

Public Procurement Report 2009



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CENTRE FOR SOCIAL JUSTICE
(MAINSTREAMING SOCIAL JUSTICE IN PUBLIC LIFE)

Public Procurement Report 2009

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List of Acronyms

Act	Public Procurement Act
BPP	Bureau of Public Procurement
CBN	Central Bank of Nigeria
CIPSM	Chartered Institute of Purchasing and Supply Management
Council	National Council on Public Procurement
CSJ	Centre for Social Justice
CSO	Civil Society Organisation
EFCC	Economic and Financial Crimes Commission
EXCOF	Executive Council of the Federation
FAAN	Federal Airports Authority of Nigeria
FCT	Federal Capital Territory
FY	Financial Year
ICPC	Independent Corrupt Practices Commission
LC	Letters of Credit
MDAs	Ministries, Departments and Agencies of Government
MDGs	Millennium Development Goals
NDPHC	Niger Delta Power Holding Company
NGO	Non Governmental Organisation
NPA	Nigeria Ports Authority
OAGF	Office of the Accountant General of the Federation
PPA	Public Procurement Act
REA	Rural Electrification Agency
UBE	Universal Basic Education

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Chapter One

INTRODUCTION

1.1 INTRODUCTION

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 general developmental concerns. Thus, public procurement reforms in Nigeria were meant to address a number of developmental and governance challenges that faced the nation.

The Public Procurement Act 2007 (“PPA” or “Act”) is made as an Act to establish the National Council on Public Procurement (“Council”) and the Bureau of Public Procurement (“BPP”) 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. The Act seeks to introduce the application of accountable, fair, competitive, cost effective, professional, transparent, value for money standards for procurements and disposal of public assets.

This is the first attempt by civil society to review the implementation of the PPA during the course of a financial year. The idea is to look at the promises of the PPA including issues of transparency and accountability, value for money and fitness of purpose, competition, etc as a basis for enhanced governmental service delivery. The report seeks to inquire into the highlights of implementation during the year in terms of what has worked and produced good results, the challenges, strengths, weaknesses and threats and the options for surmounting the “negatives” while enhancing the “positives”.

It is common knowledge that procurement provides the best opportunity for governmental corruption. Hardly will any public officer dip his hands into the pie to collect money if there is no reason or opportunity to do so. Procurement provides the perfect setting through inflation of contracts, requests for variation, contract splitting, collusion and frauds, etc. Nigeria is already rated as one of the

most corrupt countries in the world and as such, monitoring public procurement is virtually contributing to the reduction of corruption in the country.

1.2 GOAL

The Report has the central goal of monitoring public procurement implementation at the federal level in the year 2009 and holding the government to account for the implementation of the Act. The objective is to identify successes, challenges and bottlenecks in the implementation of the PPA with recommendations on how the successes can be replicated and the challenges surmounted.

1.3 IMPLEMENTATION STRATEGIES

The Report involved literature review of existing reports on PPA implementation, review of the monitoring reports of CSOs, review of current public procurement documentation of international financial institutions on Nigeria, media reports on the implementation of the PPA. The Report also reviewed the work of the BPP; Financial Regulations of the Federal Government, Treasury Circulars and other extant rules and laws to determine their compatibility with the PPA. For instance while the PPA seeks to liberalise access to procurement information, the extant Civil Service Rules are still shrouded with secrecy mandates for public officers. It further reviewed parliamentary procedures and outcomes on public procurement and its compliance with the demands of the PPA. The Report conducted interviews with practitioners in the public and private sectors on their experiences in the implementation of the PPA and ended with recommendations re-evaluation of roles for government, civil society and the private sector.

1.4 EXECUTIVE SUMMARY

Chapter One sets the tone of the Report, introducing it and stating the goal and implementation strategies. It restates the aphorism that most corruption in the Nigerian public sector stems from public procurement.

Chapter Two addressed the mandate of the National Council on Public Procurement as the policy making organ for public procurements at the federal level. It discussed the implications of the failure of the President of the Federal Republic of Nigeria to constitute the Council. The outcome is illegality and clear violations of major provisions of the Act. The mandate of the Bureau including its functions and powers are reviewed in the chapter.

Implementation of the Act reveals giant strides from the Bureau of Public Procurement. The strides include the development and review of manuals and standard bidding documents, sensitization of MDA staff, capacity building for professionals and MDA procurement officers, information dissemination and naming and shaming of some violators of the PPA. However, the Bureau has not been able to undertake procurement audits and has not established an internet portal to serve as the definitive source of all information on federal procurements.

The House of Representatives Committee on Public Procurement has taken steps for the effective implementation of the Act. The Committee has developed a Legislative Agenda, held sectoral consultative forums, investigative hearings and oversight visits, etc.

Chapter Three documents the role of civil society organizations, their work and the challenges they face. CSOs have been engaged in information dissemination, awareness raising and sensitisation, capacity building, observation and monitoring, action research, action advocacy. A procurement monitoring manual, checklist, newsletters, etc, have been produced. The challenges they face include the half-hearted attempt to involve CSOs in procurement observation and denial of access to information.

Chapter Four discusses capital budget implementation. It was noted that despite the exceptions in the law, the late President Yar'Adua made the Act applicable to all procurements. For the year 2009, there was a controversy between the Budget Office of the Federation and the Ministry of Finance. While the Minister of Finance states the capital budget implementation figure as at December 31, 2009 at 54.26%, the BOF states the figure to be 60.6%. The actual figure is more likely to be lower than the Minister's estimate considering the poor performance of the first, second and third quarters-20.68%, 42.94% and 44.46% respectively. Essentially, the utilization rate stated above by the BOF was based on the cash backed sum of N928 billion rather than the overall capital budget of N1,280.7 billion. Thus, actual implementation was N562 billion which is 60.59% of N928 billion. Stating that the capital budget recorded 60.59% implementation, is deliberately misleading because 60.59% of N1,280.7 billion is N775.98 billion. Essentially, actual capital budget implementation for 2009 was 43.9% of the appropriated capital vote.

The Director-General of the Bureau, Engineer Emeka Ezeh had proffered reasons informing poor capital budget implementation. He was reported to have attributed it to lack of integrity and transparency in awarding contracts; the reluctance to award contracts to contractors who are not in the good books of MDAs, even if the contractor met the necessary qualifications. Demands for gratification are rampant and budgetary request for money not needed by the MDAs is the order of the day. He concluded that MDAs have the capacity to implement the budget but what they lack is integrity. Engineer Emeka Ezeh debunked allegations that the Bureau through delays in processing the certificate of 'No Objection to Contract Award' was responsible for the poor implementation of capital projects. According to him

The BPP certified 566 projects worth N1.94 trillion out of the 602 requests by the MDAs in 2009. 36 are still awaiting response while 10 were rejected. It is unfortunate that less than 300 of the 566 contracts certified have been presented to the Federal Executive Council for ratification and award.Most of the challenges are caused by the contractors who go around and submit fake papers, bribe officials and get politicians to get them pre-qualified. It is a circulated fact that they pay N5 million to get pre-qualification

There were cases of contract scams including the Siemens bribery scam and the ensuing presidential pardon, Rural Electrification Agency N5 billion fraud, Universal Basic Education scam, Haliburton bribery and the lukewarm attitude of the Federal Government to prosecute offenders, etc.

Chapter Five is on violations and implementation challenges. The major violations include the fact that MDAs are still doing prequalification for projects below N300 million for works and N100 million for non works, the system throws up contractors with unequal capacity, or that do not possess the capacity to do the work. There is the burden of reconfirming unrealistic rates before certification, delayed payment, agencies utilise funds meant for particular projects for so called priority projects, refusal to hand over projects, delayed award after certificate of no objection, improper disengagement of contractors, extension of time and variation/review of contract rate. MDAs that are involved in the abuses include the Ministries of Aviation, Defence, Education, Health, Interior, Niger Delta, Petroleum Resources, Works, Housing, Science and Technology; Nigeria Customs, etc.

The abuses and challenges include the fact that the Executive Council of the Federation (EXCOF) constituted itself into an approving authority in violation of

the Act, procuring entities abridging the time between invitation for bids and submission of bids.

Proposed amendments to the Act which did not succeed were discussed. They include the attempt to remove civil society and the Society of Engineers from the Council, liberalisation of mobilisation fees, including the EXCOF as an approving authority, etc. The chapter ends with a review of the report of the House of Representatives Committee on Power and the Ad-hoc Committee that reviewed their submissions

Chapter Six is on conclusions and recommendations. Notable recommendations are made to the President, the BPP, the legislature, MDAs, civil society including the media and academia. They are detailed as follows:

A. The President

The President leads the executive arm of government and provides direction for overall governance in the country. He should lead by example through the:

- ❖ Immediate constitution of the National Council on Public Procurement;
- ❖ De-commissioning the EXCOF as an approving authority for procurements above a certain threshold;
- ❖ Clear instructions to the executive on access to procurement information according to the PPA. This may entail amendments and repeals of relevant sections of the Public Service Rules through the Head of Service and the Financial Regulations through the Minister of Finance;
- ❖ Withdraw the Amendment Bill of the PPA at the National Assembly;
- ❖ Periodic review of the implementation of the Act;
- ❖ Ensure that the Minister of Finance and the Director General of the Budget Office of the Federation start the preparation of the Medium Term Expenditure Framework and the annual budget on time to ensure that the budget gets to the legislature before the end of August every year. Late

presentation of budgets and their concomitant late approval facilitates poor capital budget implementation.

B. The Bureau

The Bureau needs to be more proactive to facilitate the implementation of the Act through the following measures:

- ❖ Establishment of the internet portal which is the definitive source of all information on government procurement;
- ❖ Enhance access to information by publishing procurement records on its website as stipulated by law;
- ❖ Engage in procurement audit of MDAs;
- ❖ Direct MDAs to give at least one week notice to CSOs who monitor bid opening sessions; grant access to procurement plans, bid solicitation documents, bid opening documentation and information on contract award to CSOs to enable them properly monitor procurement proceedings;
- ❖ Begin to exercise its powers to debar suppliers, contractors and service providers that manifestly contravene the PPA;
- ❖ Exercise disciplinary sanctions against erring accounting officers and other staff of MDAs. This will facilitate greater capital budget implementation and reduction of procurement misdemeanours;
- ❖ Further engage in the development and revision of manuals and standard bidding documents for areas not presently covered;
- ❖ Continued public sensitisation on the provisions of the law.

C. The Attorney General of the Federation, Economic and Financial Crimes Commission and Independent Corrupt Practices Commission

- ❖ Ensure the diligent investigation and prosecution of all reported procurement offences - the Siemens and Haliburton need the urgent attention of the Attorney-General.

D. Ministries, Departments and Agencies

- ❖ MDAs should decentralise their procurement process and allow parastatals under them to undertake procurements related to their agency;
- ❖ MDAs should proactively seek to acquire knowledge on procurement reforms and plan their procurements in advance of cash releases;
- ❖ Ensure that beneficiaries and communities are consulted and carried along in the location of projects in their communities. Essentially, government projects/contracts should be based on a needs assessment and identification of community needs. To this end, adequate stakeholder participation in the design of Medium Term Sector Strategies is recommended.
- ❖ Completion of all engineering designs and acquisition of sites before the award of procurement contract;
- ❖ Timely payment of contractors who have worked and delivered according to contract specifications.

E. The National Assembly

In view of its powers of lawmaking, appropriation and oversight, the legislature should:

- ❖ Stop the proposed amendments to the PPA;
- ❖ Develop a framework through collaboration with the executive to ensure that appropriate amounts are appropriated for capital projects. This could be done by the legislature taking more interest in the development of Medium Term Sector Strategies of the respective MDAs and the overall Medium Term Expenditure Framework;

- ❖ The passage of the Freedom of Information Bill to enhance access to procurement information;
- ❖ Enhanced oversight over capital project implementation;
- ❖ Improve collaboration with CSOs in the exercise of oversight functions;
- ❖ More regular updating of the Procurement Committee's website.

F. Civil Society including the Media and Academia

- ❖ Engage in detailed studies and action research for the enhancement of the implementation of the Act;
- ❖ Engage in advocacy against violations of the Act including litigation;
- ❖ Engage in capacity building of the populace for a better understanding of procurement reforms;
- ❖ The media should devote more time to investigations of procurement malfeasance and its related matters;
- ❖ The academia should consider the introduction of courses on public procurement in legal, economic, social and business related courses.

Chapter Two

PUBLIC PROCUREMENT POLICY AND REGULATORY AGENCIES

2.1 MANDATE OF THE NATIONAL COUNCIL ON PUBLIC PROCUREMENT AND THE FAILURE OF THE PRESIDENT TO CONSTITUTE THE COUNCIL

The PPA in section 1 made provision for the establishment of the National Council on Public Procurement which should serve as the policy making body on federal public procurement. Specifically, the Council has the following functions under section 2 of the PPA:

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

The PPA is suffused with roles and functions for the Council which is at the apex of procurement policy formulation and regulation. However, since the commencement of the PPA on the 4th day of June 2007, the President has failed, refused and neglected to constitute the Council. But procurement policies and regulations have been formulated and implemented since the commencement of the Act. It is imperative to detail some of the other mandates of the Council. They include general policy direction for the Bureau of Public Procurement¹, recommendation of the Director General of the Bureau to the President for

¹ Sections 18 and 19 start with: “Subject to regulations as may from time to time be made by the Bureau under the direction of Council”.

appointment (section 7 of the Act), appointment of the principal officers and other staff of the Bureau (sections 8 and 9 of the Act), receiving and approving the accounts of the BPP at the end of the year (Section 13 of the Act). The Council also sets the monetary and prior review thresholds to be enforced by the Bureau (section 6 (1) (a) and section 17).

The refusal of the President to constitute the Council is not a matter of negligence but a deliberate state policy to ensure that the law is not respected. CSJ had by its letter of September 8 2009 drawn the attention of the former President Umaru Yar'Adua and the former Attorney General and Minister of Justice Mike Aondoakaa to this situation but the letters received no response beyond the acknowledgement of receipt. Excerpts of CSJ's letter to the President reads:

We are disturbed that since June 4 2007 when the PPA became law, the President has failed, refused and neglected to constitute the National Council on Public Procurement ("Council") as envisaged under section 1 of the PPA. The functions, duties and powers of the Council are clearly stated in sections 2, 5, 6, 7, 8, 9, 10, 12, 13, etc of the PPA. Essentially the Council approves procurement policy on the recommendation of the Bureau of Public Procurement ("Bureau") including the monetary and prior review thresholds for the application of the PPA. The Council also has the power to appoint principal officers of the Bureau and recommend a candidate to the President for appointment as the Director General of the Bureau after competitive selection. The Council is further empowered to appoint staff for the Bureau, make staff regulations, approve the fund of the Bureau, receive financial and other reports from the Bureau, etc.

The implication of the non constitution of the Council two years ten months after the coming into force of the PPA is obvious. The policies, prior review and monetary thresholds set by the Bureau for the implementation of the PPA did not receive the blessing of the approving authorities envisaged by the PPA. Suffice to state that if the above policies are challenged in a court of law, they run the risk of being nullified. Further, the refusal to constitute the Council plucks feathers off the rule of law posture of the present administration and portrays it as one that deliberately violates laws which it enacted.

Those letters were not dignified with a reply. Voices from the Field² indicate that the refusal to set up the Council was a deliberate governmental policy. High level

² Our discussions with high level political office holders and senior civil servants, who prefer anonymity.

political office holders believe that the moment the Council is established, its policies will definitively remove procurement from political control. Most politicians believe that their being in politics or contesting elections cannot be justified if award of contracts are taken away from their purview.

2.2 IMPLICATIONS OF NON-CONSTITUTION OF THE COUNCIL ON PUBLIC PROCUREMENT REFORMS

The failure of the President to constitute the Council has far reaching negative implications on the implementation of the PPA and public procurement reforms. It could be asserted in law that actions that were supposed to be taken by Council and because of the absence of Council, usurped by another body are illegal and ultra vires the bodies that took the action. Essentially, it provides a chain reaction for open and consistent violation of the letters and spirit of the PPA. This is manifested through the following scenarios.

