of accountability, due consideration being given to the gravity of each emergency.

(4) Immediately after the cessation of the situation warranting any emergency procurement, the procuring entity shall file a detailed report thereof with the Bureau which shall verify same and if appropriate issue a Certification of "No Objection".

#### **PART VIII – PROCUREMENT OF CONSULTANT (SERVICES)**

44. Where a procuring entity wishes to procure services for its needs which are precise and ascertainable: Expression of Interest to Provide Services for Ascertained Needs.

(a) it shall solicit for expression of interest or applications to pre-qualify to provide the services by publishing a notice to that effect in at least 2 national newspapers and the procurement journal;

(b) where the value of the services to be procured is less than one million naira, or with the approval of the Bureau, of such a low value that only national consultants would be interested, the procuring entity may without placing any notice request at least 3 and not more than 10 consultants or service providers to make proposals for the provision of the services in a format stipulating;

(i) a statement of qualifications of the consultant to provide the service;

(ii) a statement of understanding of the procuring entity's needs;

(iii) the methodology for providing the service;

(iv) the time frame for providing the service; and

(v) the cost or fee for the service.

**45.** (1) A procuring entity wishing to procure services for its needs may do so by requesting for proposals when it intends to enter into a contract for the purpose of research, experiment, study or development, except where the contract includes the production of goods in quantities sufficient to establish their commercial viability or to recover research and development cost.

Request for Proposals to Provide Services for Unascertained Needs.

(2) The procuring entity shall procure the services of consultants by soliciting for expressions of interest by publishing a notice to that effect in 2 national newspapers and the procurement journal.

(3) A procuring entity may make direct requests to a limited number of consultants, requesting proposals for the provision of a service if:

(a) the services are only available from no more than 3 consultants;

(b) the time and cost required to examine and evaluate a large number of proposals would be disproportionate to the value of the services to be performed, provided that it invites enough consultants to ensure transparent competition; or

(c) it is in the interest of national defence and security or similar reason of confidentiality.

**46.** (1) Request for proposals shall include:

Content of the Request for Proposals.

(a) the name and address of the procurement entity;

(b) a requirement that the proposals are to be prepared in the English language;

(c) the manner; place and deadline for the submission of proposals;

(d) a statement to the effect that the procuring entity reserves the right to reject proposals;

(e) the criteria and procedures for the evaluation of the qualifications of the consultants;

(f) the requirements on documentary evidence or other information that shall be submitted by consultants to demonstrate their qualifications;

(g) the nature and required characteristics of the services to be procured including the location where the services are to be provided and the time when the services are to be provided;

(h) whether the procuring entity is seeking proposals on various possible ways of meeting its needs;

(i) a requirement that the proposal price is to be expressed in Nigerian currency;

(j) the manner in which the proposal price is to be expressed, including a statement on whether the price covers elements apart from the cost of services, such as reimbursement for transportation, lodging, insurance, use of equipment, duties or taxes;

(k) whether the procedure to ascertain the successful proposal shall be based on the lowest cost or quality and cost or a combination of the lowest cost, quality and criteria other than cost but stipulated in the request for proposals; and

(l) a short list to be made of only national consultants for consulting assignment, contract within a set threshold in the procurement regulation provided that national consultants possess such requisite skills;

(2) The procuring entity shall provide the same information to every consultant requested to submit proposals.

**47.** (1) A consultant shall be allowed to request for clarification on the request from the procuring entity and such request may be made within a reasonable time to be specified.

Clarification and  
Modification of  
Requests for  
Proposals.

(2) A procuring entity may, whether on its initiative or as a result of a request for clarification by a consultant, modify the request for proposals by issuing an addendum at any time prior to the deadline for submission of proposals.

(3) The addendum shall be communicated promptly before the deadline for the submission of proposals to the short listed consultants to whom the procuring entity has provided the request for proposals and shall be binding on those consultants.

(4) If the procuring entity convenes a meeting of consultants, it shall prepare minutes of the meeting containing the issues submitted at the meeting for clarification of the request for proposal and its responses to those issues, without identifying the source of the request for clarifications.

(5) The minutes shall be provided promptly before the deadline for the submission of proposals to the consultants participating in the selection proceedings to enable them take the minutes into account in preparing their proposal.

**48.** (1) The procuring entity shall allow sufficient time for the preparation and submission of the requested proposals but shall in no case give less than 30 days between the issue of the notice or request and the deadline for submission.

Submission  
of Proposals.

(2) The technical and financial proposals shall be submitted simultaneously but in separate envelopes.

(3) A proposal received after the deadline for submission of proposals shall be returned to the sender unopened.

(4) Immediately after the deadline for submission of proposals, the technical proposals shall be opened for evaluation whilst the financial proposals shall remain sealed and kept in a secure bid-box until they are opened publicly.

(5) The technical evaluation committee shall not have access to or insights to the financial proposals until the evaluations including any Tender Boards review are concluded.

49. (1) The procuring entity shall establish criteria to evaluate the proposals and prescribe the relative weight to be accorded to each criterion and the manner in which they are to be applied in the evaluation of: Criteria for Evaluation of Proposals.

(a) the qualification, experience, reliability, professional and managerial competence of the consultant or service provider and of the personnel to be involved in providing the services;

(b) the effectiveness of the proposal submitted by the consultant or service provider in meeting the needs of the procuring entity;

(c) the proposal price, including any ancillary or related cost;

(d) the effect that the acceptance of the proposal will have on the balance of payments position and foreign reserves of the government, the extent of participation by local personnel, the economic development potential offered by the proposal, including domestic investment or other business activity, the encouragement of employment, the transfer of technology, the development of managerial, scientific and operational skills and the counter trade arrangements offered by consultant or service providers; and

(e) national defence and security considerations;

(2) A procuring entity may accord a margin of preference for domestic consultants or service providers, which shall be calculated in accordance with the regulations and guidelines as issued from time to time by the Bureau and shall be reflected in the record of the procurement proceedings.

50. (1) The procuring entity shall select the successful proposal by either choosing the proposal with: General Selection Procedure (Services).

(i) the lowest evaluated price, or

(ii) the best combined evaluation in terms of the general criteria set out in the request for proposals and the price quoted.

(2) The procuring entity shall include in the record of procurement a statement of the grounds and circumstances on which it relied to select either of the procedures in subsection (1) of this section.

(3) Nothing in this section shall prevent the procuring entity from resorting to the use of any impartial panel of experts to make the selection.

51. (1) Where the procuring entity elects to choose the successful proposal based on technical and price factors, it shall establish a weight with respect to quality and technical price factors of the proposals in accordance with the criteria other than price as might have been set out in the request for proposals and rate each proposal in accordance with such criteria and the relative weight and manner of application of the criteria as stipulated in the request for proposals; and then Procedure for Selection of Proposal where Price is a Factor.

(2) The procuring entity shall compare the prices of those proposals that have attained a rating at or above the threshold;

(3) The procuring entity shall notify the consultants whose proposals did not meet the minimum qualifying mark or were non responsive to the invitation for proposals and terms of reference after the evaluation of quality is completed within a period of 14 working days after the decision has been taken by the procurement entity;

(4) The name of the qualifying consultants, the quality scores for the technical component of the proposal shall be read aloud and recorded alongside the price proposed by each consultant or service provider when the financial proposals are opened;

(5) The procuring entity shall prepare the minutes of public opening of financial proposals which shall be part of the evaluation report and shall retain this record.

(6) The successful proposals shall be:

(a) the proposals with the best combined evaluation in terms of the criteria established under subsection (1) of this section from price in the case of quality and cost-based selection;

(b) the proposals with the lowest price in the case of least-cost selection; or

(c) the highest ranked technical proposal within the budget.

(7) The consultants with the winning proposal shall be invited for negotiations, which shall focus mainly on the technical proposals.

(8) The proposed unit rates for staff-months and reimbursable shall not be negotiated unless there are exceptional reasons.

**52.** (1) Where the procuring entity elects to make a quality-based selection, based on consultant's qualifications or single-source selection, it shall engage in negotiation with consultants in accordance with this section.

Selection Procedure where Price is Not a Factor.

(2) The procurement entity shall:

(i) establish a weight with respect to quality and price of the proposals;

(ii) invite for negotiation on the price of its proposal, the consultant that has attained the best rating in accordance with subsection (1) of this section;

(iii) inform the consultants that attained ratings above the weight that may be considered for negotiations if the negotiation with the consultant with the best rating do not result in a procurement contract; and

(iv) inform the consultant with the best rating, that it is terminating the negotiation if it becomes apparent to the procuring entity that the negotiation with that consultant invited under subsection (b) will not result in a procurement contract.

(3) The procuring entity shall, if negotiations with the consultant with the best rating fail, invite the consultant that obtained the second best rating, and if the negotiations with that consultant do not result in a procurement contract, the procuring entity shall invite the other suppliers or contractors for negotiations on the basis of their rating until it arrives at a contract or rejects the remaining proposals.

(4) The procuring entity shall treat proposals and any negotiations on selection procedure as confidential and avoid the disclosure of their contents to competing consultants.

## PART IX – PROCUREMENT SURVEILLANCE AND REVIEW

53. (1) The Bureau may review and recommend for investigation by any relevant authority any matter related to the conduct of procurement proceedings by a procuring entity, or the conclusion or operation of a procurement contract if it considers that a criminal investigation is necessary or desirable to prevent or detect a contravention of this Act.

Bureau to  
Recommend  
Investigation.

(2) The relevant authority may in the course of investigation:

(a) require an officer, employee or agent of the procuring entity or bidder, supplier, contractor or consultant to produce any books, records, accounts or documents;

(b) search premises for any books, records, accounts or documents;

(c) examine and make extracts from and copies of books, records, accounts or documents of any procuring entity, bidder, supplier, contractor or consultant;

(d) remove books, records, accounts or documents of the procuring entity, bidder, supplier, contractor or consultant for as long as may be necessary to examine them or make extracts from or copies of them but the investigator shall give a detailed receipt for the books, records, accounts or documents removed;

(e) require an officer, employee or agent of the procurement entity or bidder, supplier, or contractor or consultant;

(i) to explain an entry in the books, records, accounts or documents;

(ii) to provide the investigator with information concerning the management or activities of the procurement entity or bidders as may be reasonably required;

(f) explain an entry in the books, records, accounts or documents; and

(g) provide the investigator with information concerning the management or activities of the procurement entity or bidders as may be reasonably required.

(3) The Bureau may, pursuant to the advice of the procuring entity, results of its review of a procurement or report of investigation by a relevant government agency issue a variation order requiring a contractor at this own expense to repair, replace, or to do anything in his or her contract left undone or found to have been carried out with inferior or defective materials or with less skill and expertise than required by the contract of award.

(4) The Bureau shall, if satisfied that there has been a contravention of this Act or any regulations in relation to procurement proceedings or procurement contracts, take action to rectify the contravention which action shall include:

(a) nullification of the procurement proceedings;

(b) cancellation of the procurement contract;

- (c) ratification of anything done in relation to the proceedings; or
- (d) a declaration consistent with any relevant provision of this Act.

(5) On completion of the investigation, the relevant authority shall if an offence is disclosed, take all necessary steps to commence prosecution and inform the Bureau and the procurement entity accordingly, but where no offence is disclosed, the file shall be closed and the Bureau and procuring entity shall be duly informed.

**54.** (1) 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.

Administrative  
Review.

(2) A complaint by a bidder against a procuring or disposing entity shall first be submitted in writing to the accounting officer who shall:

(a) within fifteen working days from the date the bidder first became aware of the circumstances giving rise to the complaint or should have become aware of the circumstances, whichever is earlier;

(b) on reviewing a complaint, the accounting officer shall make a decision in writing within 15 working days indicating the corrective measures to be taken if any, including the suspension of the proceedings where he deems it necessary and giving reasons for his decision; or

(c) where the accounting officer does not make a decision within the period specified in sub-section (2)(b).

(3) The bidder is not satisfied with the decision of the accounting officer, the bidder may make a complaint to the Bureau within 10 working days from the date of communication of the decision of the accounting officer.

(4) Upon receipt of a complaint, the Bureau shall promptly;

(a) give notice of the complaint to the respective procuring or disposing entity and suspend any further action by the procuring or disposing entity until the Bureau has settled the matter;

(b) unless it dismisses the complaint;

(i) prohibit a procuring or disposing entity from taking any further action;

(ii) nullify in whole or in part an unlawful act or decision made by the procuring or disposing entity;

(iii) declare the rules or principles that govern the subject matter of the complaint; and

(iv) revise an improper decision by the procuring or disposing entity or substitute its own decision for such a decision.

(5) Before taking any decision on a complaint, the Bureau shall notify all interested bidders of the complaint and may take into account representations from the bidders and from the respective procuring or disposing entity.