A. Appointment of Director-General, Principal Officers and Hiring of Staff for the Bureau in Contravention of the Act

On the appointment of the Director-General, principal officers and hiring of staff for the Bureau, section 7(1) of the Act provides as follows:

“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”.

However, the current Director-General of the BPP was appointed and confirmed by the President without a Council. This appointment in the light of the above cited provisions of the Act was ultra vires the powers of the President and therefore void in the eyes of the law.

The illegality committed against this explicit provision of the PPA extends also to the appointment of principal officers of the Bureau and other officers and staff of the Bureau in the absence of a Council. This is because Section 8(1) of the Act mandates the Council to appoint the principal officers for the Bureau after competitive selection process. The transparency and competitiveness that should have accompanied and characterised the process of appointment were lacking as the law was deliberately violated. The violations further extend to section 9 of the Act which requires the Council to appoint such officers and other employees as may from time to time be deemed necessary to enhance the performance of the Bureau’s duties and functions. Pray, who appointed the officers of the Bureau when there is no Council?

Going by these factual positions, the element of competition, due process and transparency, popular participation which are critical to the procurement reforms process have been compromised from the beginning. When the chief priests of due process, competition, transparency and accountability are recruited through a process that violates these basic tenets, nay an “undue process”, then procurement reforms are imperiled.

B. Denial of Platform for Enhanced Popular Participation and Greater Professional Input to Public Procurement Reforms

Part 1, section 1(2) of the PPA provides that the National Council on Public Procurement 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;*
the Media and
- g) *the Director-General of the Bureau who shall be the Secretary of the Council.*

The dereliction of duty by the President in constituting the Council which provides a platform for professional bodies, the media and the civil society to work in synergy with government representatives towards the emergence of a functional, sound, and reformed public procurement system in Nigeria is antithetical to the faithful implementation of the PPA and in achieving the desired public procurement reforms.

2.3 MANDATE OF THE BUREAU OF PUBLIC PROCUREMENT

In conferring wide ranging functions on the Bureau, Section 5 of the PPA provides as follows: 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) 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 programmes to build institutional capacity; and maintain related database*

Section 6 of the Act elaborates on the powers of the Bureau.

(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 provision 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;

(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.

The functions and powers provided in the Act are broad and wide enough to ensure that the Bureau regulates a reformed procurement system.

2.4 IMPLEMENTATION SO FAR

The Bureau has so far recorded some positive and remarkable achievements in the exercise of its powers and the discharge of its duties and functions under the PPA. It has formulated so many policies which guide public procurement, unfortunately without a Council in place to approve them. The achievements so far recorded are in the following areas.

A. Development and Review of Manuals, Standard Bidding Documents, etc

The Bureau has developed a Procurement Procedures Manual for Public Procurement in Nigeria. It is instructive to note that the manual is intended to give advice and assistance to public procurement staff to help them in the performance of their procurement responsibilities, and explains in detail how specific aspects of procurement should be handled in line with the PPA. The manual serves as a know-how information source about the tasks and elements

that comprise the procurement process.³ The Bureau has also produced standard bidding documents, procurement templates, approved thresholds for service wide application, complaints procedure, a code of conduct and other documentation that will facilitate the procurement process. The standard bidding documents already prepared by the Bureau include those for the procurement of: works, small works and goods, etc. There are also Standard Request for Proposals for the selection of individual consultants and the selection of consulting firms based on any of complex lump-sum, complex time based, small assignment lump-sum and small assignment time-based. Other documents include procurement reform project sample document for national shopping, public procurement regulations for goods and works and for consultancy services. The use of the documents by MDAs has contributed to the progress made in the federal public procurement process.

B. MDA Staff and Public Sensitisation

The Bureau, during the period under review kept up civil service and public sensitisation and education on the provisions of the Act and the need for sound public procurement system as a basis for national development. It has also requested MDAs to engage civil society organisations working on transparency and anti corruption issues in their bid opening processes. The Bureau has also organised sector specific training for the respective MDAs to ensure that the demands of the PPA are met in their respective procurement functions. Sensitisation workshops have also been organised in the six geo-political zones of the country wherein contractors, the media, non-governmental organisations, public servants etc, were generally invited to participate. Procurement planning and review workshops were also featured in the Bureau's sensitisation programmes.

C. Capacity Building for Professional and MDA's Procurement Officers

The Bureau has also within the period of this report, conducted training programmes for professionals in purchasing and supply, business management, law, accounting and procurement officers in MDAs, in fulfillment of one of its statutory objectives as enshrined in Part 11, section 5 (k) of the Public Procurement Act, 2007. This exercise was targeted at enhancing the competence and skills of the professionals and public officers in playing their

³ Procurement Procedures Manual for Public Procurement in Nigeria by the Bureau of Public Procurement at page1.

roles in public procurement reforms. This has certainly increased public knowledge of the role of the Bureau and the workings of public procurement reform in Nigeria.

D. Outright Indictment, Naming and Shaming of Some Violators of the PPA

In its bid to mainstream procurement best practices in MDAs, the Bureau has openly indicted the Ministries of Defense and Education⁴ for various forms of violation of the PPA in their procurement proceedings. This revelation brings to the fore the awareness that irregularities have been existing in the procurement process and also that the Bureau is beaming a search light on the conduct of the procurement process. It is also commendable that the EFCC is also in the crusade against procurement related fraud, which is evident in the recent sentence slammed on some prominent Nigerians for procurement related offences⁵. This posture would serve as a deterrent to those contemplating fraud and embezzlement through the procurement process.

E. Information Dissemination

The Act is very clear on the importance of openness in procurement information collation, storage and dissemination. In this respect, the PPA in Section 5 (r) mandates the Bureau to:

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;

This mandate of the Bureau is vital for public procurement information dissemination. An internet portal is a site that serves as a point of access to information within the entire system. A proper upload of data on the portal should present unified information from various units, departments, procuring entities and other sources. In essence, the portal will point users from a single point to all the information available on public procurement, which they might otherwise be unable to access or track. The portal should make it possible and practicable

⁴ Daily Sun newspaper, Friday, October 2, 2009 at page 49.

⁵ The Bode George imprisonment case.

for bidders, contractors, interested members of the public and CSOs monitoring public procurement to access vital information which they need.⁶

The BPP has established a website; www.bpp.gov.ng for effective and efficient dissemination of public procurement information pursuant to its mandate. The homepage of the website displays inter alia, electronic copy of the Act, Federal Tender Journal (containing Federal Government Procurement Notices), list of Federal Government Approved Contracts; Status Report, Information for Practitioners (containing budget implementation process handbook); Public Procurement Documents etc. Provision is also made on the website for Frequently Asked Question (FAQs) which seeks to provide a two-way question and answer mechanism and enhance communication between the stakeholders, the general public and the Bureau on public procurement issues.

The poser is: Can this website and its contents equate an internet portal properly so called which is a definitive source of all federal procurement information? Does it contain and display all public sector procurement information at all times? How comprehensive and up to date is the portal? Does it serve as a one stop shop for procurement information? Does it display a comprehensive record of procurement proceedings generated by all procuring entities within each financial year? A critical examination of the internet portal of the Bureau should speak for itself to ascertain its compliance level with the requirements of the PPA. The procurement records on the website is essentially:

Procurement Record for Federal Capital Territory Administration and some other MDAs for FY 2009

In accordance with Part II Section 5 (r) of the Public Procurement Act, 2007 the Bureau hereby releases the Procurement Record for Federal Capital Territory Administration (Education Department) for FY 2009 as submitted.

The sub-heads of procurement records from MDAs highlighted above are as follows:

⁶ Taken from the background of an article: *Examining the Access to Information Provisions of the PPA, 2007*, by Chibuzor Ekwewuo, in Public Procurement Journal of the BPP, April-June 2009, page 18.

- ❖ Budget Classification Code: this provides the code of classification of the procurement in the budget;
- ❖ The provision for the procurement: this seems to be the budgetary appropriations for the procurement;
- ❖ The project title: this describes the project undertaken;
- ❖ The location indicating the project sites though not the specific location;
- ❖ The name and address of the contractor;
- ❖ The actual contract sum;
- ❖ The payment made or actual disbursement;
- ❖ The outstanding payment certified;
- ❖ The physical progress of the work in percentage;
- ❖ The original and actual completion date;
- ❖ The remark which indicates whether the work is fully paid for, completed but not paid for;
- ❖ Some MDAs also indicated the procurement methods adopted and whether there was a certificate of the No Objection by the Bureau.

It is instructive to note that the records such as primary information on advertisement for the procurement, time line between advertisement and bid opening, the procedure adopted at the various stages of the procurement, qualifications of the bidders, contractors, consultants and other basic information necessary to ascertain the compliance of the procurement processes with the due process, transparency and popular participation requirements of the PPA are not uploaded on the portal. As such, the portal has not yet satisfied the requirements of Part II Section 5 (r) of the PPA.

Granted that this is a herculean task for the Bureau; however, where the minutes of the procurement proceedings at each stage of the procurement process

namely pre-bidding, bid opening, examination of bids, evaluation of bids, acceptance of bids and award are diligently documented by the procuring entities and submitted to the Bureau, the task would be accomplished by uploading same to the portal. This is particularly pertinent in the light of section 16 (13) (a) - (d) of PPA which provides:

(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.

Further, the procurement records are primarily on procurement of goods and works. Visitors to the site looking for records on procurement of services are bound to make a vain search. It is expected that a constant update of the website with relevant and detailed information will to a very large extent serve as a one-stop source of public procurement information for interested members of the public.

The Bureau is also under obligation to publish the paper and electronic editions of the procurement journal. The journal is published on a quarterly basis. The Bureau also runs a television programme on public procurement.

F. Explaining the Provisions of the Act

Section 5 (b) requires that the Bureau shall publicise and explain the provisions of the Act. To explain the provisions of the PPA would involve an analysis of its contents for easy understanding. This function is vital to the proper understanding and implementation of the PPA. Against the background of the complex nature of the Act and the tendency for the emergence of divergent and conflicting interpretations from both informed and uninformed members of the public, an explanation of the Act emanating from the Bureau becomes very desirable. This will further generate research and stimulate intellectual discourse on the real meanings and intendments of the provisions of the Act with the end result of providing the relevant publics with a wide range of resource material to which recourse could be had in engaging the public procurement process.

The Bureau has only reproduced the Act in hard and electronic copies. Besides the conduct of training workshops, the Bureau is yet to undertake the task of explaining and analysing the provisions of the Act.

G. National Database of Standard Prices

The Bureau maintains a database of standard prices on its website. But the database needs constant updating and the inclusion of more goods.

H. Performance of Procurement Audit

There are no indications that the Bureau has commenced the performance of procurement audits as required by section 5 (p) of the Act. 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, and tactics in a bid to identify challenges, opportunities and facilitate the development of appropriate action plans or express independent opinion⁷. It involves the systematic or comprehensive examination of public procurement proceedings. It is also the requirement of the PPA that the procurement audit reports which are also public documents shall be submitted to the National Assembly bi-annually. It is highly imperative that the Bureau lives up to this duty to further ensure probity in public procurement process.

2.4 THE HOUSE OF REPRESENTATIVES COMMITTEE ON PUBLIC PROCUREMENT

The House of Representatives Committee on Public Procurement exercises oversight over the Public Procurement Act; the Bureau of Public Procurement; monitoring the implementation of all capital projects in the Appropriation Act; ensuring due process and transparency in the procurement of goods and services. It also receives complaints and petitions arising from procurement of goods and services and liaises with NGOs, donors and the international community to ensure the implementation of government reform programmes related to procurement.

The Committee developed a 15 month Legislative Agenda for the years 2008 and 2009 with a view to engender a transparent governance structure through

⁷ *Public Procurement Audit in Nigeria - the Theory and Practice*, being a paper presented by Engr. Ibiam Ogujiofor at the CIPSMN National Seminar in Abuja 20-21 August 2009.

accountable, reliable and trustworthy public procurement practices in Nigeria. The objective is to institute a proactive and all inclusive oversight strategy on matters of public procurement at the federal level. Highlights of the activities and outputs from the Legislative Agenda include a monthly public procurement review report, quarterly sectoral consultative forums, implementation reports, workshops, study tour/training, public hearings and national procurement summit.

It has established a website www.nasspubproc.org to communicate its activities and programme priorities. It holds quarterly sectoral consultative forums on procurements of selected MDAs. The first session which was held in March 2009 focused on the education sector whilst the second held in August 2009 focused on the health sector. The third forum had agriculture and water resources as its theme. The Committee carries out oversight visits and has also held investigative hearings based on complaints received from aggrieved contractors and service providers⁸.

2.5 RESERVATION OF N500M CONTRACTS FOR LOCAL CONTRACTORS

Late President Umaru Musa Yar'adua during the period under review gave a directive to MDAs to reserve exclusively all engineering works and services up to N500 million for indigenous engineering firms to enable the country build local capacity in procurement of works, goods and services for national development. The late President further directed that all applications for expatriate quota should be routed through the Council for the Regulation of Engineering in Nigeria (COREN) for attestation that there are no qualified Nigerians for the job in question at the time of application.

On contracts above N500 million, late President Yar'adua said "Nigerians must be attached to expatriate engineers on major projects not below N500 m to understudy them from inception⁹". This is a very positive directive towards mainstreaming Nigerian indigenous participation in public procurement.

⁸ See the Committee's website on the report of the Investigative Hearing carried out in response to the petition of Rolls Royce/IPDC-MORPOL.

⁹ Nigerian Tribune, Thursday, 20, August, 2009. P. 43.

Chapter Three

CIVIL SOCIETY ORGANIZATIONS AND PUBLIC PROCUREMENT REFORMS

3.1 THE ROLE OF CIVIL SOCIETY ORGANISATIONS IN THE PPA

Civil Society Organisations (“CSOs”) include the traditional Non-Governmental Organisations (“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 enshrined in the PPA while ensuring that obligations are respected by duty holders.¹⁰ CSOs played a crucial role in the advocacy for the enactment of the Act, starting from providing inputs into the call for memoranda by the Budget Monitoring and Price Intelligence Unit of the Presidency,¹¹ up to public hearings in the legislature, the clause by clause analysis and lobby when it became evident that the legislature had developed cold feet in the passage of the law.

CSOs are therefore expected to effectively engage the public procurement system in a number of ways including information dissemination, sensitisation and awareness raising, capacity building, observation and monitoring, action research and advocacy, etc. The central objective of CSO interventions is to improve the system, enhance value for money and governmental service delivery.

A. Information Dissemination, Awareness Raising and Sensitisation

In playing this role, CSOs are to compliment the efforts of the Bureau in creating massive awareness on the provisions of the PPA for public procurement reforms. The conduct of seminars, publications and discussions in the print and electronic media, dissemination of information through websites, newsletters and pamphlets are vital avenues of public awareness creation that could be adopted

¹⁰ See *Insisting on Due Process*, being a Public Procurement Monitoring Manual, by Centre for Social Justice, page 10

¹¹ Socio Economic Rights Initiative led the process with the support of the Heinrich Boll Foundation.

by CSOs. Setting up dedicated columns in the print media and special discussions focused on the procurement function in the electronic media is an option that could be adopted by the media in public sensitisation since the media is an indispensable stakeholder in procurement reforms. While the NGOs could utilise stickers, posters and fliers to reach out to the communities on the issues, professional bodies could include courses on public procurement in their professional training package or in their compulsory refresher and continuous training courses. Notably, the general thrust is to raise consciousness in the society of the inextricable link between public procurement, service delivery, and the well being of society particularly the poor and vulnerable.

The efforts of three NGOs stand out so far - Centre for Social Justice (“CSJ”), the Public and Private Development Centre (“PPDC”) and Civil Society Legislative Advocacy Centre (“CISLAC”). CSJ with the support of Misereor has established a Nigeria Public Procurement Observatory which has enlisted over 100 NGOs into its listserv pem_ngr@yahoo.com. Its website www.csj-ng.org contains a number of materials on the PPA and its implementation. The listserv disseminates regular procurement information and serves as a discussion forum on public procurement. It also publishes a biannual procurement newsletter - *Observatory News*. CSJ has also authored and published over twenty print media articles in support of procurement reforms.

PPDC disseminates procurement information through its PPDC news. It has also established a procurement observatory and internet monitoring portal www.procurementmonitor.org. CISLAC has organised a number of training sessions for CSOs on the PPA.

The print media have also been instrumental to creating awareness on the provisions of the PPA. Several editorials and columns have been written on procurement reforms including issues of the non constitution of the Council, poor budget implementation, over-invoicing of contracts, late payment of contractors, etc¹².

B. Capacity Building

Having a level of capacity sufficient to understand the issues and challenges of the public procurement system is a prerequisite for effective engagement of the

¹² Daily Trust, September 25, 2009 at page 13 and April 22 2010 at page 16 ; Punch Editorial of March 25 2010,etc.

process by CSOs. Thus, the first challenge is to raise 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. Publishing simplified versions of the Act in ordinary English devoid of the technical legalese and even in street/pidgin and local languages could provide a sure way of reaching the populace with the provisions of the Act. CSJ published the first comprehensive manual on procurement monitoring - *Insisting on Due Process*. CSJ has also designed the procurement Observers' Checklist and Code of Conduct. The Code of Conduct has been adopted and published by the BPP to guide civil society. CSJ has also organized a capacity building workshop at the federal level and one state specific workshop in Nasarawa State.

Some NGOs have been recently supported by donors to conduct training sessions on public procurement. They include Development Alternatives and Resource Centre supported by the World Bank and the Centre for African Settlement Studies and Development (CASSAD) supported by the United Nations Development Programme. PPDC has also been supported by PACT of USAID and the United Nations Democracy Fund to run capacity building training whilst CISLAC has also run training workshops in collaboration with the BPP.

C. Observation and Monitoring

Civil society groups can focus on specific aspects of the procurement of MDAs or sectors, 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 the limited human and financial capabilities of CSOs. Thus, strategic thinking makes some form of structured intervention for results necessary. The idea is to monitor from cradle to grave, that is to say, from the procurement plan to implementation and achievement of results. Observation should proceed from the angle of ensuring that the PPA and due process of procurement reforms are followed by the MDAs in letter and spirit. It should also include both violations and result based approaches. It is expected that CSOs could raise red flags 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. CSOs could consider resort to the altar of public opinion and the courts as a last resort.

CSJ researches and publishes half yearly reports on the implementation of the PPA and makes the result available to policy makers, implementing agencies and the legislature. It has so far published *Half Hearted Attempts and Continuation of the Norm*. PPDC is also engaged in procurement monitoring and has established an electronic monitoring portal to guide its activities.

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 improvement of the system and ultimately the improvement of service delivery. It may be some form of diagnostic study leading to the identification of strengths, weaknesses, challenges, threats and replicable best practices. The participation and the buy in of 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 which will lead to action for positive change. It is interesting to note that in recognition of these vital roles of the civil society in implementing the Act for public procurement reforms, the PPA makes provision for a representative of the civil society in the yet to be constituted National Council on Public Procurement. It appears that the present work is the first action research to be recorded by civil society since the coming into force of the PPA.

E. Action Advocacy

CSJ had written letters to the President and the Attorney General on the non constitution of the Council and its implications for procurement reforms. On two occasions, the letters were not dignified with a response. We have concluded our drafts and will be filing originating processes for a declaration of the duties of the President in respect of the law and an order of mandamus to compel the performance of the public duty to constitute the Council. CSJ will also test the law by filing suits to compel some identified MDAs to release information about completed procurement proceedings to us in accordance with section 38 of the Act. These MDAs have refused to oblige our requests for access to information despite the clear provisions of the Act. The idea behind these litigations is to test the law and give the courts an opportunity to infuse vigour and rigour to the dry letters of the law.

3.2 HALF- HEARTED INVOLVEMENT OF CIVIL SOCIETY ORGANISATIONS BY PROCUREMENT ENTITIES

Section 19 of the Act clearly stipulates the guidelines for public entities in the implementation of their procurement plans. It states:

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:

- (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 organisation whose expertise is relevant to the particular goods or services 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;*

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. CSJ have monitored bid opening processes in the National Primary Health Care Development Agency, Universal Basic Education Commission, Ministry of Works, Ministry of Women Affairs, Teachers Registration Council, Fiscal Responsibility Commission, Federal Character Commission, Federal Medical Centre, Lokoja, etc.

Considering CSOs restriction to the bid opening process, the poser is; since the requirement for invitation to credible observers like the NGOs is to enhance transparency in the entire procurement process, can the Bureau make any regulation to defeat this important principle of procurement especially when there is no Council to direct the Bureau on such regulations? What is the interpretation being given to the words “procurement process” 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 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 transactions¹³, 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.

Despite the fact that NGOs 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. NGOs are merely demanding to observe the process from conception to the award of contract in accordance with the letters 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?

To compound matters, most invitations by procuring entities for bid opening observation come to CSOs at very short notices and without any formal letter of invitation or other necessary information as regards the bid to be observed. In several instances, CSJ and other CSOs have been given oral invitation to bid opening observation less than three hours to the bid opening exercise. Sometimes a text message is sent to a CSO and when letters do come, they come in less than 3 days before bid opening.

For CSOs to properly participate in bid observation sessions, they would need prior access to the solicitation documents that have been issued up to the time of bid opening and these include call for tender, advertisements, report of pre-qualification proceedings, etc. CSOs also need access to procurement plans.

The Office of the Special Adviser to the President on Relations with Civil Society, through a consulting firm¹⁴ conducted a study on the level of MDAs involvement of CSOs in public procurement processes as part of its project on improving

¹³ Blacks Law Dictionary, Centennial Edition at page, 1205.

¹⁴ Ado Investment Limited.

CSOs' involvement in public procurement. The report of its finding on willingness of MDAs to engage CSOs in public procurement processes reads thus:

Majority of the respondents (MDAs) reached by the study admitted willingness to involve CSOs at various levels of public procurement processes. The percentage representation by States is:

- ❖ FCT - 95.2%
- ❖ Bauchi - 94.3%
- ❖ Lagos - 92.3%
- ❖ Niger - 85.4%
- ❖ Sokoto - 82.6%
- ❖ Anambra - 76.7% and
- ❖ Edo - 72.1%

A critical look at the near perfect score of the Federal Capital Territory to which the PPA applies leaves one at a loss as to the criteria used in the assessment of the MDAs. Involvement of the CSOs at various levels of public procurement processes implies that the MDAs engage the CSOs to observe the entire procurement processes beyond bid opening up to the award of contract as required by the PPA. It is already pointed out in 3.2 of this Report that contrary to the PPA but *“According to the regulations of the Bureau, invitations come to non-governmental organizations when bids are being opened and beyond that, NGOs are not allowed to observe any other part of the process.”*

Worst still, most MDAs that deem it fit to invite CSOs to bid opening observation bring such invitations far less than three days and in most cases, few hours to the date and time fixed for the bid opening. Thus, the 95.2% score of the FCT as representing its level of willingness to involve CSOs at various levels of public procurement processes is unmerited. It is obvious that the report was based solely on the claims of the MDAs without a further step to test the veracity of such claims.

3.3 MISDIRECTED STEPS AT IMPROVING CSOs INVOLVEMENT IN PUBLIC PROCUREMENT BY THE OFFICE OF THE SPECIAL ADVISER TO THE PRESIDENT ON RELATIONS WITH CIVIL SOCIETY

Recognising the fact that involving non state actors in public procurement processes in Nigeria will go a long way to deepen and sustain the gains of a

sound and functional public procurement regime; institutionalise the efficient implementation of the PPA and *ipso facto*, engender transparency, value for money, popular participation and accountability in public procurement, the Office of the Special Adviser to the President on Relations with the Civil Society with the support of the World Bank embarked on a project aimed at improving civil society involvement in public procurement.

Essentially, the project seeks to:

- ❖ Increase Government-Civil Society partnership in the achievement of current economic policies through effective implementation, tracking and monitoring of public procurements in Nigeria;
- ❖ Build the capacity of relevant actors to improve integrity and accountability in the development and management of public procurement system through tracking and monitoring;
- ❖ Advocate and engage critical stakeholders to replicate the PPA of the Federal Government at the States and Local Government level of the project coverage.

Ten MDAs of the FCT and six States of the Federation representing the six geopolitical zones were chosen as pilot targets of the project. However, the steps taken to execute this project question the sincere commitment of the implementation organisation¹⁵ and the supervising agency¹⁶ to effectively execute the project.

First, the process leading to the selection of the project implementing organisation contravened the provisions of the PPA. Sections 44 (a) 45 (1) (2) and 48 (1) of Part VIII of the PPA dealing on procurement of consultant (services) provide as follows:

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

¹⁵ Ado Investment Nigeria Ltd, a consulting firm

¹⁶ Office of the Special Adviser to the President on Relations with Civil Society. OSAP---CS.

(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;

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.

(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.

S. 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.

Available records obtained from the implementing organisation and the representatives of the supervising agency show that:

- ❖ The advertisement for the procurement of services of the implementing organisation was published only in one national newspaper¹⁷ on December, 31, 2009. Thus the requirement for publication in two national newspapers and the procurement journal was therefore treated with disdain;
- ❖ Selection of the management/ implementing organization was concluded on January 21, 2010;
- ❖ Conclusion of Management Documentation Process, was done by January 25, 2010.

It is therefore apparent from the foregoing that the process was commenced and concluded within such a very short period of time than the PPA envisaged. And which consultants and service providers were expected to be reading and applying for consulting services by December 31, the eve of the New Year, except they were pre-arranged?

¹⁷ Leadership Newspaper to be precise.

Definitely, the process of procuring the consultant for the project shut its doors against popular, competitive and fair participation of other possible consultants with better competence for the job. This opaque procurement process would have been avoided by a simple obedience to the sections of the PPA as reproduced above.

Secondly, the vague process of procuring the consultant/service provider for the implementation of the project dovetailed into the improper and inefficient mapping of the civil society groups and as such the field data collection failed to elicit the responses of most CSOs with the requisite competence for the project. It is instructive to accentuate the point that one of the goals of the project is to

- ❖ Increase Government-Civil Society partnership in the achievement of current economic policies through effective implementation, tracking and monitoring of Public Procurements in Nigeria.

Driving by the operative expression, “*effective implementation, tracking and monitoring of Public Procurements in Nigeria*”, three core and broad areas were expected to be used in assessing CSOs and Networks to implement components of the projects at various levels namely:

- ❖ Organizational Structure and Legal Status;
- ❖ Thematic Foci and Programmatic Experience;
- ❖ Involvement in Public Procurement and Ancillary Activities.

Interestingly, there are a number of well organised and registered CSOs, whose domain of activities on good governance advocacy lies with the PPA as one of their basic working tools. A few among this class of CSOs have produced Public Procurement manuals, checklists, public procurement newsletters, etc. They have also carried out national and sub-national level capacity building on Public Procurement and have also engaged the government and its MDAs at various platforms towards the implementation of the PPA¹⁸.

Consequently, the natural expectation is that any sincere process of enhancing Government-Civil Society engagement of the public procurement process in

¹⁸ CSJ is a force to be reckoned with in this field.

Nigeria shall engage such organized CSOs that have so far distinguished themselves in the field. Unfortunately however, the Office of the Special Adviser to the President on Relations with Civil Society and the implementing organisation selected in contravention of the PPA, have failed to properly inform themselves as to diligently engage the best available hands for the project in keeping with the stipulated criteria.

3.4 DENIAL OF ACCESS TO RECORDS OF PROCUREMENT PROCEEDINGS

One of the very important principles of the PPA is that *all public procurement shall be conducted in a manner which is transparent, timely, equitable for ensuring accountability and conformity with the Act and regulations deriving therefrom.*¹⁹ These principles of transparency and accountability also extend to the keeping of procurement records and allowing public access to them upon request. Specifically, Sections 16(12) and (14) of the PPA provide as follows:

16 (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.

16 (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.

Further, section 38 of the Act guarantees access to procurement records after the conclusion of proceedings.

Notwithstanding these clear transparency and accountability provisions of the Act, procuring entities (MDAs) still rely on their oaths of secrecy and refuse CSOs request for access to records of procurement proceedings. The Federal Government Public Service Rules (“Rules”) 2008 in Rule 020209 provides that it is the duty of every accounting officer to ensure that officers in his ministry or extra ministerial department sign an oath of secrecy on Security Form 1 and that the oaths so signed are carefully preserved. Again in Rule 030415, this duty is reaffirmed by the Rules. In accordance with the Official Secrets Act and Rule 030416, every officer is subject to the Official Secrets Act and is prohibited at the pain of punishment from disclosing to any person, except in accordance with

¹⁹ Section 16 (1) (d), PPA.

official routine or with the special permission of government, any article, note, documents or information entrusted to him or her in confidence by any person holding office under any government in the Federal Republic of Nigeria or which he has obtained in the course of his official duties and shall exercise due care and diligence to prevent the knowledge of any person against the interest of the government. Further, by Rule 030417, every officer is prohibited from abstracting or copying official minutes, records or other documents except in accordance with official routine or with the special permission of his accounting officer. Civil servants are more at home with the Rules and tend to follow it.

The implication of the foregoing is that every request for information or records of procurement proceedings (whether classified or unclassified including published gazettes, books, journals, reports, etc) by a non civil servant from any staff in an MDA is usually to be put in writing and the request addressed to the accounting officer who is the sole authority to approve or reject the application. This is a laborious process and most at times, there are no replies to such requests. Admitted that there may be need to classify some official information, but this should not pertain to the routine records of procurement proceedings.

The response of MDAs to harmless requests for comprehensive records of procurement proceedings calls to question the basis of the enactment of the PPA especially the provisions touching on transparency, accountability and probity. CSJ and other CSOs sent various letters and followed up with visits to several MDAs to get access to basic comprehensive records of procurement proceedings to no avail. Specific instances of such request include:

A. CSJ's request for Access to Comprehensive Records of Procurement Proceedings dated November 21, 2009. The letter was addressed to the Director-General, National Primary Health Care Development Agency, Plot 681/682 Port Harcourt Crescent, off Gimbiya Street, Area 11, Abuja, requesting for the records of procurement proceedings in respect of:

- ❖ Lot/2009/6/1 for computer accessories and consumables; Lot 2009/6/2 for printing of non security documents; Lot 2009/6/3 for general store items; Lot 2009/6/4 for fire prevention equipment; Lot 2009/6/5 for automobile batteries and tyres; Lot/2009/6/6 or Hajj vaccines/CSM (ACWY 135).

- ❖ Lot/2009/1/1MSS for TBA Kits and Mama KITS; Lot/2009/1/2MSS for medical and laboratory equipment; Lot/2009/1/3/MSS for registers, record/log books, family health record books.

All these invitation for tender were advertised in the Nation Newspapers of Wednesday, July 1, 2009 at page 10.

In response, the National Primary Health Care Development Agency, through its procurement officer called for a meeting with CSJ wherein the Agency clearly stated that it will not make the requested records available and further directed CSJ to make its request to the Bureau. Present at the meeting were Eze Onyekpere and Henry Unongo from the CSJ side while Bernard N. Oyaghire, the procurement officer, Tajudeen Oyaawei the procurement facilitator and Seyi Taiwo represented the National Primary Health Care Development Agency.