(6) The Bureau shall make its decision within twenty-one working days after receiving the complaint, stating the reasons for its decisions and remedies granted, if any.

(7) Where the Bureau fails to render its decision within the stipulated time, or the bidder is not satisfied with the decision of the Bureau, the bidder may appeal to the Federal High Court within 30 days after the receipt of the decision of the Bureau, or expiration of the time stipulated for the Bureau to deliver a decision.

## **PART X – DISPOSAL- OF PUBLIC PROPERTY**

- 55.** (1) This section shall apply subject to the Public Enterprises (Privatization and Commercialization) Act 1999. Disposal of Public Property.
- (2) For the purposes of this Act, every procuring entity shall also be disposing entity.
- (3) The open competitive bidding shall be the primary source of receiving offers for the purchase of any public property offered for sale.
- (4) The Bureau shall, with the approval of the Council:
- (a) determine the applicable policies and practices in relation to the disposal of all public property;
  - (b) issue guidelines detailing operational principles and organizational modalities to be adopted by all procuring entities engaged in the disposal of public property; and
  - (c) issue standardized document, monitor implementation, enforce compliance and set reporting standards that shall be used by all procuring entities involved in the disposal of public property.
- (5) For the purposes of this Act, public property is defined as resources in the form of tangible and non-tangible assets (ranging from serviceable to the unserviceable):
- (a) created through public expenditure;
  - (b) acquired as a gift or through deeds;
  - (c) acquired in respect of intellectual or proprietary rights;
  - (d) acquired on financial instruments (including shares, stocks, bonds, etc); and
  - (e) acquired by good will and any other gifts of the Federal Government.
- (6) The means of the disposal of public assets shall include:
- (a) sale and rental;
  - (b) lease and hire purchase;
  - (c) licenses and tenancies;
  - (d) franchise and auction;
  - (e) transfers from one government department to another with or without financial adjustment; and
  - (f) offer to the public at an authorized variation.

56. (1) Before slating any public property for disposal, the accounting officer (whether acting in his own authority or at the direction of any superior or other authority) in charge of any public property set for disposal shall authorize the preparation of a valuation report for such property by an independent Evaluator, or such professional with the appropriate competence to carry out the valuation.
- (2) The disposal of assets whether or not listed in the Assets register for a procuring entity shall be planned and integrated into the income and expenditure budget projection of the procuring entity.
- (3) The disposal of assets referred to in subsection (2) of this section shall be timed to take place when the most advantageous returns can be obtained for the asset in order to maximize revenue accruing to the government.
- (4) All procuring entities shall distribute responsibilities for the disposal of public property between the procurement unit and the Tenders Board.

Planning  
of  
Disposals.

## PART XI – CODE OF CONDUCT

57. (1) The Bureau shall, with the approval of the Council, stipulate a Code of Conduct for all public officers, suppliers, contractors and service providers with regards to their standards of conduct acceptable in matters involving the procurement and disposal of public assets.
- (2) The conduct of all persons involved with public procurement, whether as official of the Bureau, a procuring entity, supplier, contractor or service provider shall at all times be governed by principles of honesty, accountability, transparency, fairness and equity.
- (3) All officers of the Bureau, members of Tenders Boards and other persons that may come to act regarding the conduct of public procurements shall subscribe to an oath as approved by Council.
- (4) All persons in whose hands public funds may be entrusted for whatever purpose should bear in mind that its utilization should be judicious.
- (5) Where a transaction involves the disposal of assets, principles of honesty, accountability, transparency, fairness and equity shall continue to apply to the same extent as where it involves procurement.
- (6) These principles shall apply at all times, particularly when:
- (a) making requisition for or planning of procurements;
  - (b) preparing solicitation documents;
  - (c) receiving offers in response to any form of solicitation towards a procurement or disposal;
  - (d) evaluating and comparing offers confidentially and in complete neutrality;
  - (e) protecting the interest of all parties without fear or favor; and
  - (f) obviating all situation likely to render an officer vulnerable to embarrassment or undue influence.

Code of  
Conduct for  
Public  
Procurement

(7) All public officers shall handle public procurement and disposal of assets by:

- (a) ensuring adequate time for preparing offers;
- (b) complying with this Act and all derivative regulations; and
- (c) maintaining strict confidentiality until completion of a contract.

(8) All public officers involved in public procurement and disposal of assets shall maintain the highest standards of ethics in their relationships with persons real or corporate who seek government commerce whether as a bidder, supplier, contractor or service provider by developing transparent, honest and professional relationships with such persons.

(9) Every public officer involved directly or indirectly in matters of public procurement and disposal of assets shall:

- (a) divest himself of any interest or relationships which are actually or potentially inimical or detrimental to the best interest of government and the underlining principles of this Act; and
- (b) not engage or participate in any commercial transaction involving the federal government, its ministries, extra-ministerial departments, corporations where his capacity as public officer is likely to confer any unfair advantage – pecuniary or otherwise on him or any person directly related to him.

(10) Any person engaged in the public procurement and disposal of assets who has assumed, or is about to assume, a financial or other business outside business relationship that might involve a conflict of interest, must immediately declare to the authorities any actual or potential interest.

(11) Such a declaration shall be given such consideration at the relevant level as is necessary so that, where it is seen that remedial action is taken, a conflict of interest is present.

(12) A conflict of interest exists where a person:

- (a) possesses an interest outside his official duties that materially encroaches on the time or attention which should otherwise be devoted to affairs of government;
- (b) possesses a direct or indirect interest in or relationship with a bidder, supplier, contractor or service provider that is inherently unethical or that may be implied or constructed to be, or make possible personal gain due to the person's ability to influence dealings;
- (c) entertains relationships which are unethical, rendering his attitude partial toward the outsider for personal reasons or otherwise inhibit the impartiality of the person's business judgments;
- (d) places by acts or omissions the procuring entity he represents or the Government in an equivocal, embarrassing or ethically questionable position;

(e) entertains relationships compromising the reputation or integrity of the procuring entity he represents or the Government;

(f) receives benefits by taking personal advantage of an opportunity that properly belongs to the procuring entity he represents or the Government;

(g) creates a source of personal revenue or advantage by using public property which comes into his hands either in course of his work or otherwise; and

(h) discloses confidential information being either the property of his procuring entity, the Government or to a supplier, contractor or service provider to unauthorized persons.