B. CSJ also requested to have access to comprehensive record of procurement proceedings from the Ministry of Works, Housing and Urban Development in respect of procurement contract for the rehabilitation and expansion of the Aba Owerri road, and the Abuja Airport Express Way Lots 1 and 2 awarded Messrs Niger Construction Company Ltd and Julius Berger (Nigeria) Plc respectively which were approved by the Federal Executive Council on 29/04/09. The first letter was dated November 21, 2009 and addressed to the Permanent Secretary of the Ministry. CSJ waited in vain up till the date of writing this report.

C. Another request was made to the Universal Basic Education Commission on November 21, 2009 through the Executive Secretary for the comprehensive records of procurement proceedings generated on the Self-Help Community Initiative project which was advertised in This Day Newspaper of July 30, 2009. The Commission merely replied on December, 11, 2009 stating that the projects were still on-going and had since then, not made the documents available to CSJ as requested.

CSJ later addressed a letter to the office of Director-General, calling for the intervention of the Bureau in such a way that the records would be made available to CSJ as requested. The Bureau, via, a reply dated February 24, 2010, eventually referred CSJ to its website for the information on the records requested. However, contrary to the Bureau's letter, the requested records were not available on the BPP website.

The Bureau has the powers to call for the production of books of accounts, plans, documents, and examine persons or parties in connection with any procurement proceeding.²⁰ Also, every procuring entity is duty bound to transmit to the Bureau copies of all procurement records not later than 3 months after the end of the financial year showing as noted earlier:

- ❖ information identifying the procuring entity and the contractors;
- ❖ the date of the contract award;
- ❖ the value of the contract; and
- ❖ the detailed records of the procurement proceedings.²¹

The Financial Year Act²² prescribes Nigeria's financial year as the period between 1st January to the 31st of December and the records of procurement proceedings requested for by CSJ were generated in 2008 and 2009. It is therefore presumed that the Bureau is either in possession of those records but does not want to make them available to the public on request to enhance transparency in public procurement or that the Bureau is not exercising its powers in that area thereby allowing procuring entities to frustrate the transparency provisions of the Act.

Chapter Four

IMPLEMENTATION OF THE CAPITAL BUDGET

²⁰ Section 6(1) (j) of PPA.

²¹ Section 16(12), PPA.

²² Cap F.27, LFN, 2004; See also Section 13, PPA which provides that the financial year of the Bureau shall be the same as that of the Federal Government.

4.1 THE ACT APPLIES TO ALL PROCUREMENTS

It is gratifying to note that the Act has been made to apply to all procurements by the order of the late President Umaru Yar'Adua. Subsection (2) of section 15 of the Act had given the leeway for the authorities to make exceptions to the general rule:

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.

Special purpose goods are defined in the interpretative section 60 of the Act 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.

4.2 2009 CAPITAL BUDGET IMPLEMENTATION²³

A total of N1,022.26 was appropriated in the 2009 Appropriation Act. 2009 recorded two supplementary budgets and the second one was passed by the legislature late in December 2009. The first supplementary budget provided additional N4.9billion for capital expenditure whilst the second provided additional N253.55billion. This brought the total approved capital expenditure to N1,280.71 billion. However, what was cash backed for expenditure was N928 billion. The fiscal year had to be extended to March 2010 to ensure enhanced capital budget implementation. This raises a strong poser; why was it necessary to pass a supplementary budget in late December 2009 instead of integrating the requests in the 2010 Appropriation Bill?

By the end of the Third Quarter, the Budget Implementation Report stated as follows:²⁴

Capital budget implementation averaged 44.46% by the end of the third quarter of 2009 indicating a gross utilisation of N327.94 billion of the N737.53 billion cash-backed by the office of the Accountant-General of the Federation (OAGF).

²³ This section is partly taken from *Obedience in the Breach - Report on the Implementation of the Fiscal Responsibility Act in the Year 2009*.

²⁴ 2009, 3rd Quarter Budget Implementation Report at page vi

Though marginally higher than the second quarter's performance, it falls below expectations. Of the 43 MDAs reported on by the OAGF as at the end of the third quarter, 25 (or 58%) of the MDAs (including Power, Education, Health and Works) had utilisation rates below the overall average of 44.46%. It is noteworthy that these MDAs which are critical to the achievement of this administration's 7-Point Agenda have consistently performed below average over the period under review.

Budgets are meant to inter-alia, provide fund for MDAs to carry out capital projects, facilitate the running of their affairs and through these, government policies are transformed into concrete realities for the benefit of the citizenry. It is against the principle of social justice and development for funds approved for projects to be lying idle without any substantial reasons only to be returned to the Treasury at the end of the financial year in the face of infrastructural decay and grave social needs. It is even disheartening to know that the biggest culprits include the Ministries of Education, Health, Power and Works which are no doubts key ministries that have the greatest impact on human and social indicators; the standard of living and upgrading of infrastructure for economic growth. All the performance indicators in these ministries would qualify them for a declaration of state of emergency in the sectors.

The Minister of State for Finance on October 24 2009 stated that the \$5.3 billion Power Emergency Fund was lying idle at the CBN.²⁵ This sum was removed from the Excess Crude Account as Power Sector Intervention Fund and each State and the Federal Government was to seek the approval of their respective legislature for the expenditure of their contribution. He stated that 11 (eleven) states were delaying the project by not forwarding the approval of their legislature. That Nigeria missed the targeted 6000 megawatts of electricity by the end of December 2009 was therefore no surprise, considering the poor capital budget implementation and the funds that were idle at the CBN.

There is a controversy between the Budget Office of the Federation ("BOF") and the Ministry of Finance. While the Minister of Finance states the capital budget implementation figure as at December 31, 2009 at 54.26%, the BOF states the figure to be 60.6%. The actual figure is more likely to be lower than the Minister's estimate considering the poor performance of the first, second and third quarters- 20.68%, 42.94% and 44.46% respectively. Table 1 taken from the Budget Implementation Report of 2009 shows the position of the BOF.

²⁵ Daily Trust, Wednesday, October 14, 2009.

Table 1: Sample of MDA's Capital Budget Utilization Report as of 31st December, 2009

MDA	Total Release	Total Cash Backed	Total Utilization	% Utilization
Police Formation & Commands	21,324,630,000	21,324,630,000	13,142,984,730	61.63%
Power ¹	39,599,212,715	39,599,212,715	10,143,106,694	25.61%
Transport	38,402,031,359	25,902,031,359	22,578,206,651	87.17%
Health ¹	48,643,289,834	48,658,789,834	24,509,417,925	50.37%
Agric. & Water Resources ¹	138,824,895,686	138,724,895,686	115,954,374,024	83.59%
Education ₁	36,386,571,952	36,372,321,952	23,719,577,628	65.21%
Defence	47,302,887,338	47,302,887,338	38,883,177,145	82.20%
Works	209,093,840,018	209,093,840,018	99,382,926,917	47.53%
Niger Delta	48,000,000,000	48,000,000,000	31,943,273,606	66.55%
Average Utilisation by all MDAs				60.59%

Source: OAGF and BOF²⁶

Essentially, the utilization rate stated above by the BOF was based on the cash backed sum of N928 billion rather than the overall capital budget of N1,280.7 billion. Thus, actual implementation was N562 billion which is 60.59% of N928 billion. Stating that the capital budget recorded 60.59% implementation, is deliberately misleading because 60.59% of N1,280.7 billion is N775.98 billion. Essentially, actual capital budget implementation for 2009 was 43.9% of the appropriated capital vote.

The words of the BOF in the 2009 Budget Implementation Report speaks loudly²⁷:

²⁶ Utilization for certain projects and entities, such as the PHCN successor companies, was not included in the OAGF report. Releases for the 2nd supplementary budget which was approved in late December 2009, have been excluded as MDAs did not have sufficient time to utilize funds. It should be noted that data on capital utilization for certain projects under the Ministries of Power, Agriculture and Water Resources, Education, Health and Science and Technology were not available at the time this report was prepared

²⁷ At pages 83 to 85 of the Budget Implementation Report.

While N928.18 billion (96.60%) of the capital expenditure release made to MDAs were cash-backed as at 31st December, 2009, based on data from the OAGF, average capital utilization by all the MDAs was given as N562.37 (60.59%). Although this is an improvement from the 44.46% performance as of the third quarter of 2009 and data from the OAGF indicates a rise to 77.13% as of the end of March 2010, the overall performance for 2009 is not encouraging. 14 MDAs had utilization rates of above 80% of their releases while 16 MDAs performed below the overall average during the period. It is expected that MDAs will improve on their performance even as Government continues to dialogue with all stakeholders to determine lasting solutions to the identified impediments to budget implementation.

Several facts emerged during field visits to a sample of selected capital projects across selected MDAs which revealed some of the constraints face by MDAs and their contractors in bringing their projects to completion. These include:

- ❖ Disruptions to work by local communities for reasons relating to compensation;
- ❖ Overloading of specific contractors with more contracts than they can handle, leading to resources spread thinly across several projects and delays in project completion;
- ❖ Delay in payments to contractors even when releases have been made to MDAs by the OAGF;
- ❖ Lack of ownership of projects by local communities which leads to neglect of completed projects and a hostile attitude towards contractors.

To address some of these challenges, Government has made several efforts to ease the constraints faced by MDAs. The simplification and decentralization of the procurement process, which is an ongoing process, has already yielded positive results and a cabinet-level meeting every month is devoted to assessing the progress made by MDAs in implementing their budgets. Ministerial approval thresholds have also been raised and several training programmes have been organized to train key MDA staff in the e-payment and procurement processes. MDAs are also encouraged to start the planning phase of their projects as early as possible as this will give them the required momentum to complete their projects on time.

The BOF also continues to interact with key MDA officials and other stakeholders involved in the implementation of capital projects to find a lasting solution to these problems. The constraints faced by contractors in particular were also identified at the Budget Implementation Workshop organized by the BOF in February 2010 and efforts are continuously being made to remove all bottlenecks that are currently impeding the budget implementation process.

The monitoring team also made several observations concerning practices by MDAs which impeded their ability to implement their budgets.

- ❖ Several MDAs did not make adequate provision for the completion of both new and ongoing projects, leading to resources being spread thinly across several projects;
- ❖ There were disparities between the actual projects executed by some MDAs and project descriptions in the 2009 Appropriation Act;
- ❖ Contract awards for some projects were delayed for no apparent reason by some MDAs, leading to delays in project execution;
- ❖ Some contracts were awarded based on the preliminary design rather than the final design, resulting in cost variations;
- ❖ Delays in project completion for the reasons outlined above, led to the extension of project completion dates which oftentimes gave rise to additional costs due to the request for 'cost variation' by contractors;
- ❖ There were concerns about the manner in which Internally Generated Revenue (IGR) was being utilized by some MDAs in completing their projects as there are strict and specific guidelines on what portion of IGR can be retained for use by MDAs.

The attention of the concerned MDAs has been drawn to these observations and some of these issues are currently under further investigation. We believe that by resolving these problems, capital utilization rates and thus the achievement of set deliverable targets will improve.

The Director-General of the Bureau, Engineer Emeka Ezeh has proffered reasons informing poor capital budget implementation.²⁸ He was reported to have attributed it to lack of integrity and transparency in awarding contracts. He alleged that MDAs would normally not award contracts to contractors who are not in their good books, even if the contractor met the necessary qualifications. Demands for gratification are rampant and budgetary request for money not needed by the MDAs is the order of the day. He concluded that MDAs have the capacity to implement the budget but what they lack is integrity.

²⁸ This Day Newspapers of February 16 2010 as reported by Kunle Aderinokun.

Engineer Emeka Ezeh debunked allegations that the Bureau through delays in processing the certificate of 'No Objection to Contract Award' was responsible for the poor implementation of capital projects. According to him²⁹

The BPP certified 566 projects worth N1.94 trillion out of the 602 requests by the MDAs in 2009. 36 are still awaiting response while 10 were rejected. It is unfortunate that less than 300 of the 566 contracts certified have been presented to the Federal Executive Council for ratification and award.Most of the challenges are caused by the contractors who go around and submit fake papers, bribe officials and get politicians to get them pre-qualified. It is a circulated fact that they pay N5 million to get pre-qualification.

The Director-General of the BPP is right in his analysis. The MDAs have been encouraged to enhance capital budget implementation through the fact that the procurement process has been simplified with higher executive approval thresholds and the decentralization of the procurement procedures in the MDAs.

The former Minister of State for the Ministry for Works and Housing added her perspective that government contracts are concentrated in the hands of a few cronies of those with responsibility to pre-qualify contractors for contracts and it has been observed that these contractors lack the capacity to handle jobs of such magnitude. A contractor with limited equipment may be handling contracts in different parts of the country. There are also cases where genuine contractors who have been pre-qualified are not informed of the certification of such contracts. In such cases, contracts are left unattended to despite the allocation and availability of funds for the project.³⁰

4.4 DELAYED PAYMENT TO CONTRACTORS

Section 37(1) – (4) of the PPA reads thus:

(1) payments for 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,

²⁹ Business Day, Tuesday February 16,2010.

³⁰ Business Day, supra.

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 rate for late payment of more than sixty days.

The above scenario outlines the implication of delayed payment for executed contracts. Yet MDAs for unknown reasons still delay payments. Ordinarily, they would have incurred more costs for their MDAs, but available information has not disclosed any contractor or service provider who has insisted on interest being paid for delayed payment in accordance with the law, except where the matter has become a subject of litigation in court. The present centralised system of payment by some MDAs including the Ministry of Education is unproductive and must be stopped to allow for timely payments for executed contracts and to avoid accumulation of interest.

Examples of delayed payment to contractors include road projects totaling N230 billion in the Niger Delta where contractors handling the roads were threatening to pull out for delayed payment. The contractors and the specific contracts include³¹:

- ❖ Reynolds Construction Company Nigeria Ltd who were paid N5.684 billion out of N35.6 billion for the dualisation of the 99 kilometre East West Road (section 111), Port Harcourt from Eleme Junction to Eket in Akwa Ibom State;
- ❖ Setraco Nigeria Ltd on the N74.8 billion contract for the dualisation of the 47 kilometre East West Road project from Port Harcourt- Ahoada and Kaima Ahoada and Warri – Kaima (sections 1 and 11);
- ❖ Gritto Construction Company for the N26 billion dualisation of East West Road (section IV) from Eket to Oron in Akwa Ibom State

It would be recalled that immediately after the commencement of the Act, the Federal Government arbitrarily suspended the implementation of projects under

³¹ Disclosure by the Chairman of the House of Representatives Committee on the Niger Delta, Honourable Nwogu Olaka published in Financial Standard of July 20 2009 .

the Nigeria Integrated Power Supply Project. This led to suspension of payments on projects with approved certificates and of course suspension of further work by the contractors. However, when the government decided to continue with the project, no interests were paid on delayed payments.

A contractor interviewed in the course of this study indicated that:

Government officials still expect and demand to be bribed to facilitate the processing of payments to contractors. If you insist on not paying bribes, your documents will still be processed but at a very slow speed. However, if you play ball, then you get your dues at the right time.

4.5 CONTRACT SCAMS IN PUBLIC PROCUREMENT

PPA provides for the conduct of all public procurement in such a manner as to ensure transparency; value for money, accountability, etc.³². It went further to provide in section 57(4) of Part XI under the Code of Conduct for Public Procurement that:

All persons in whose hands public funds may be entrusted for whatever purpose should bear in mind that its utilisation should be judicious.

However, contract scams perpetuated by trustees of public resources have violated the letters and spirit of these principles of public procurement. Some of these scams are examined hereunder.

A. Siemens Bribery Scandal and Presidential Pardon

Nigerians were shocked to realise that a German telecommunications company, Siemens gave over 10 million Euros as bribes to top government officials in former President Obasanjo's government. A German court in Munich had named some past Nigerian Ministers of Communications as well as a Senator as having received bribes of about 10 million Euros from the German engineering conglomerate. A lot of high ranking Nigerians currently occupying public office and previous office holders were named in the scandal as bribe recipients. Late President Umaru Musa-Yar'Adua had told the nation through his Media Adviser, Segun Adeniyi that those involved in the scandal would be investigated and prosecuted. Only recently, the new Attorney General and Minister of Justice and

³² Section 16 (1)

the EFFC have started new “noises” by inviting some suspects for quizzing and vowing to bring the culprits to books.