(13) A person involved in the disposal of assets, shall not either by a third party or by himself be interested in any manner in buying directly or indirectly these assets and shall not have or obtain any type of advantage or revenue from the disposal for a period of three years after the disposal.

## PART XII – OFFENCES

- 58.** (1) Any natural person not being a public officer who contravenes any provision of this Act commits an offence and is liable on conviction to a term of imprisonment not less than 5 calendar years but not exceeding 10 calendar years without an option of fine. Offences  
Relating to  
Public  
Procurement.
- (2) Any offence in contravention of this Act shall be tried by the Federal High Court.
- (3) Prosecution of offences under this Act shall be instituted in the name of the Federal Republic of Nigeria by the Attorney General of the Federation or such other officer of the Federal Ministry of Justice as he may authorize so to do, and in addition, without prejudice to the Constitution of the Federal Republic of Nigeria 1999, he may:
- (a) after consultation with the Attorney General of any state of the Federation, authorize the Attorney General or any other officer of the Ministry of Justice of that State; or
  - (b) if the relevant authority so requests, authorize any legal practitioner in Nigeria to undertake such prosecution directly or assist therein.
- (4) The following shall also constitute offences under this Act:
- (a) entering or attempting to enter into a collusive agreement, whether enforceable or not, with a supplier, contractor or consultant where the prices quoted in their respective tenders, proposals or quotations are or would be higher than would have been the case had there not been collusion between the persons concerned;
  - (b) conducting or attempting to conduct procurement fraud by means of fraudulent and corrupt acts, unlawful influence, undue interest, favor, agreement, bribery or corruption;
  - (c) directly, indirectly or attempting to influence in any manner the procurement process to obtain an unfair advantage in the award of a procurement contract;

- (d) splitting of tenders to enable the evasion of monetary thresholds set;
  - (e) bid-rigging;
  - (f) altering any procurement document with intent to influence the outcome of a tender proceeding;
  - (g) uttering or using fake documents or encouraging their use; and
  - (h) willful refusal to allow the Bureau or its officers to have access to any procurement records.
- (5) Any person who while carrying out his duties as an officer of the Bureau, or any procuring entity who contravenes any provision of this Act commits an offence and is liable on conviction 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.
- (6) Any legal person that contravenes any provision of this Act commits an offence and is liable on conviction 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.
- (7) Where any legal person shall be convicted pursuant to subsection (4) of this section, every director of the company as listed on its records at the Corporate Affairs Commission shall be guilty of an offence and is liable on conviction to a term of imprisonment not less than 3 calendar years but not exceeding 5 calendar years without an option of fine.
- (8) An alternation pursuant to subsection 4(f) shall include::
- (a) insertion of documents such as bid security or tax clearance certificate which were not submitted at bid opening; and
  - (b) request for clarification in a manner not permitted under this Act.
- (9) Collusion shall be presumed from a set of acts from which it can be assumed that there was an understanding, implicit, formal or informal, overt or covert under which each person involved reasonably expected that the other would adopt a particular course of action which would interfere with the faithful and proper application of the provisions of this Act.
- (10) Bid-rigging pursuant to subsection 4(e) means an agreement between persons whereby;
- (a) offers submitted have been pre-arranged between them; or
  - (b) their conduct has had the effect of directly or indirectly restricting free and open competition, distorting the competitiveness of the procurement process and leading to an escalation or increase in costs or loss of value to the national treasury.
- (11) For the purposes of the presumption under section 51(7) of this section, consideration shall be given to a suspect's ability to control the procurement

proceedings or to control a solicitation or the conditions of the contract in question, whether total or partial.

(12) For the purposes of section 59(5) of this section, it shall be sufficient to prove that a reasonable business person should have known that his action would result in his company or firm having an undue advantage over other bidders to the detriment of the national treasury.

### PART XIII – MISCELLANEOUS

59. (1) The fixing of the seal of the Bureau shall be authenticated by the signature of the Chairman, the Director-General or of any other person authorized generally or specially to act for that purpose by the Council. Miscellaneous

(2) Any contract or instrument which, if made or executed by a person not being a body corporate, would not be required to be under seal may be made or executed on behalf of the Bureau by the Director-General or any person generally or specially authorized to act for that purpose by the Council.

(3) Any document purporting to be a document duly executed under the seal of the Bureau shall be received in evidence and shall unless and until the contrary is proved, be presumed to be so executed.

(4) The validity of any proceeding of Council or of a Committee thereof shall not be adversely affected by any vacancy in the membership of the Council or Committee, or by any defect in the appointment of a member of the Council or of a Committee, or by reason that a person not entitled to do so took part in the proceedings of the Council or Committee.

60. In this Act: Interpretation

“Accounting officer” means the person charged with line supervision of the conduct of all procurement processes;

“Approving authority” means the person charged with overall responsibility for the functioning of a ministry, extra-ministerial department or corporation;

“Assets” includes tangible and intangible things which have been or may be sold or procured for consideration;

“Bid security” means a form of security assuring the bidder shall not withdraw a bid within the period specified for acceptance and shall execute a written contract within the time specified in the bid;

“Debar” means the placing of a firm, company or natural person on a list of persons ineligible to participate in any procurement proceedings under this Act;

“Certificate Of No Objection” means the document evidencing and authenticating that due process and the letters of this Act have been followed in the conduct of a procurement proceeding and allowing for the procuring entity to enter into contract or effect payments to contractors or suppliers from the Treasury;

“Contract” means an agreement entered in writing;

“Contractor or supplier” means any potential party to a procurement contract with the procuring entity and includes any corporation, partnership, individual, sole proprietor, joint stock company, joint venture or any other legal entity through which business is conducted;

“Excessive price” means a monetary value proposed by a bidder for any procurement which is in the estimation of the Bureau unreasonable and injudicious after consideration of the actual value of the item in question plus all reasonable imputations of cost and profit;

“Goods” means objects of every kind and description including raw materials, products and equipment and objects in solid, liquid or gaseous form and electricity as well as services incidental to the supply of the goods;

“Interim Performance Certificates” means evidence that a contractor or supplier has performed its obligations under a procurement contract up to a level stipulated by the contractor but not meaning completion;

“International Competitive Bidding” means the solicitation of bids from both domestic and foreign contractors and suppliers;

“Lowest evaluated responsive bid” is the lowest price bid amongst the bids that meets all the technical requirements and standards as contained in the tender document;

“Margin Of Preference” means the extra mark up on price allowed any domestic contractor or supplier bidding under International Competitive Bidding without being otherwise disadvantageous to the bid in terms of price;

“Minor Value” means a monetary value which is not in excess of the monetary thresholds set for any approving authority by the Bureau;

“Monetary Threshold” means the value limit in Naira set by the Bureau outside of which an approving authority may not award a procurement contract;

“National Competitive Bidding” means the solicitation of bids from domestic contractors and suppliers registered or incorporated to carry on business under Nigeria Law;

“Negotiation” means discussions to determine the terms and conditions of a contract or procurement;

“Open Competitive Bidding” means the offer of prices by individuals or firms competing for a contract, privilege or right to supply specified goods, works, construction or services;

“Procurement” means acquisition;

“Procurement proceedings” means the initiation of the process of effecting a procurement up to award of a procurement contract;

“Procuring entity” means any public body engaged in procurement and includes a Ministry, Extra-Ministerial office, government agency, parastatal and corporation;

“Public Procurement” means the acquisition by any means of goods, works or services by the government;

“Relevant authority” includes Economic and Financial Crimes Commission and Independent Corrupt Practices Commission;

“Services” means the rendering by a contractor or supplier of his time and effort and includes any object of procurement other than goods, works or construction;

“Solicitation Documents” means the bid solicitation documents or any other documents for solicitation of offers proposals or quotations;

“Special Purpose Goods” means any objects of armaments, ammunition, mechanical, electrical equipment or other thing as may be determined by the President needed by the Armed Forces or Police Force as well as the service incidental to the supply of the objects;

“Substantially Responsive” means the response to bid solicitations which virtually answers to all the needs of a procuring entity as stipulated in the bid solicitation documents;

“Supplier” means a real or legal person that provides supply of goods, contracting of works or consultants;

“Threshold” refers only to the approving and not the actual process of award;

“Validity Period” means the period during which a bidder agrees not to increase the cost of its bid or to remove any components of the bid;

“Works” means all works associated with the construction, reconstruction, demolition, repair or renovation of a building, structure or works such as site preparation, excavation, erection, building, installation of equipment or materials, decoration and finishing, as well as services incidental to construction such as drilling, mapping, satellite photography, seismic investigation and similar services provided pursuant to the procurement of contract, where the value of those services does not exceed that of the construction itself;

61. This Act may be cited as the Public Procurement Act, 2007

Short title.

### EXPLANATORY MEMORANDUM

This Act establishes the National Council on Public Procurement and the Bureau of Public Procurement as the regulatory authorities responsible for the monitoring and oversight of public procurement, harmonizing the existing government policies and practices by regulating, setting standards and developing the legal framework and professional capacity for Public Procurement in Nigeria.

## Appendix Two

### BUREAU DOCUMENTS

#### BUREAU OF PUBLIC PROCUREMENT (BPP)

#### THE APPROVED REVISED THRESHOLDS FOR SERVICE-WIDE APPLICATION

The Approved Revised Thresholds and Composition of Tenders Boards are as follows:-

(a) **Procurement Approval Thresholds for Bureau of Public Procurement, Tenders Boards and Accounting Officers (PSs and CEOs) for All Ministries, Departments and Agencies**

Approving Authority/ "No Objection" to award	Goods	Works	Non- Consultant Services	Consultant Services
BPP issues "No Objection" to award/ FEC approves	N100 million and above	N1.0 billion and above	N100 million and above	N100 million and above
Ministerial Tenders Board	N5 million and above but less than N100 million	N10 million and above but less than N1.0 billion	N5 million and above but less than N100 million	N5 million and above but less than N100 million
Parastatal Tenders Board	N2.50 million and above but less than N50 million	N5 million and above but less than N250 million	N2.50 million and above but less than N50 million	N2.50 million and above but less than N50 million
Accounting Officer: Permanent Secretary	Less than N5 million	Less than N10 million	Less than N5 million	Less than N5 million
Accounting Officer: Director General/CEO	Less than N2.50 million	Less than N5 million	Less than N2.50 million	Less than N2.50 million

(b) **Revised Special Financial Limits and Thresholds, Procurement**

**Methods and Thresholds of Application and for Expenditure Related to the Nigerian National Petroleum Corporation:-**

<b>Approving Authority/ “No Objection” to award</b>	<b>Special Works (NNPC)</b>
BPP issues “No Objection” to award/FEC approves	N2.70 billion (US\$20m) and above
Ministerial Tenders Board ( <i>NNPC Tenders Board</i> )	N1.40 billion (US\$10m) and above but less than N2.70 billion (US\$20m) For NNPC Tenders Board
Group Headquarters/Tenders Board	N540 million (US\$4m) and above but less than N1.40 billion (US\$10m) For GEC NNPC
Parastatal Tenders Board (Refinery & Petrochemicals/Exploration & Production/Corporate Supply Chain Tenders Boards)	N270 million (US\$2m) and above but less than N540 million (US\$4m) For <i>SBU B/GED/ (DEXCOM)</i>
Parastatal Tenders Board (Minor Refinery and Petrochemicals/Exploration and Production/Corporate Supply Chain Tenders Board)	N70m (US\$0.5m) and above but less than N270m (US\$2m) For <i>SBU B/GED/ (MEXCOM)</i>
Parastatal Tenders Board (Business Unit Refinery and Petrochemicals/Exploration and Production/Corporate Supply Chain Tenders Board)	N13.50 million (US\$0.10m) and above but less than N70million (US\$0.50million) for SBU ED/MT/(DIVCOM)
Accounting Officer: Permanent Secretary (Group Managing Director at CHQ Level)	Less than N40million (US\$0.30m)
Accounting Officer: Director General/CEO (Managing Directors at SBU Level)	Less than N13.50million (US\$0.10m)

(C) Procurement Methods and Thresholds of Application

Procurement/ Selection Method and Prequalification	Goods (N)	Works (N)	Non- Consultant Services (N)	Consultant Services (N)
International/ National Competitive Bidding	N100 million and above	N1 billion and above	N100 million and above	Not Applicable
National Competitive Bidding	N2.5 million and above but less than N100 million	N2.5 million and above but less than N1 billion	N2.5 million and above but less than N100 million	Not Applicable
Shopping (Market Survey)	Less than N2.5 million	Less than N2.5 million	Less than N2.5 million	Not Applicable
Single Source/ Direct Contracting (Minor Value Procurement)	Less than N0.25 million	Less than N0.25 million	Less than N0.25 million	Less than N0.25 million
Prequalification	N100 million and above	N300 million and above	N100 million and above	Not Applicable
Quality and Cost Based	Not Applicable	Not Applicable	Not Applicable	N25 million and above
Consultant Qualifications	Not Applicable	Not Applicable	Not Applicable	Less than N25 million
Least Cost	Not Applicable	Not Applicable	Not Applicable	Less than N25 million