Contrary to this earlier position, what the nation has seen is that presidential pardon has been granted the company – SIEMENS by former President Umaru Musa -Yardua and they are back in Nigeria prospecting and procuring contracts, even when the parent country Germany has since prosecuted the operators of the telecom giant involved in the bribery according to their laws. This pardon granted this company is in violation of the provisions of the PPA. Part XII Section 58 sub-section 4 (a)–(c)

“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 have 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, favour, 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”

Nigerians had expected our President to allow justice to run its full course by implementing the provisions in section 58, sub-sections (6) and (7) of the Public Procurement Act which states:

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.

Sub-section (7) of section 58 states that:

Where any legal person shall be convicted pursuant to sub-section (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.”

This manner of fighting corruption where those whose names were mentioned in the Siemens bribery scandal and the company itself have been allowed to walk the streets as free men and legal persons does not make room for development, nor national progress. It contradicts in its entirety, the whole essence of enacting the PPA and fails to provide a deterrent benchmark for future offenders.

B. Rural Electrification Agency and the N5 Billion Fraud

In an irony of fate, during the period under review, the Chairmen of Committees on Power in both Senate and House of Representatives, 7 senior officials of the Ministry of Power are currently standing trial on a 157 count charge bordering on alleged over 5 billion Naira frauds at the Rural Electrification Agency. What makes this case worrisome is that the chairman of the House of Representatives Power Probe now turned out to be one of the persons accused of looting power sector funds. How can the legislature exercise oversight over executive implementation of the budget and other laws when its members are deep in the cesspool of corruption, in close collaboration with the institutions they are supposed to oversight? The bizarre manner of looting the public treasury is antithetical to national development and runs contrary to the position of the laws against corruption in Nigeria. The only way to ensure that public procurement serves the public good is when corruption in all its ramifications is eradicated in the procurement system in Nigeria.

C. Universal Basic Education Commission Scam

One of the objective standards of measuring the impact of PPA on the citizenry is not the amount of resources available to governments to carry out budget implementation but on the impact of the spending particularly in critical areas that will facilitate the attainment of the MDGs. The second among the eight - time bound goals is that of achieving primary education and literacy in Nigeria by

2015. However, this may end up as a mirage if what goes on in the Universal Basic Education Commission is something to go by. The Commission has become a centre for frauds. N850 million contracts scam for the supply of only plastic seats for Junior Secondary Schools in Nigeria was recently recorded in UBE. If a huge amount of up to N850 million ends up being mismanaged in the name of plastic seats, you can imagine the cesspit of fraud and looting going on in a sector central to national development and the contradictions of this development with the essence of the PPA.

In a release signed by David Apeh, Principal Public Relations Officer, UBEC stated its position as follows³³. The contract awarded to Intermarkets was for the production and supply of plastic chairs and desks for selected Junior Secondary Schools in Nigeria in 2005. The contract was for a period of six months. The value of the contract was N850 Million for 109,440 chairs and desks. The contract was executed prior to Dr. Ahmed Modibbo Mohammed's assumption of duty as Executive Secretary of UBEC. On assumption duty, Dr. Ahmed Modibbo Mohammed was briefed on an additional sum of N850 Million with the Education Trust Fund (ETF) meant for UBEC for supply of another set of chairs and desks which should be accessed before it lapses. In response to a formal request from UBEC for release of N850 Million, the ETF observed that UBEC had not accounted for the first disbursement and could not get the additional amount until it had properly accounted for the first disbursement. The Executive Secretary drew attention to the response from ETF and requested for the file on the matter to acquaint himself with the details. In an effort to answer the ETF query, the Executive Secretary discovered that due process was not followed in the award of the contract. The findings among others were:

- ❖ The contract was awarded by UBEC Board without Federal Executive Council approval;
- ❖ There was no advertisement of the contract as required by due process guidelines;
- ❖ Copies of advertisement in the Punch of 15th March, 2004, New Nigeria of 15th March, 2004, and Thisday of 15th March, 2004 contained in the file were not found in the said Newspapers filed with the National Library.

³³ THISDAY, Tuesday July 21 2009 at page 57.

The following companies were listed as having bid for the contract:

- ❖ Calfe Industry, 98D Platanen Street, Pretoria, South Africa;
- ❖ Intermarkets, 24 Delay Street, Suite 3, Danbury, CT 06810, USA;
- ❖ MTS Manufacturer Ltd., 56 Trans Amadi Industrial Layout, Port Harcourt;
- ❖ U.C.H. Investment Ltd., 114 Ibrahim Taiwo Street, Kano;
- ❖ Modern Rubber Int'l Ltd., 113 Olu Obasanjo Road, Port Harcourt, Rivers State;
- ❖ Boars Plastic Industry, 125 Ilupeju Industrial Estates, Lagos.

The Four Nigerian Companies purported to have bid were not registered with the Corporate Affairs Commission (CAC) and could not be traced at the addresses they claimed. Intermarkets USA was also not registered with CAC. No bidding was conducted prior to the award of the 2005 contract to Intermarkets. Minutes of the Due Process Committee Meeting were suspect, as non-existent firms allegedly attended to show that bidding was conducted and Intermarkets recommended. UBEC received an audit query from the Auditor-General of the Federation through ETF on the way and manner the 2005 contract was awarded and executed. The Auditor-General observed among others that:

- ❖ Due process was not followed in the award of the contract to Intermarkets Nig. Ltd. No competitive bidding was carried out before the Contractor (Intermarkets Nig. Ltd.) was selected;
- ❖ Mobilization of 85% of the contract sum of N787,968,000.00 (i.e N669,772,800) was paid to the contractor as against 25% stipulated by the Federal Government in Circular Ref: No 15775 Dated 27th June, 2001;
- ❖ Even though the contract agreement (Para 11.1) states as follows: “the Supplier is requested under the contract to transport the goods to a specified place of destination as may be delivered”. N41,500,000.00 was still paid UBEC from the Education Trust Fund for transportation of the sitting materials from the Contractor’s factory in Osogbo to various states;
- ❖ It was observed that the company had no previous knowledge of plastic manufacturing nor had any factory to fabricate the materials prior the

award of the contract. This might explain why 85% mobilization was paid to it to help establish such factory”.

The Executive Secretary compiled a Report on his findings and sent it to the Minister of Education. The Executive Secretary proceeded to ensure that UBEC reconciled its accounts with ETF in respect of the first disbursement and complied with other conditions, including advertising for a new contract for supply of chairs and desks to be funded by ETF. The N850 Million for this new contract has not been released by ETF to UBEC till date.

After publication of the advertisements calling for pre-qualification for the new contract, Intermarkets sued UBEC claiming exclusive right to the new contract which it claimed was the second phase of the one it had earlier executed. The matter is now before a Federal High Court in Abuja.

D. Halliburton Bribery Scandal and the Lukewarm Attitude of the Federal Government

The outbreak of the Halliburton bribe scandal in Nigeria is one of the greatest revelations of procurement abuses and financial malfeasance in official places in the recent history of the continent of Africa. The three Nigerian leaders and top government functionaries mentioned in the scandal are from the regime of late General Sanni Abacha through General Abudusallam Abubakar to General Olusegun Obasanjo. However, General Obasanjo’s mantra in office from 1999 to 2007 was “*war against corruption*”. Cumulatively, the suspects are reported to have received at least N27 billion in bribes from foreign companies in exchange for billions of dollars in contract to build Nigeria’s liquefied natural gas plant. This is a scandalous series of events which commenced with the 1994 initiative to build Africa’s first liquefied natural gas plant in Bonny, Rivers State, at a price of \$6 billion.

According to a cover story in a Nigerian newspaper, *Next on Sunday of the 29th March 2009*, American authorities are now pursuing their own citizens and corporations, notably the oil services company Halliburton, in connection with the scandal. Halliburton has agreed to pay \$579 million in fines and many of its agents face long jail terms. Nigeria’s law enforcement authorities notably the former Attorney-General Michael Aaondoaka and the Economic and Financial Crimes Commission, have lately been making noises but have in reality done little to pursue those indicted in this scandal. This scandal reveals Nigeria as a

nation that fully justifies its reputation as one of the world's leading cesspits for corruption and unrestrained graft.

Most Nigerians believe that government is paying lip service to the rule of law mantra. What kind of rule of law policy is it that till now, the Mike Okiro Panel on Halliburton has not given Nigeria any headway in terms of who are to be prosecuted and who are not? Halliburton Company is still carrying on business as usual in Nigeria, in a manner it is not even allowed in its parent country, the United States. The United States has even convicted two of their nationals involved in the Halliburton scandal and has gone further to say that the Federal Government has "enough information" to act on the Halliburton bribery scandal as Nigerian laws and nation deems fit.³⁴ Yet the matter has been swept under the carpet.

The PPA has been grossly violated by this company and we hereby call on the Attorney-General and Minister of Justice to prosecute both the company and all individuals involved in this scandal no matter how highly placed.

E. Central Bank of Nigeria/Australian Firm Polymer Note Scam

The Nigerian people woke up in the last week of September 2009 to the reality of the news of bribery scandal rocking the Central Bank of Nigeria and an Australian currency printing firm that won the contract for the printing of the various denominations of Nigeria's polymer notes under the Chukwuma Soludo led Central Bank. The Australian company was alleged to have paid N750 million as inducement to top Nigerian government and CBN officials to aid the securing of the contract. This is in gross violation of the spirit and letters of the Public Procurement Act 2007. Up till now, nothing concrete has been done to unravel the corrupt mysteries surrounding the scam. Although the new CBN Governor, Sanusi Lamido has blown so hot and vowed to unmask the characters involved in the scam; no convincing steps have so far been taken by the authorities to uncover those behind the scam. This pattern of investigation is at variance with the ongoing procurement reforms meant to revitalise and engender best procurement values in the public contract system in Nigeria. In Australia unlike Nigeria, crack detectives have been reviewing case files in Canberra, the

³⁴ Ms. Robin Rene Sanders, US Ambassador to Nigeria, in This Day News Paper as reported by Tokunbo Adedaja in Washington D.C, April 9.2010.

administrative capital of Australia, trying to unravel those involved in the N750 million bribe scandal.

F. Unresolved N8.4bn Nigeria Television Authority Contract Saga

The NTA Contract Scam involved the award of contract by NTA to a firm named WTS based in London for upgrading, to be funded partly through contractor financing, of eight OB Vans for use in the Under 17 World Cup hosted by Nigeria. Over a year after the conclusion of the Under 17 World Cup, the vans are yet to be released to NTA. The Senate held a public hearing on the matter without addressing the fundamental issues involved and failed to provide a way out of the scandal. The violations involved in this scam are legion. First, NTA paid 20% part financing from its internally generated revenue without recourse to appropriation by the National Assembly. This sum should have properly been paid over to the Federal Treasury as demanded by relevant laws including the 2009 Appropriation Act. NTA was also anticipating that it would use funds generated by the Local Organising Committee of the World Cup to pay for the contract. Second, the contract was not advertised or subjected to open competitive bidding. Third, the contract failed the basic tenets of procurement because it was not supported by a properly articulated procurement plan based on prior budgetary appropriation, neither were funds available to meet the obligations of the contract. It did not have detailed bill of quantities. Fourth, the contract failed the test of value for money. Fifth, and indeed there was evidence of deliberate violations of the law.

The story line appears like a Nollywood movie. A memo from the Minister of Information and Communication had been forwarded to the President and EXCOF seeking approval to award the contract to three firms at the same time. The request was promptly turned down by the President considering that the certificate of no objection to contract award had not been obtained from the BPP. The question arises as to the reason informing the Ministry's by-passing of the BPP and proceeding straight for presidential approval. The President promptly sent the request back to BPP for its intervention. Instead of ordering for a fresh tender in view of the listed anomalies which the BPP itself discovered, the BPP engaged in what it referred to as damage limitation by selecting "the best" of the three contractors. WTS was to give NTA, reasonable moratorium to pay the remaining 80% of the value of the contract over a period of 24 months including an interest rate of 5% per annum. And the contract eventually sailed through the necessary approvals.

In support of the claim of lack of value for money, contracts for new OB vans, cameras and other support equipments issued by the South African authorities for the 2010 World Cup came at a cheaper price. While the South African orders were brand new, NTA was asking for renovation, yet it attracted a higher price. A Commentator succinctly paints the picture as follows:

Looking at the cost of the OB Vans supplied to South Africa for the just-concluded 2010 World Cup. [Johannesburg, Report of 9 September 2008] – The South Africa Broadcasting Corporation (SABC) won the right to proceed with a R380 million contract with Sony SA. The deal covers the provision of four outside broadcasting (OB) vans to broadcast the 2009 Confederations Cup and the 2010 Soccer World Cup in high-definition. The specification of these OB vans supplied for the World Cup are far superior to that of NTA and are as follows: SABC will deploy all four of the new Obs. Identically specified, each 30-ton vehicle is equipped with 18 cameras, and wired for 24, including 3 super-slot HD cameras. The interior is divided into four main areas: Production, Sound, Video Tape Area (VT) and Vision Control.

Note that SABC OB Vans are brand new vans, whilst WTS intends to ‘renovate’ the current NTA OB vans, which are more than 10 years old with HD Equipment. Let us therefore examine this issue further. The WTS approved tender is for 12 cameras and the facilities being provided are not as expandable as the vans to be supplied to SABC. This is obvious in what SABC ordered for, compared with what has been approved for NTA.

In terms of cost, it would seem that the WTS OB vans are well over-priced, and not value for money. The total cost of 4 x 18 camera HD OB vans with far superior facilities to SABC is N6.3 Billion. This includes new equipment, new 30-ton vans, generators and towable equipment hauls. Nigeria on the other hand is paying N6.7 Billion for renovating 6 existing OB facilities supposedly from SD to HD, and with only 12 cameras (as against 18 in the SABC vans) and far inferior equipment are being supplied. Additionally, all equipment within the existing NTA OB’s will be removed, so no new vans are supplied, just the old ones being reused; no new generators, just a total overhaul of what has been on the ground for about 10 years. And for that we pay a substantial amount and lose out on actually upgrading with new equipment totally.

A clear violation of the law involved the incurring of a procurement loan without the authorization of the National Assembly or the involvement of the Ministry of

Finance and the Debt Management Office before committing the government to the terms of the procurement³⁵.

G. Scheming out of Nigerian Indigenous Company from a \$43 Million Production Sharing Contract (PSC)

During the period under review, the House of Representatives Committee on Public Procurement indicted Total Upstream Nigeria Limited (TUPNI) over the award of contracts worth \$43million in its Akpo Oil Field Development Project, to a foreign firm, Oceaneering International, instead of Tilone Nigeria Limited, an indigenous firm. The Akpo Field Development Project on the Oil Mining Lease No. 130 (OML130) is a Production Sharing Contract (PSC) venture between the Federal Government of Nigeria (as represented by the NNPC) and TUPNI.

It was observed that the contract bid was originally won by the local firm, but was awarded to Oceaneering in contravention of the Public Procurement Act and local content policy in the oil and gas industry in Nigeria. This scheme-out design masterminded by TUPNI runs contrary to the spirit and letters of the PPA which envisions the participation of Nigerians in the procurement of goods, works and services for national development.

The Act provides in section 34 (1) as follows:

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.

(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.

³⁵ Taken from the background of an Independent Report on the unresolved N8.4BN NTA Contract Award Saga prepared by Mohammed Bougei Attah, Managing editor, NGO Network, June 28, 2010.