(d) Composition of Tenders Boards

<b>Ministry:</b>		
	Chairman:-	Permanent Secretary
	Members:-	Heads of Departments
	Secretary	Head of Procurement
<b>Parastatals:</b>		
	Chairman:-	Chief Executive Officer
	Members:	Heads of Departments
	Secretary:	Head of Procurement

2. The Bureau of Public Procurement wishes to observe that by these new thresholds, greater procurement responsibilities has been placed on the Ministries, Departments and Agencies while the **Bureau would be paying greater attention during post-procurement reviews in compliance with Clause 16(13), Part IV (Fundamental Principles for Procurements) of the 2007 Public Procurement Act**, which states that-

"Copies of all procurement records shall be transmitted to the Bureau not later than 3 months after the end of the financial year and shall show:-

- (a) Information identifying the procuring entity and the contractors;
- (b) The date of the Contract award;
- (c) The value of the Contract, and,
- (d) The detailed records of the procurement proceedings",

### **NOTES**

ONLY PROJECTS in excess of N300m for Works and NI00m for Goods & Services qualify for Pre-qualification.

In other words Ministries/Department/Agencies (MDAs) should go straight to invite Bids for Tender for projects costing less than NI00m for Goods (Supply Items) and N300m for works (Construction).

**(e) Procurement Plan - For Works Projects Under National/International Competitive Bid: Above N300 Million**

		<b>ACTIVITY</b>	<b>BPP Time - Line</b>
<b>S/N</b>	<b>Project Name</b>		
1	Procurement Method i. Selective ii. Open		
2	Preparation of Bid Document	(Usually before budgeting)	2-3 weeks
3	Pre- qualification	Advertisement	2 weeks
		Closing & Opening of Bid.	Nil - Within Advert period
		Bid Evaluation.	1-3 weeks
4	Authorisation		Nil - Global Authorisation at Procurement Planning Stage
5	Tendering	Collection and Return of Bid Documents.	6 Weeks
		Closing & Opening of Bid.	Nil - Within the Tender period.
		Bid Evaluation	2-3 weeks.
6	Certificate of NO OBJECTION		2 weeks.
7	Contract Finalization	PCC/FEC Approval	2 weeks
		Contract Award	3 weeks
		Agreement	-
8	Contract Implementation	Mobilization	-
		Delivery Date	-
		Remarks	-
	Total (For Contract Award)		23 Weeks

**Note:**

- Preparation of bid documents for large projects are done as consultancy services usually as separate contracts.
- BPP Time-Lines assumes that the procuring entity has finished all designs as directed by Mr. President

**(f) Procurement Plan For Goods and Services (Projects Under National/  
International Competitive Bid: Above N100 Million**

		<b>Time line</b>	
		<b>ACTIVITY</b>	<b>BPP</b>
<b>S/N</b>	<b>Project Name</b>		
1	Procurement Method i. Selective ii. Open		
2	Preparation of Bid Document		2 Weeks
3	Pre-qualification	Advertisement	2 Weeks
		Closing and Opening of Bid	Nil Within Advert Period
		Bid Evaluation	1-3 Weeks
4	Authorisation		Nil - Global Authorisation at Procurement Planning Stage
5	Tendering	Collection and Return of Bid Documents	6 Weeks
		Closing and Opening of Bid.	Nil- Within the Tender Period.
		Bid Evaluation.	2-3weeks.
6	Certificate of NO OBJECTION		2 Weeks
7	Contract Finalization	PCC/FEC Approval	2 Weeks
		Contract Award	3 Weeks
		Agreement	-
8	Contract implementation	Mobilization	-
		Delivery Date	-
		Remarks.	-
		<b>Total (For Contract Award)</b>	<b>23 Weeks</b>

**(g) Procurement Plan- For Works/Project Under National Competitive Bid;  
Below N300 million**

		Time - Line	
		Activity	BPP
S/N	Project Name		
1	Procurement Method i. Selective ii. Open		
2	Preparation of Bid Document	Pre- Procurement stage.	1 week- Adopt BPP standard bidding Document.
3	Authorization		Nil- Global Authorization at Procurement Planning Stage.
4	Tendering (Technical and Financial Bids to be opened at the same time)	Collection and return of Bid Documents.	6 weeks
		Closing & Opening of Bid	Nil- within the Tender period.
		Bid Evaluation	2-3 weeks.
5	Certificate of NO OBJECTION		2 weeks.
6	Contract Finalization	PCC/FEC Approval	2 weeks
		Contract Award	3 weeks
		Agreement	-
7	Contract implementation	Mobilization	-
		Delivery Date	-
		Remarks	
Total (For Contract Award)			17 weeks.

**(h) Services Project Under National Competitive Bid: Below N100 Million**

		Time-Line	
		ACTIVITY	BPP
<b>S/N</b>	<b>Project Name</b>		
1	Procurement Method i. selective ii. Open		
2	Preparation of Bid Document	Pre- procurement Stage	1 week- Adopt BPP Standard Bidding Document.
3	Authorization		Nil- Global Authorization of Procurement Planning Stage.
4	Tendering (Technical and Financial Bids to be opened at the same time)	Collection and Return of Bid Documents	6 weeks.
5	Certificate of NO OBJECTION	Closing & Opening of Bid.	Nil- Within the Tender Period
		Bid Evaluation	2-3 weeks
			2 Weeks.
6	Contract Finalization	PCC/FEC Approval	2 Weeks.
		Contract Award	3 Weeks
		Agreement	-
7	Contract implementation	Mobilization	-
		Delivery Date	-
		Remarks	
8	Total (For Contract Award)		17 Weeks

# Appendix Three

## CIVIL SOCIETY DOCUMENTS

### 1. PUBLIC PROCUREMENT ACT 2007- OBSERVATION CHECKLIST

#### 1. Introduction

- a) Observer's Name:
- b) Observer's Organisation:
- c) Observer's Address (include Telephone, Email and Fax):
- d) Ministry, Department or Agency Observed:
- e) Description of Procurement:
- f) Value of Procurement:
- g) Sources of Procurement Funding and their Respective Percentages:
- h) Name of Accounting Officer:

#### 2. Procurement Plan

- a) Was the procurement plan made available to you? Yes [ ] No [ ]
- b) Did the Procurement Plan:
  - i) contain a Needs Assessment and Evaluation? Yes [ ] No [ ]
  - ii) identify the goods, works or services required? Yes [ ] No [ ]
  - iii) contain cost implications arising from the result of market and statistical surveys? Yes [ ] No [ ]
  - iv) aggregate requirements where possible both within the procuring entity and between procuring entities Yes [ ] No [ ]
- c) Was the procurement contained in the annual budget? Yes [ ] No [ ]
- d) Who prepared the Procurement Plan? List the persons and their designations

#### 3. Procurement Methodology

- a) Which procurement methodology was chosen?
- b) Reasons for choosing the methodology:
- c) Did the methodology comply with the prior review thresholds set by the Bureau? Yes [ ] No [ ]
- d) Is there evidence that tenders have been split to avoid thresholds set by the Bureau? Yes [ ] No [ ]  
If the answer is in the affirmative, provide details

#### 4. Advertisement

- a) Did the procuring entity advertise for bids or proposals? Yes [ ] No [ ]  
If the answer is in the affirmative, where was the advertisement placed?
- i) Notice Board
  - ii) National Newspapers - Specify
  - iii) Procurement Journal
  - iv) Official websites
  - v) Relevant internationally recognised publication
  - vi) Others-specify
- b) How many weeks before the deadline for submission of bids was the bid advertised?
- c) Did the advert contain all necessary information for collection and submission of bids? Yes [ ] No [ ]
- d) Was there any complaint from bidders of non-provision of equal and simultaneous opportunity? Yes [ ] No [ ]  
If the answer is in the affirmative, please give details

## 5. Prequalification

- a) In prequalification proceedings, what documentation did the procuring entity issue to bidders?
- b) Was this document made available to you? Yes [ ] No [ ]
- c) Were there requests for clarifications/complaints? Yes [ ] No [ ]
- d) Did the procuring entity respond to the requests for clarification? Yes [ ] No [ ]
- e) Did the procuring entity communicate other bidders of its response to the request for clarification? Yes [ ] No [ ]

## 6. Bidding

- a) Nature of bidder - natural person or a company?
- b) If a company is bidding, does it have:
- i) Corporate Affairs Commission's registration? Yes [ ] No [ ]
  - ii) financial capacity to execute the procurement? Yes [ ] No [ ]
  - iii) equipment and infrastructure to execute the procurement? Yes [ ] No [ ]
  - iv) the personnel required to executive the contract? Yes [ ] No [ ]
- c) Is the company in receivership, the subject of any form of insolvency or bankruptcy proceedings or the subject of winding up petition? Yes [ ] No [ ]  
If the answer is in the affirmative, please give details

- d) Has the company or individual fulfilled its obligation to pay taxes, pensions and social security contributions? Yes [ ] No [ ]  
If the answer is in the negative, please give details
- e) Has the company any director or senior manager who has been convicted in any country for any criminal offence relating to fraud or financial impropriety or criminal misrepresentation or falsification of facts relating to any matter? Yes [ ] No [ ]  
If the answer is in the affirmative, please give details
- f) If a private company, is it controlled by persons who are subject to any bankruptcy proceedings, who have been declared bankrupt or made compromises with their creditors within the last two calendar years prior to the initiation of procurement proceedings? Yes [ ] No [ ]  
If the answer is in the affirmative, please give details
- g) Has the bidder been sentenced for a crime committed in connection with a procurement proceeding or any other crime committed to gain financial profit? Yes [ ] No [ ]  
If the answer is in the affirmative, please give details
- h) Did the bidder fail to submit a statement regarding dominating or subsidiary relationships with other parties to the procurement proceedings or persons acting for the procuring entity? Yes [ ] No [ ]  
If the answer is in the affirmative, please give details
- i) What was the language of the procurement proceedings?
- j) Was every bid accompanied with an affidavit disclosing lack of pecuniary interest and confirming the contents of the bid as true and correct? Yes [ ] No [ ]
- k) Were any bids excluded and what were the reasons for the exclusion? Yes [ ] No [ ]
- l) Did you observe any conflict of interest, bribery, treating, or inappropriate conduct in the bidding? Yes [ ] No [ ]  
If the answer is in the affirmative, provide details

## 7. Requests for Quotations

- a) How many suppliers were asked to present quotations?
- b) Were there negotiations between the procuring entity and the contractor before the award of the contract?

## 8. Submission of Bids and Bid Security

- a) If bid security was required, did all bidders provide one? Yes [ ] No [ ]
- b) Were the submitted bids placed in a secured tamper proof bid box? Yes [ ] No [ ]

- c) Did the procuring entity issue receipts showing the date and time of submission of bid? Yes [ ] No [ ]
- d) Were bids accepted after the closing date for bid submission? Yes [ ] No [ ]

## 9. Bid Opening

Did the Bid Opening Formalities:

- a) Permit attendees to examine the envelopes in which the bids have been submitted to ascertain that the bids have not been tampered with? Yes [ ] No [ ]
- b) Cause all the bids to be opened in public, in the presence of the bidders and their representatives and any interested member of the public? Yes [ ] No [ ]
- c) Ensure that the bid opening takes place immediately following the deadline stipulated for the submission of bids or any extension thereof? Yes [ ] No [ ]
- d) Ensure that a register is taken of the names and addresses of all those present at the bid opening and the organisations they represent? Yes [ ] No [ ]
- 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 ensure that these are recorded in the minutes of the bid opening? Yes [ ] No [ ]

## 10. Examination of Bids

- a) Did all bids meet the minimum eligibility requirements stipulated in the bidding documents? Yes [ ] No [ ]  
Give details if the answer is no
- b) Were bids
- i) duly signed Yes [ ] No [ ]
  - ii) generally in order? Yes [ ] No [ ]  
(If no, how many were not)
  - iii) substantially Responsive to the Bidding Documents? Yes [ ] No [ ]
  - iv) if bids were rejected during examination, what were the reasons? Give details
- c) How were the following treated during bid examination?
- i) change in prices
  - ii) changes of substance in a bid
  - iii) changes to make an unresponsive bid responsive

- iv) bids received after the date and time for the submission of bids stipulated in the solicitation documents
- v) bids submitted at the wrong location
- d) Did any invalid bid move from the examination to the evaluation stage?  
Yes [ ] No [ ]  
(Provide details where necessary)