The investigation revealed that TUPNI organised the call for tender marked: APO/CO4/05 for provision of Remotely Operated Vehicles (ROVs) services to the Akpo Field Development Project out of which Tilone Nigeria Limited, Oceaneering International AG and SUB-SEA 7 indicated interest and were subsequently pre-qualified. SUB-SEA later opted out of the bidding process and on June 13, 2006, a competitive bid exercise was conducted between Oceaneering International and Tilone Nigeria Limited, wherein Tilone Nigeria Limited emerged the winner.

However, in the course of sorting the bids for the contract, TUPNI allegedly inflated the bid of Tilone Nigeria by about \$10.975 million to make it higher than the bid of Oceaneering Limited, the foreign firm and only competitor on the job. TUPNI therefore automatically disqualified Tilone and proceeded to award the contract to Oceaneering International, contrary to earlier directive of the NNPC Board to the effect that the contract be awarded to Tilone.

It is interesting to report that consequent upon its the findings on the allegations, the House of Representative Committee on Procurement demanded immediate demobilisation of Oceaneering International from the project and directed Total Upstream Nigeria to comply immediately with the directive of the Board of the NNPC, by awarding the contract to Tilone Nigeria Limited at the current commercial rates and pay compensation to it for undue financial exposure during the period it was denied the contract.

This directive of the House of Representative Committee on Procurement is a positive action towards the implementation of the PPA. It is further expected that Oceaneering International and TUPNI be visited with appropriate sanctions in line with section 58 of PPA.

H. N64 Billion Airport Runway Contract Scam

The Federal Airports Authority of Nigeria (FAAN) and the Ministry of Aviation are reported to have sharply manipulated the procurement process leading to the inflation of the contract for the construction of a second runway at the Nnamdi Azikiwe International Airport, Abuja following the depreciation discovered on the old runway built about twenty years ago. The House of Representatives Committee on aviation which probed the procurement noted the secrecy and undue haste that preceded the award of the contract. It appeared that FAAN had decided from the beginning to award the contract to Julius Berger Construction

Company and was merely working from the answer to the question. The contract was awarded on selective tendering instead of open competitive bidding. At the end of the hearings, the House Committee on Aviation recommended the revocation of the contract and a new tendering process while the Presidential Projects Assessment Committee recommended the reduction of the contract fee by N13.5 billion. However, the Presidency has finally directed the cancellation of the contract and a new tendering process to be undertaken.

I. Listing of Unapproved Firms for N47.2 Billion Contract

It was revealed during the period of this Report that in a N47.2 billion silos contract to be executed nationwide, the National Food Reserve Agency (NFRA) through the Federal Ministry of Agriculture pre-qualified 20 companies for the job. The projects were to be funded from the N120billion Natural Resources Development Fund (NRDF). Two, out of the twenty companies, Baraj Nigeria Ltd and Nahman Construction Company Ltd got contracts for N1, 286,447,463 and N3, 986,330,359.20 respectively. Following NFRA's recommendation, BPP issued a certificate of no objection for the implementation of the contracts. The Minister of Agriculture Abba Ruma then tabled BPP's certification to the Executive Council of the Federation for approval.

Two unapproved firms appeared in the list of 20 companies picked by EXCOF for the N47.2billion silos contract nationwide. It was reported that the firms, Trenur Nigeria Limited and Metropole Development Company Limited were clandestinely brought in to replace Baraj Nigeria Limited and Nahman Construction Company Limited. While Baraj and Nahman got the contract for N1, 286,447,463 and N3, 986,330,359.20 respectively; Trenur Nigeria Limited and Metropole Development Company Limited were to execute the job for N1, 737,452, 981.02 and N4, 174,766,757.52 respectively. The implication is that the two unapproved companies were favoured by EXCOF to get the jobs at N500million above the contract sums that BPP approved for Baraj and Nahman.

Investigation revealed that some forces in the Federal Ministry of Agriculture prevailed on the BPP to bring in Trenur and Metropole, which were initially refused a certificate of no objection due to their high quotations³⁶. This may have confirmed the Global Competitiveness Report 2009-2010 by the World Economic

³⁶ The Nation news papers, Tuesday, June 16, 2009 pgs. 1, 2, 3.

Forum that government officials in Nigeria frequently favour well-connected companies and individuals when deciding upon policies and contracts.³⁷

J. Failed Rural Telephony Contract

Despite huge public expenditure running into billions on the rural telephone project meant to facilitate communications in the rural areas, there is nothing on the ground justifying such expenditure. To make matters worse, the contractors, when summoned, refused to appear before the House of Representatives Committee on Communications. The Committee was considering handing the contractors over to the EFCC.

4.6 80% OF CORRUPTION IS THROUGH PUBLIC PROCUREMENT

During the period under review, the Minister of Justice and Attorney General for the Federation revealed that 80% of the corrupt activities in the country were perpetuated through public procurement³⁸. He noted contract inflations, non delivery of contracted items, etc as the banes of the procurement.

Confirming the above scenario, the BPP boss on his part further said:

There were abuses of financial rules and regulations in the award and execution of government contracts in Nigeria. Such abuses included over invoicing, reckless inflation of cost of contract, abandonment or partial execution of projects already paid for, award of contracts to non-competent contractors and other serious abuses that led to loss of billions of Naira and non-provision of infrastructural development, some of these abuses were due to ignorance while major part of it was to make money³⁹.

4.7 NIGERIA LOSES N1.51TR YEARLY TO FRAUDULENT CONTRACTS

Findings revealed that Nigeria loses N1.51 trillion yearly through various forms of fraudulent manipulations including inflation of contract costs, proliferation of

³⁷ Business Anti-Corruption Portal, Nigeria Country Profile under Public Procurement and Contractors p.1

³⁸ At a forum organised by the Bureau and the World Bank Economic Reform and Governance Project.

³⁹ Engineer Emeka Ezeh, Director-General, BPP, in the news column, Public Procurement Journal April to June 2009, Page 4.

ghost projects, as well as lack of procurement plans, poor project prioritization, poor budgeting processes, lack of competition and value for money in the award and execution of government contracts. According to the Director-General, Bureau of Public Procurement (BPP), a study from which these facts emerged also revealed that lapses in due process were high at the Federal level, higher at the State level and highest at the local council levels. It is further revealed that abuses in public procurement process provide the major sources of diversion of public funds, poor projects conception, poor implementation and denial of social services to Nigerians, at all levels and tiers of government⁴⁰.

4.8 REVOCATION OF 2.3 GHZ LICENSE AUCTION

In May, 2009, the Nigerian Communications Commission (NCC) conducted an auction for the 23 GHz spectrum license wherein three telecommunications companies were said to have won under controversial circumstances. It was gathered that the National Frequency Management Council (NFMC) had earlier revoked the sale and released the spectrum to the NCC for a new bid process but NCC refused to shift ground. The three winners had paid the fixed price of N1.368billion to the federal treasury. However, it was revealed that one of the winners, Mobitel got a N243 million waiver contrary to laid down stipulations. The controversy informed the former President, late President Umaru Musa Yar'dua to revoke the license auction. He therefore ordered fresh auction to reflect transparency and due process. Part of the President's directive as read by his spokesman states:

Having carefully reviewed official reports and representations from stakeholders, and after availing himself of competent advice on the recent licensing of the 23 GHz Spectrum Band, President Umaru Musa Yar'adua has come to the conclusion that the letters and spirit of the stipulated rules and guidelines were not adequately complied with. In furtherance of the Federal Government's desire to assure all prospective investors of its commitment to the observance of due process and a level playing field, President Yar'adua's today (that is to say, on the Tuesday, August 11, 2009) directed that the Nigerian Communications Commission (NCC) should initiate a fresh process for the award of the 23GHz spectrum band licenses. The President further directed that in performing its statutory function of awarding licenses for the band through a fresh process, the NCC should make every possible effort to ensure that its actions are seen and

⁴⁰ The Guardian, Monday, September 28, 2009.

perceived by all stakeholders to be open, transparent and fully in keeping with the requirements of due process and fair-play.

It was also directed that monies paid into the coffers of the Federal Government by the Nigerian Communication Commission (NCC) on behalf the winners of the 23GHz spectrum license be refunded to the bid winners⁴¹.

Chapter Five

⁴¹ The Nation, Wednesday, August 12, 2009 at page 42.

VIOLATIONS AND IMPLEMENTATION CHALLENGES

5.1 USURPING THE POWERS OF THE COUNCIL TO SET PRIOR REVIEW THRESHOLDS

Section 2 (a) of the PPA provides that 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;*

Similarly, section 16 (2), (3) and (4) provides as follows:

(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.

The reproduced sections clearly show that the duty to set prior review thresholds in the procurement regulations lies with the Bureau with the approval of Council. Essentially, the Bureau proposes while the Council approves.

The Bureau has purportedly, already set and revised the thresholds⁴². 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 CSOs⁴³. The word “purportedly” is used because the circular prescribing these

⁴² See the *Approved Revised Thresholds for Service Wide Application and Special Thresholds for Procurement in Oil Sector*.

⁴³ The Bureau has developed a handbook titled “*Procedures and Documentation Pre-requisite for the Issuance of a Certificate of ‘No Objection’ to MDAs*”.

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. 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.

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

Approving Authority/ Objection” award	“No to	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

A list of other relevant Federal Government Circulars on public procurement processes (as shown in Table 2) shows that virtually all of them did not come from the appropriate authority recognized by the Act.

Table 2: Relevant Federal Government Circulars on Public Procurement Processes

S/N	TITLE	REF. NUMBER	DATE
1	Compliance with the Principle of Due Process in Public Procurement by Ministries, Departments and Agencies (MDAs)	Ref. No. SGF/OP/1/S.3/VII/918	16 th December, 2007
2	Immediate Commencement of the implementation of Procurement activities for new projects and programmes in the 2008 Budget Bill by Ministries, Departments and Agencies	Ref. No. SGF/OP/I/S.3/VII	6 th March, 2008
3	Due Process Review of Procurements in the 2008 Budget Bill by Ministries, Departments and Agencies	Ref. No. SGF/OP/I/S.3/VII	6 th March, 2008

4	Establishment of the Procurement Officer Cadre in the Federal Civil Service	Ref. No. HCSF/PSO/155/1/3	31 st March, 2008
5	Requirement for the completion of final designs before contract awards for rehabilitation/construction projects to obviate requests for variation of costs	Ref. No. SGF/OP/1/S.3/VII/964	7 th April, 2008
6	Implementation of Approved Revised Thresholds for Service Wide Application and Special Application to the Federal Ministry of Petroleum for Expenditure related to the Nigerian National Petroleum Corporation (NNPC) Procurement Methods and Thresholds of Application and the composition of Tenders Boards.	Ref. No. SGF/OPI/S.3/VIII/57	11 th March, 2009
7	Implementation of Projects Approved in the 2009 Appropriation.	Ref. No. SGF/OP/I/S.3/VIII/75	28 th April, 2009
8	Implementation of Revised Procurement Thresholds as it Affects Parastatals	Ref. No. SGF/OP/I/S.3/VIII/77	3 rd June, 2009
9	Implementation of Revised Procurement Thresholds Regarding Projects with Variations	Ref. No. SGF/OP/I/S.3/VIII	19 th August, 2009
10	Procurement Plans for 2010	Ref. No. SGF/OP/I/S.3/VIII/177	31 st December, 2009

The circulars whose reference numbers start with SGF are from the Office of the Secretary to the Government of the Federation while those starting with HCSF emanate from the Office of the Head of the Civil Service of the Federation. None of them is a recognized authority for the purpose of making rules and regulations under the PPA.

5.2 ABUSES IN PROCUREMENT PROCESSES

The following patterns of procurement abuse have been identified by the Bureau based on petitions it receives from contractors⁴⁴.

Prequalification

- ❖ Agencies are still doing prequalification for projects below N300 million for works and N100 million for non works;
- ❖ Integrity of the exercise- proper due diligence not done;
- ❖ Throws up contractors with unequal capacity, or that do not possess the capacity to do the work.

Lowest Bidder/Evaluation

- ❖ This is a direct consequence of the prequalification exercise;
- ❖ Burden of reconfirming unrealistic rates before certification;
- ❖ Lowest bidder means lowest evaluated responsive bid.

Delayed Payment

- ❖ Processing of approvals;
- ❖ Need to have templates to fast track payments;
- ❖ Interest on delayed payments (60 days);
- ❖ Submission of interim certificates for payment;
- ❖ Agencies utilise funds meant for particular projects for so called priority projects.

Post Qualification Award

- ❖ Refusal to hand over project;
- ❖ Non execution of contract agreement;
- ❖ Delayed award after certificate of no objection;

⁴⁴ See page 39 of the Public Procurement Journal, 4th Edition, October to December 2009, published by BPP.

- ❖ Improper disengagement of contractors;
- ❖ Extension of time;
- ❖ Variation/review of contract rate.

The list of abuses and MDAs that are prevalent in the abuses are as stated in Table 3 below.

Table 3: Areas Of Abuses In Procurement Processes

S/ N	MDAs	AREAS OF ABUSE
1	EDUCATION	1. Lowest bidder/evaluation 2. Post qualification award
2	HEALTH	1. Lowest bidder/evaluation 2. Post qualification award
3	POWER	1. Prequalification
4	WORKS, HOUSING AND URBAN DEVELOPMENT	1.Lowest bidder/evaluation
5	AGRICULTURE & WATER RESOURCES	1. Post qualification award 2. Prequalification 3. Lowest bidder/evaluation
6	TRANSPORT	1.Post qualification
7	AVIATION	1.Post qualification
8	FED. INLAND REVENUE SERVICE	1. Post qualification
9	PETROLEUM RESOURCES	1. Post qualification award 2. Prequalification 3. Lowest bidder/evaluation
10	MIN. OF NIGER DELTA AFFAIRS	1.Prequalification
11	FINANCE	1.Post qualification
12	DEFENCE	1.Post qualification
13	FCDA	1.Lowest bidder/evaluation
14	NIGERIA CUSTOMS SERVICE	1.Post qualification
15	INTERIOR	1.Post qualification
16	HEAD OF CIVIL SERVICE OF THE FEDERATION	1. Lowest bidder/evaluation
17	NATIONAL SPORTS COMMISSOION	1.Prequalification
18	TOURISM	1.Lowest bidder/evaluation
19	SCIENCE & TECHNOLOGY	1.Delayed payment

Source: *Petitions from Contractors/Consultants to the Bureau published in the Procurement Journal, 4th Edition.*

It was also noted that some contractors after being awarded a contract ended up selling the contract award papers to third parties without disclosure to the procuring entity. The third party would now be responsible for contract execution. The implication is that the contractor who buys the contract may not have been qualified in the first place to win a bid if he had been a bidder in the competitive selection process.

A civil society stakeholder interviewed in the course of preparing this Report stated as follows about procurement abuses:

A functional procurement system is known by its outcomes which is increased and enhanced governmental service delivery. Although the formal rules under the new dispensation seem so nice on paper, Nigerians have not seen measures of improvement in service delivery. Our ability to achieve the MDGs is still in doubt as our maternal and child mortalities still rank as one of the highest in the world, our roads are yet to be repaired after all the budget expenditures, while our electricity is exceptionally epileptic, etc. The more things appear to change on paper, the more they remain the same⁴⁵.

A bidder interviewed in the course of preparing the Report was of the view that:

We are still living witnesses to a lot abuses in the procurement system, but most of us have not summoned the courage to confront the system to make it grow. Until we begin to challenge violations particularly, when we are disadvantaged, then the system will remain as it has always been.

5.3 EXECUTIVE COUNCIL OF THE FEDERATION BECOMES AN APPROVING AUTHORITY

Contrary to section 17 of the Act, which stipulates a Parastatal Tenders Board and a Ministerial Tenders Board as the approving authorities for public procurement, the Executive Council of the Federation (EXCOF) insists on appointing itself as an approving authority. This is without legal backing and a naked usurpation of the powers of the approving authorities designated in the Act. The current state of affairs informs the executive's decision to send an

⁴⁵ Christian Njoku, a procurement monitor from PEF.

amendment bill to the legislature to include the EXCOF as an approving authority. Considering that the Act is yet to be amended, the actions of the EXCOF in this respect are manifestly illegal.⁴⁶ According to a learned commentator:

Even the EXCOF is aware of the illegality of its action considering that the Attorney-General, Minister of Justice and the Chief Law officer of the Federation is a member of EXCOF⁴⁷.