## 11. Evaluation of Bids

- a) In evaluation of bids, did the procuring entity use any other criteria apart from the ones stipulated in the bid solicitation documents?  
Yes [ ] No [ ]
- b) Did the evaluation
  - i) check out omissions and quantify same? Yes [ ] No [ ] Not Applicable [ ]
  - ii) apply discounts, as applicable? Yes [ ] No [ ] Not Applicable [ ]
  - iii) clarify with bidders of questionable minor deviations?  
Yes [ ] No [ ] Not Applicable [ ]
  - iv) quantify in monetary terms such questionable deviations?  
Yes [ ] No [ ] Not Applicable [ ]
  - v) convert to common currency? Yes [ ] No [ ] Not Applicable [ ]
  - vi) calculate and tabulate bid amount with domestic preference where applicable?  
Yes [ ] No [ ] Not Applicable [ ]
  - vii) determine the lowest calculated prices in order of rank?  
Yes [ ] No [ ] Not Applicable [ ]
  - viii) post qualification of bidders where applicable?  
Yes [ ] No [ ] Not Applicable [ ]

## 12. Acceptance of Bids

- a) For goods and works, was the successful bid the lowest cost bid from the bids responsive as to the bid solicitation?  
Yes [ ] No [ ]
- b) Were there grounds supported by the PPA to award the contract to another bidder who is not the lowest cost responsive bidder?  
Yes [ ] No [ ]  
Provide explanations
- c) For proposals, what were the criteria for their acceptance as the winner?
- i) The responsive bid or the proposal with the best combined evaluation in terms of general criteria set with respect to technical and price factors in the case of quality and cost based selection. Yes [ ] No [ ]

ii) The responsive bid or proposal with the lowest price in the case of least cost selection Yes [ ] No [ ]

iii) The responsive bid with the highest technical ranking within the budget. Yes [ ] No [ ]

Provide explanations if any

### 13. Tenders Board

List the names and designations of the members of the Tenders Board or technical evaluation committee of the Tenders Board that worked on the procurement

### 14. Certificate of “No Objection” to Contract Award

Did the procuring entity obtain a certificate of “No Objection” to award of contract before awarding the contract? Yes [ ] No [ ]

### 15. Margins of Preference

a) Was a margin of preference applied? Yes [ ] No [ ]

i) if applied, is the procurement under international competitive bidding? Yes [ ] No [ ]

b) Did the solicitation documents indicate that domestic preferences will be applied and the information required to establish eligibility? Yes [ ] No [ ]

### 16. Mobilisation Fees

If mobilization fees have been paid:

a) At what percentage of contract value?

b) Did the contractor provide an unconditional bank guarantee?

### 17. Administrative Review

Timely response by the Accounting officer and Bureau to complaints by bidders?

a) How many working days did it take the Accounting Officer to make a decision?

b) How many working days did it take the Bureau to make a decision? (If applicable)

### 18. Conflict of Interest

In your opinion, (give reasons for your opinion) did the public officers involved

(a) Possess an interest outside his official duties that materially influenced the outcome of the tender? Yes [ ] No [ ]

(b) Possess a direct or indirect interest in or relationship with a bidder, supplier, contractor, or service provider that is inherently unethical or that may be

implied or constructed to be, or make possible personal gain due to the person's ability to influence dealings? Yes [ ] No [ ]

- (c) Entertain relationships which are unethical, rendering his attitude partial towards the outsider for personal reasons or otherwise inhibits the impartiality of the person's judgments? Yes [ ] No [ ]
- (d) Place by acts or omissions the procuring entity he represents or the Government in an equivocal, embarrassing or ethically questionable position? Yes [ ] No [ ]
- (e) Entertain relationships compromising the reputation or integrity of the procuring entity he represents or the Government? Yes [ ] No [ ]
- (f) Receive benefits by taking personal advantage of an opportunity that properly belongs to the procuring entity he represents or the Government? Yes [ ] No [ ]
- (g) Create a source of personal revenue or advantage by using public property which comes into his hands either in course of his work or otherwise? Yes [ ] No [ ]
- (h) Disclose confidential information being either the property of his procuring entity, the Government, a supplier, contractor or service provider to unauthorized persons in bid to influence bidding outcomes? Yes [ ] No [ ]

**19. Concluding Comments**

- a) In your opinion was the public procurement
  - i) transparent?
  - ii) timely?
- b) Did the public procurement promote
  - i) competition?
  - ii) value for money?
  - iii) fitness for purpose?
  - iv) generally in accordance with the provisions of the PPA?

**20. Further Information**

Use extra sheets of paper for further comments and issues not covered by this Checklist but which you consider relevant to the achievements of the objectives of the PPA

**Signature**

**Date**

## 2. Code of Conduct for Public Procurement Monitors

Observers are expected to perform their duties in strict compliance with the following Code of Conduct:

1. They shall wear their identity cards/badges while executing their functions.
2. They shall observe the procurement proceedings without participating or interfering with the proceedings by directing, controlling, instructing or countermanding decisions of the Accounting Officer or any other relevant authority.
3. All Observers shall comply with lawful directives issued by the Accounting Officer, chairperson of a Tender's Board or any relevant authority or its representatives.
4. Observers shall not grant press interviews or comments on any procurement proceedings.
5. Observers can comment on the procurement process and other related matters in their report to their organizations, the Bureau and relevant agencies.
6. No Observer shall wear any apparel which:
  - (a) reflects affiliation with a bidder or service provider partaking in the procurement proceedings;
  - (b) in any way canvasses for a bidder or service provider to win the procurement proceedings.
7. No Observer shall participate in any function or activity that could lead to perception of a leaning or being favourably disposed towards a bidder or service provider.
8. An Observer shall not accept any gift, offer of employment, favour or any other benefit, item or service that can be quantified in monetary terms from any bidder, service provider, public officer or any person involved in the procurement proceedings.
9. Observers shall display strict impartiality in the course of observing procurement proceedings and shall at no time indicate or express any statement capable of public incitement at the venue of the procurement proceedings.
10. Observers shall desist from doing anything that compromises the integrity of the procurement proceedings.
11. Observers shall decline serving in that capacity, if any of the bidders, service providers or public officials engaged in the procurement proceedings is related to him by blood, marriage or business association, grant relationship or where the success of a particular bidder or service provider in the proceedings will confer a pecuniary or other advantage on him.
12. Observers shall not serve in a ministry, department or agency where he has been in the last three years, is or likely to be involved in procurement proceedings as a bidder or service provider.