5.4 ADVERTISEMENT FOR BIDS AFTER FIVE MONTHS OF BUDGET RELEASE

The Budget Implementation Handbook issued by the Bureau states that all planning processes should be finalised within two months after the release of the budget, and the actual 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 weeks⁴⁸.

The current practice whereby advertisements for bids are published in October and November, several months after the release of the budget, runs contrary to the Handbook's stipulations. This also raises the issue of the time for the implementation of the procurement - whether it will be done within the financial year.

5.5 PROCURING ENTITIES STILL FALL SHORT OF THE TIME LINE BETWEEN THE INVITATION AND DEADLINE FOR SUBMISSION OF BIDS AND PROPOSALS/EXPRESSION OF INTEREST

Section 25 (2) of the PPA provides that 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

⁴⁶ See the Procurement Approval Thresholds in Table 1 above.

⁴⁷ Kalu Onuoha Esq in an interview with the author.

⁴⁸ See BPP's Budget Implementation Handbook at page 8.

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.

On the time frame for procurement for services, section 48 (1) of the Act provides:

(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.

Observation of bid opening sessions have revealed that one of the major areas of non compliance is the six weeks timeframe required after advertisement in open competitive bidding before the deadline for submission of bids. The average time line given by MDAs is now about two weeks⁴⁹. MDAs claim 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”.

5.6 PUTTING THE CART BEFORE THE HORSE

The procurement records displayed on the website of the Bureau reveal that some contracts were awarded by some MDAs⁵⁰ for certain construction works without first securing the sites for the projects. This is antithetical to timeliness in procurement. It may lead to cost or budget overruns and demands for review and variation of the contract pursuant to the economic realities at the time the

⁴⁹ Independent National Electoral Commission advert at page 7 of Daily Champion of February 18 2010 gave two weeks; Customs Service advert of February 1 2010 at page 54 of This Day gave three weeks; BPP on February 5 at page 11 of this Day gave two weeks; Central Bank of Nigeria on February 4 in Daily Trust gave one week; Federal Ministry of Health in Daily Trust of February 9 2010 gave less than 2 weeks, etc.,

⁵⁰ See for example procurement records of the Education Secretariat at page 7.

site is eventually secured. Improper handling of this issue may lead to sub-optimal procurement performance.

5.7 CONVICTION OF CHIEF OLABODE GEORGE AND 5 OTHERS

Chief Olabode George and 5 others notably Architect Aminu Dabo, Captain O. Abidoye, Alhaji Abdulahi Aminu Tafida, Alhaji Zanna Maidaribe, Engr Sule Aliyu, as Defendants were charged to a Lagos High Court presided by Justice J.O.K Oyewole for procurement related offences. A total of 68 counts were preferred against the defendants. Counts 1- 7 were proffered on inflation of different contract prices contrary to section 22 (3) of the Corrupt Practices and Other Related Offences Act, 2000. Count 8 was on conspiracy to disobey lawful orders issued by constituted authority contrary to section 517 of the Criminal Code Cap 32 Vol. 2, Laws of the Lagos State of Nigeria, 1994.

Counts 9-57 were that the accused persons at various instances and with intent to defraud disobeyed lawful orders issued by constituted authority to wit: the Federal Government of Nigeria, through the Federal Ministry of Finance, in Circular No. F15775, dated 27th June, 2001, on policy guidelines for procurement and award of contracts in Government Ministries and Parastatals, and awarded various contracts at various sums beyond their approval limits contrary to Section 203 of the Criminal Code Cap. 32 Vol.2, Laws of Lagos State of Nigeria, 1994. Counts 58-68 were on abuse of office by contract splitting with intent to defraud and award of contract beyond their approved limits.

Trial started immediately after the defendants pleaded not guilty to the charges. Ten (10) witnesses testified for the prosecution while only one witness, the 1st defendant testified for the defence. Prosecution tendered 20 exhibits while the Defence tendered 9 exhibits.

In delivering judgement, the court first considered the contention that the defendants were not charged in their personal capacities but as members of the board of the Nigeria Ports Authority (NPA) and that unless it is shown that the board of the NPA is a public officer, they should be acquitted.

The court considered Section 2 of the Corrupt Practices and Other Related Offences Act which provides a definition of public officers as follows:

Public officer means a person employed or engaged in any capacity in the public service of the Federation, State or Local Government, public corporation or private company wholly or jointly floated by any government or its agency, including the subsidiary of any such company whether located within or outside Nigeria and includes judicial officers serving in magistrates, area or customary courts or tribunals.

The Court held that the defendants as persons who served as directors of a public corporation, the NPA are properly before the Court in that capacity and are consequently public officers within the contemplation of the Corrupt Practices and Other Related Offences Act.

The second point raised in this regard which is an extension of the first one is that since the defendants are before the Court as the board of the NPA which has a statutory composition, by leaving a few of them out, the defendants are thereby not fully before the Court.

The position of the Court on this is that, the defendants are before the Court as persons who served on the board of NPA from 2001 to 2003. That the board of the NPA is inanimate and only individuals who serve as directors therein are tangible. The Court further considered the various extra judicial statements of the defendants that they were not appointed to the NPA board at the same time and that what could only be said to be uniform to them all is that they participated at the board meetings where the alleged offences being tried herein were supposedly committed. The Court reasoned that the defendants would not and cannot thereby become an indivisible entity.

The Court therefore held that having held earlier that the defendants are charged for personal roles allegedly played by them while serving on the said NPA board, and having further held that there is a prosecutorial discretion as to who to prosecute, the issue of the defendants being before the Court as an indivisible board does not arise.

On the issue that the defendants acted as agents of a corporate body, the NPA and as such cannot be held personally liable, the Court held that the corporate shield for personal criminal liability is no longer impregnable. The Court therefore held that the defendants could be competently tried and if found guilty convicted for any alleged criminal infraction committed by them while serving as directors of the NPA.

On the issue of contract inflation in counts 1-7, the Court reasoned that inflation can only arise when there is evidence of a price benchmark for a given procurement. The Court came to the conclusion that the prosecution failed to establish the prevailing prices for the contracts said to have been inflated in Counts 1 to 7 thereby making it impossible for the Court to assess the basis for a conclusion that the contracts contained therein were indeed inflated as alleged. The Court held that the said counts must therefore fail against the defendants.

On the second issue of abuse of office by splitting of contracts contrary to Section 104 of the Criminal Code contained in Counts 58-68 of the amended information, the Court adopted the description of contract splitting as the splitting of contracts with an intention to bringing them within the threshold of the approval limit of the approving authority instead of taking it to the higher approving authority.

In totality, the Court held in one hand that the prosecution failed to prove the allegation of contract splitting in Counts 58, 62, 63, 66 and 68 beyond reasonable doubt against the defendants. On the other hand, the Court held that contract splitting in Counts 59, 60, 61, 64, 65 and 67 respectively have been proved beyond reasonable doubt by the prosecution against the defendants.

The third issue relates to alleged disobedience of lawful orders contained in Counts 9-57 pursuant to Section 203 of the Criminal Code. The order was exhibit P3 being a circular guiding the procurement. The Court held that exhibit P3 is a lawful order and that the explanations offered by the defendants do not constitute a lawful excuse to justify their disobedience to the order.

The Court on this issue held that the prosecution failed to prove the allegations of disobedience to lawful order in Counts 13, 14, 17, 18, 30, 31, 45, 47 and 48 against the defendants beyond reasonable doubt. On the other hand, the Court held that the prosecution established the allegations of disobedience in counts 9, 10, 11, 12, 15, 16, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 46, 49, 50, 51, 52, 53, 54, 55, 56 and 57 against the defendants beyond reasonable doubt.

The last issue in Count 8 is on conspiracy to commit the offence alleged in Counts 9-to 57 contrary to Section 517 of the Criminal Code. On this issue, the Court held as follows:

Having held that the disobedience of the circular, copy of which is before the Court as exhibit P3 is unlawful, it follows that the agreement to engage in the said unlawful act as could be seen in the minutes of meetings exhibits D2 and D3 at which the 1st defendant presided while the other defendants participated would satisfy the legal ingredients required to establish the offence of conspiracy.

I accordingly hold that the prosecution has made out this Count as well beyond reasonable doubt.”

In totality, the Court found each of the defendants not guilty on Counts 1, 2, 3, 4, 5, 6, 7, 13, 14, 17, 18, 30, 31, 45, 47, 48, 58, 62, 63, 66 and 68 respectively and discharged and acquitted each of them on each of those Counts. The Court however found each of the defendants guilty as charged on each of counts 8, 9, 10, 11, 12, 15, 16, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43,44,46,49,50,51,52,53,54,55,56,57,59,60,61,64,65 and 67 respectively and convicted each one of them on each of the said Counts respectively.

In conclusion, the former chairman of the Nigerian Ports Authority, Olabode George was sentenced to two years imprisonment. He, along with five other members of the 2001/2003 Ports Authority Board, was found guilty and convicted of a 47-count charge, including disobedience to lawful order and abuse of office by splitting of contracts. The judge gave no option of fine and the 2 year jail term is to run concurrently.

5.8 DISPUTE RESOLUTION MECHANISM AND CAPITAL BUDGET DELAYS

The dispute resolution mechanism in procurement proceedings may lead to undue delays and even outright project cancellation. In the petition of Roll Royce IPDC-MORPOL, the 2008 petition was not resolved before the end of the year 2008 leading to the unspent funds being returned to the Treasury. And to make matters worse, the particular project was not recaptured in the 2009 budget of the Energy Ministry. This development raises a number of issues including whether the Ministry had a Medium Term Sector Strategy and how it was implementing that strategy.

Some stakeholders have questioned the role of legislative committees in resolving procurement disputes considering that the Act makes explicit provisions on the recourse mechanism. However, the legislature’s oversight functions are

based on the 1999 Constitution (sections 88 and 89) which takes precedence over any other legislation.

5.9 NON-GENDER MAINSTREAMING

Popular participation and fairness in the procurement of goods, works and services for the public are among the basic principles of public procurement. Certainly, popular participation is meaningless in the absence of gender equality both at the supply and demand sides. A disaggregation of the membership of Public Procurement Committees/Board of most MDAs in the FCT by gender reveals that while the male gender has 81% representation in the Committees, the female gender membership of Committees/Boards is represented by 19%.⁵¹ This poor representation of the female gender in the Committees/ Boards does not enhance the desired gender mainstreaming and popular participation in public procurement.

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 procurement should address the specific and special needs of all segments of society. Unfortunately, the extant PPA appears gender blind.

5.10 PROPOSALS TO LEGALISE VIOLATIONS THROUGH AMENDMENTS TO THE LAW

A. The Idea of Amending an Untested Act

⁵¹ Data from key findings: situation analysis on the membership of Public Procurement Committees/Board by Gender conducted by the Office of the Special Adviser to the President on Relations with Civil Society, through a consulting firm as part of its assessment of the level of implementation of the PPA and for its project of improving Civil Society involvement in Public Procurement at page 7.

The enactment of the PPA became imperative because public procurement is one of the biggest channels of government expenditure, and is easily prone to abuse and accompanying corruption, as past experience has shown. The overall impact of public procurement in governance and national development cannot be overemphasized, because if mishandled, it can impact negatively on the lives of ordinary Nigerians. To that extent, the passage and signing into law of the Act was a positive development for all stakeholders and public authorities. It stands to reason that the Act as enacted in 2007 would have been operational and given opportunity to manifest its weaknesses and loopholes before issues of amendment would come up.

Proposing amendments to an untested Act is therefore surprising and appears to be in bad faith. This is so, because there is no justification for it beyond the whims and caprices of procuring authorities and public office holders who feel that the Act and its contents constitutes a hindrance to their desire to create opportunities for looting the Treasury by weakening the Act. The following details will prove the retrogressive nature of the proposals for amendment:

B. Proposed Amendment to Section 1(2) (A-G) Of The Act

Section 1 (2) (a-g) of the Act provides that 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.

The proposed amendment on the other hand [provides in paragraph (a) of section 1(2)], seeks to make provision for the President to appoint a person other than the Minister of Finance as the Chairman of the Council. Whoever leads the Council goes to no issue. By S.5 of the 1999 Constitution, the executive powers of the Federation are vested in the President. Whether it is the Minister of Finance or a chairman appointed by the President that leads the Council, each will be exercising powers delegated by the President.

The second part of the proposed amendment seeks to remove the Nigerian Society of Engineers, Civil Society and the Media from the membership of the Council. The Senate version of the amendment however did not remove Nigerian Society of Engineers, Civil Society and the Media as members of the Council but it rather went further to increase the membership of the Council by including the Institute of Quantity Surveyors. The House of Representatives version went ahead and removed these pillars of integrity.

It is instructive to note that the Nigerian Society of Engineers is a professional group that can make critical inputs to procurement policy considering the diverse nature of their profession and the fact that engineering jobs form a critical mass of government procurement in the execution of capital projects of the budget. Quantity Surveyors are also relevant to procurement policy formulation. Civil Society and the Media have the potential of ensuring the ideals of accountability, transparency, due process, value for money and popular participation in the public procurement process. Best practices encourage alternative viewpoints in procurement policy formulation. Civil society and the media as major pillars of integrity can provide the alternative view point. Thus, the Senate version of the proposed amendment is preferred and any attempt or actual removal of any of these vitally important groups from the membership of the Council will be counter-productive to the realization of public procurement reforms in Nigeria.

C. Proposed Amendment to Section 7 (1) Of The Act

Section 7(1) of PPA provides as follows: *“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.”*

The proposed amendment reads thus: *“There shall be for the Bureau, a Director-General who shall be appointed by the President, on the recommendation of the Council.”*

It is crystal clear that the proposed amendment is simply set out to remove competitiveness in the process that will produce the Director-General of the Bureau. Ensuring competition in public procurement is one of the principal objects of the Act and by S.4 (c) and (d), to ensure competition is also one of the objectives of the Bureau. It therefore makes eminent sense that the Director General of the Bureau, the chief priest of competition in government commerce should be selected from a competitive process. To do away with the original provision of that important section of the Act will indeed be insidious to any meaningful public procurement reforms.

D. Proposed Amendment to Section 17 Of The Act

Section 17 of the PPA provides as follows:

Subject to the monetary and prior thresholds for procurements in this Act as may from time to time be determined by the Council, the following shall be the approving authority for the conduct of public procurement;

(a) In the case of:

(i) a government agency, parastatal or corporation, a Parastatal’s Tender Board; and,

(ii) a ministry or extra-ministerial entity, the Ministerial Tenders Board.

The proposed amendment version on the other hand provides:

Subject to the monetary and prior review thresholds for procurements in this Act as may from time to time be determined by the President, the following shall be the approving authority for the conduct of public procurement:

(a) for a government agency, parastatal, or corporation, a Parastatals Tenders Board; and,

(b) for a ministry or extra-ministerial entity, the Ministerial Tenders Board;

(c) for procurements in excess of the thresholds set out in subsection (b) of this section, the Federal Executive Council.

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 amending section 17 without touching the powers of the Council in section 2, section 17 specifically contradicts section 2(a) of the Act.

Also making the Federal Executive Council an approving authority runs counter to best practices. Nigeria's Country Procurement Assessment Report June 2000⁵² had warned against this. The Report had recommended as follows:

“Once a law on public procurement has been enacted and regulations, manuals and standard bidding documents issued, carrying out public procurement including contract awards will clearly be an administrative function, the mechanics of which should be disengaged from the executive. Currently, high level politicians such as Governors, Ministers and Commissioners are operationally involved in the procurement process. However, under the reformed procurement system, high level politicians should maintain their overall managerial oversight responsibilities while leaving administrative and operational matters (including procurement) to the civil servants.”

When this recommendation is juxtaposed with the intended amendment, it becomes quite easy to assert that this amendment is not in line with best practices.

E. Proposed Amendment of Section 35 (1)

Section 35 (1) of PPA provides:

⁵² Undertaken by the Federal Government with the support of the World Bank.

“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:”

The version intending to amend the section reads thus:

“In addition to any other regulations as may be prescribed by the Bureau, a mobilization fee of an amount to be prescribed in the bid document may be paid to a supplier or contractor supported by the following:”

The Senate version of the amendment reads *“In addition to any other regulations as may be prescribed by the Bureau, a mobilization fee of 30% for construction works and 50% for technical items may be paid to a supplier or contractor supported by the following:”*

The proposed amendment lifts the limitation on mobilization fees from 15% of total contract sum to an amount prescribed in the bid document which could be higher than 15% or 30% or 50% in the Senate version. 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% mobilization fees? And this amendment is proposed in a country where contractors have been known to collect mobilization fees and disappear from project sites. Giving procuring entities the discretion to fix mobilization fees or increasing the quantum will incur more losses to the Treasury and encourage enhanced contract abandonment.

The Public Procurement Act 2007 was signed into law by President Yar’Adua on June 4 2007. It is about three years since it was signed and the system is still grappling to be at home with its provisions. Other provisions of the Act have been observed in breach as has so far been demonstrated in this Report. Amendments make sense when a law has been tested through implementation and its shortcomings and mischief are discovered. Then, an empirical basis for amendments will arise. Apparently, there is no justification for the attempt to amend the Act especially when the proposed amendments are inimical to the desired public procurement reforms.

5.11 HOUSE OF REPRESENTATIVES PROBE IN THE POWER SECTOR - WASTING PUBLIC RESOURCES

A. Background

It is no longer news that the House of Representatives Committee on Power probed into how *huge sums of money were spent on Power Generation, Transmission and Distribution between June 1999 and May 2007 without commensurate result*. This was during the administration of former President Obasanjo. The mind-boggling revelations showed how the administration spent over \$12.93 billion. Two former Ministers of Power, Segun Agagu and Liyel Imoke, the former President Obasanjo and many contractors and senior government officials were indicted by the Ndudi Elumelu Committee on Power. The report was politicised and an Ad-hoc Committee to review the report was set up by the House of Representatives. This was after tax payers moneys have been spent on the hearings including public sittings and trips across the federation by the Committee on Power. Can that exercise of the House Committee on Power pass a value for money test? Till today, no natural or artificial person has been prosecuted due to the findings and revelations of the Committee. It is embarrassing to note that most of the companies that were involved in the power sector contracts scandals are still working in the country. It is apparent the political will to take action is lacking. A good part of the general findings and recommendations of the report is reproduced hereunder.

B. Preamble

The House of Representatives, at its sitting on Thursday, 19th March, 2009 commenced consideration of the Report of the Committee on Power on the investigation into how *“huge sums of money was spent on Power Generation, Transmission and Distribution between June 1999 and May 2007 without commensurate result.”* Due to controversy arising from the recommendations in the Report, the House resolved to constitute a Seven-Member Committee to revisit the recommendations therein and draw-up Recommendations that will enable the House reach a consensus on the Report. The Members are as follows:

The Ad-hoc Committee drew up modalities and held series of meetings to enable it achieve its mandate. The modalities are as follows:

- ❖ To take a holistic look at the Findings and Recommendations with a view to appraising the said recommendations in relation to the Committee`s mandate;
- ❖ To request for information on the status of all projects including the National Integrated Power Projects (NIPP) from Ministries, Departments and Agencies of Government (MDAs);
- ❖ To obtain professional opinion on project design, execution and management with specific reference to Engineering, Procurement and Construction (EPD) projects;
- ❖ To make consequential recommendations that would move the power sector forward.

C. Findings//Observations

The Ad-hoc Committee took a critical look at the entire Report by the Committee on Power (Vols. 1-7 containing the Main Report, Verbatim Proceeding and On the Spot Assessment Report) and observed as follows:

1. That several of the Committee`s recommendations were not in consonance with the findings as contained in their Report.
2. That some of the Committee`s recommendations were to all intents and purposes clearly outside their mandate.
3. That the Committee`s recommendations in several instances did not reflect clear understanding of the technicalities involved in the nature of contracts under investigation. It is obvious that contracts of this nature have three separate components viz:
 - (a) Engineering
 - (b) Procurement
 - (c) Construction

The structure of the contract is such that Engineering aspect is usually not tangible and yet takes substantial percentage of the contract cost. Procurement which comes second in the process may not be appreciated if the equipment is

not on site and Construction which is the last phase, can only take place when the two aforementioned have been completed.

4. That more often than not, the responsibility for delivering project site to contractors rests on government. Therefore, where government has not paid compensation to land-owners, it will be against the principle of natural justice, equity and good conscience to hold the contractor responsible for inability to mobilize to site. This Committee found that several sites had not been delivered to the contractors because of non-payment or delayed payment of compensation to land-owners and furthermore, some contractors have been evicted from sites delivered to them either through court or physical eviction by Communities.

5. That though in the Executive Summary, of the Committee`s Report, it was reported that `` ***The sum of \$13.28bn was expended on the power sector during the period, with further unfunded commitments, of over \$12bn,***`` these ``facts`` were neither reflected in their Findings nor Recommendations. Ironically, this is the crux of the Committee`s mandate which was to establish the actual amount spent in the power sector between June 1999 and May 2007.

6. It was observed that the Committee on Power complained of the non co-operation of the Governor of the Central Bank with respect to production of documents requested by the Committee. There is however, no evidence that the Committee exhausted legislative procedural means and authority to compel the production of documents sought.

7. The Ad-hoc Committee observed that the Committee on Power failed to distinguish between due process for contract award and due process for payment. The waiver referred to in the Report was in fact in respect of payments and not award.

8. It is abundantly proven before the Ad-hoc Committee that obtaining due process certificate for payment had become a clog in the wheel of fast-tracking the process of obtaining power supply. Consequently, the President in the exercise of his powers waived this requirement which was a mere administrative measure put in place by the government. It is noteworthy, that even the Public Procurement Act that was subsequently passed by the National Assembly removed the requirement of due process certificate for payment.

9. That the Committee on Power misconstrued fund released for off-shore component of the contract as cash releases to the Contractors, whereas these

were cash releases through the Central Bank of Nigeria (CBN) by way of Letter of Credit (LC) and consequently, the contractors could not have accessed such funds. It is pertinent to stress further that all payments were secured by Performance Bond (BP) and Advance Payment Guarantee (APGs)

10. The Committee on Power misconstrues the phrase (100% funding of projects to mean 100% payment to contractors). On the contrary, 100% funding implied that the total contract sum had been credited to the Central Bank of Nigeria (CBN) Account in favour of that project available for disbursement as the need arose.

11. In the same vain, the Ad-hoc Committee found that the issue of seeming over-payment to some contractors arose from additional funds required for Letters of Credit (LC) charges which were not incorporated in the original contract sum. These are charges applied by the Central Bank of Nigeria (CBN).

12. The Ad-hoc Committee regards the list provided by the Committee on Power in the main Report (in respect of appearances at Public Hearings) as exhaustive. There is no record from the Committee`s Report to show that some of the persons, Consultants and Contractors were invited to appear or indeed appear before the Committee. The Ad-hoc Committee could not, therefore, in good conscience, sustain or up-hold the Committee`s recommendations on them.

13 On the issue of over-scoping, the Ad-hoc Committee observed that adequate risk mitigation strategies or safeguards were in place in the body of the contracts to protect government interest. To the effect that payments are only according to verified actual scope of work executed.

14. The Ad-hoc Committee affirms the finding of the Committee on Power that the contracts were grossly behind the contractual time frame.

15. The Ad-hoc Committee found that one of the principal reasons for failure to keep the contractual time frame was funding related issues. It took particular note of the decision of Kwara State Government in completing the Ganmo 330/132/33kV s/s lines project. This Kwara model is a clear indicator of the benefit of uninterrupted funding.

16 The Ad-hoc Committee observed that proper feasibility studies especially in the area of transportation were not carried out before the commencement of the National Independent Power Projects. Consequently, some of the projects were stalled because heavy equipment like turbines could not be transported to project

sites due to inadequate capacity of the bridges and unavailability of access roads.

17. The Ad-hoc Committee observed that the Court action by the Revenue Mobilization, Allocation and Fiscal Commission on the Excess Crude Account also contributed in slowing down the implementation of the National Independent Power Project (NIPP)

18. The Ad-hoc Committee observed that central to the problems that have attended the implementation of the National Independent Power Project is the intermittent expansion of the scope from original concept. This led to difficulty in project implementation.

19. Lack of clear and formalized governance structure for the Niger-Delta Power Holding Company (NDPHC) led to conflict of roles between the Ministry of Power, Niger-Delta Power Holding Company (NDPHC) and Power Holding Company of Nigeria (PHCN) This absence of clearly defined roles for each agency and lack of coordination amongst the participating agencies have continued to hamper the smooth implementation of the power projects.

20. The Ad-hoc Committee observed that bureaucratic bottlenecks have tended to hamper the smooth implementation of the projects and noted that legal effect need be given to the setting up and composition of the Board of the Niger-Delta Power Holding Company (NDPHC) to discharge their duties and represent the interest of the Federal, State and Local Governments that are stakeholders in the Company.

21. That the Mambila hydro-electric power generation station conceived as part of the integrated power improvement programme and which has the single highest proposed capacity of 2,600mw remains abandoned. The contract for this project which has a total cost of \$1.47bn with a 5 year project completion period was awarded in March 2007 even though the contractor has met all requirements; the advance payment which was due by 30th September 2007 is yet to be paid.

22. From evidence available to the Ad-hoc Committee, the total expenditure in the power sector for the period under review was \$12.93 billion with the breakdown as follows:

S/NO.	AGENCY	AMOUNT BILLION (\$)
1	Ministry	0.01
2	PHCN (Budget released)	3.2
3	National Integrated Power Projects (NIPP)	3.07
4	Rural Electrification Programme/Rural Electrification Agency (REP/REA)	0.5
5	Energy Commission of Nigeria (ECN)	0.01
6	Loans	0.46
7	PHCN Internally Generated Revenue (IGR)	4.06
8	Sub-Total	11.31
9	Nigeria National Petroleum Corporation (NNPC) (IOC) Joint Venture for new power plant	1.62
	Grand Total	12.93

The 3 major expenditure components are:

- (i) NIPP Projects which is expected to inject 5,212mw into the grid on completion \$3.02bn⁵³ (Note that the project amount is \$10.42bn meaning that expenditure so far is less than 40%)
- (ii) PHCN expenditure of \$7.13bn accomplished:
 - (a) generation of additional 1,600mw into the grid from 5 new stations, and
 - (b) refurbishing, modernization and maintenance of the broken down existing 79 units/stations out of which only 19 were functional as at March, 2000 (it is noteworthy that equipment modernization raised the monthly tariff collection from \$1.9m to \$6m).
- (iii) Special joint venture power for the oil companies \$1.62bn.

23. The Ad-hoc Committee found that one Engr. Chinedu Ibekwe, the CEO of Interaf Engineering Co. Ltd whose contract in the NIPP project was terminated on grounds of lack of performance was engaged by the Committee on Power as the lead technical consultant for the investigation. In his testimony before the Committee, Engineer Ibekwe submitted that he was an interested party but had disclosed his interest informally and orally to the Chairman and few members. He

⁵³ This contradicts the N3.07 billion stated above.

denied that his interest would result in bias. The Ad-hoc Committee also found that it was the same consultant that wrote the main Report for the Committee, which is contrary to the practice in the legislature. These facts were corroborated by the former Clerk of the Committee during the investigation.

D. Recommendations

In addition to the recommendations contained in the Main Report of the Ad-hoc Committee, we wish to further recommend as follows:

1. Given that Nigeria's power demand in the short, medium and long term is enormous and under the ongoing programme, only 10,000mw is projected to be attained by 2010, it is recommended that the government should declare the proposed *State of Emergency in the Power Sector* immediately and undertake the execution of annual minimum generation and transmission capacity that will attain the vision 20-2020 goal through joint ventures and direct private sector participation. In this regard, it is recommended that the House of Representatives should timeously support all well meaning initiatives in that regard.

2. Considering the magnitude of funding requirement, which can not be solely borne by government, the Ad-hoc Committee recommends that the model used in the Telecommunications Sector of the Nigeria economy that has brought about massive private sector investments, efficiency, availability and affordability to the sector be introduced into the Power Sector of the economy. In this regard, the tariff structure in the Power Sector should be substantially deregulated and competition introduced under the guidance of a robust, fair, competent and independent regulatory body.

3. In the transition period, before a fully regulated regime, the Regulatory authorities in the Power Sector should avail themselves of the powers under the ESPR Act of 2005 to ensure open access to available transmission and distribution lines and substations at fair, transparent and regulated prices.

4. During the transition period, a flexible licensing regime is hereby recommended to be introduced wherein commercial entities and willing consumer groups should be encouraged to enter into power purchase agreements with Generation and Distribution Companies in which case, appropriate tariffs could be introduced which will help in releasing more power into the National Grid.

5. That the ongoing prospective transmission operators proposing to install fresh 132KV or 33KV transmission infrastructure to overcome identified gaps in existing transmission infrastructure in order to support prospective generation projects and consumer clusters, should be licensed in accordance with the existing laws.
6. That henceforth, Letters of Credit (LC) for power projects should be for a minimum period of 2 years. This is to assure manufacturers of equipment of our commitment to the execution of those projects. The danger of short tenured Letters of Credit (LCs) is that one could lose one's place on the queue during the interregnum of expiry and renewal of the Letters of Credit given the fact that manufacturing of power equipment are over-subscribed.
7. That the Federal Government should as a matter of urgency, diversify our sources of energy to encompass coal, solar, and nuclear energy.
8. That the modernization of power plants should be carried out and regular training and retraining of personnel undertaken.
9. Having identified policy inconsistencies in the power sector as a major contribution to the country's inability to meet its energy needs, for instance, the practice of not making provision for completion of ongoing projects in the annual budgets, the Ad-hoc Committee recommends that government should pay greater attention to observance of policy consistency, adequate budgetary provisions and funding.
10. That government should fast-track the execution of all transmission and other related projects with a view to closing the loop in the National Grid.
11. That in view of the high capacity contribution that the Mambilla hydro-electric power project will inject into the national grid and the time already lost, the contractors should be urgently mobilized to enable them commence work.
12. The government should timeously pay adequate compensation to land owners to ensure the delivery of unencumbered sites to eliminate the undue delays in project execution.

13. The government should ensure that in future, all conceived projects are properly packaged, participating agency identified and coordination properly networked to avoid difficulties and undue delay in implementation.

14. That the Revenue Mobilization Allocation and Fiscal Commission is hereby advised to seek out of court settlement especially since legality has returned on the withdrawal of funds from the Federation Account, which is now approved by the various relevant legislative Houses.

15. In view of the fact that funding of the NIPP projects has been resumed and appreciable project execution progress attained as contained in the project status report herewith attached, the relevant House Committee be mandated to step up oversight to ensure the timely completion of the projects.

16. That the services of the company headed by Engr. Chinedu Ibekwe, the Consultant to the House Committee on Power should be terminated forthwith for the embarrassment caused the House by employing the medium of Power Committee report to settle personal scores.

17. That House Committees should at all times exercise due diligence in the procurement of services of Consultants or any employees for that matter to ensure that persons capable for bringing the name of the House into disrepute are excluded. Furthermore committees must realize that in quasi-judicial assignments involving the determination of rights and privileges of persons, due diligence must be employed to adopt a judicial mind knowing not only that justice must be the end but that their decisions may be subject to litigation. In all such instances, committees must observe the elementary principles of natural justice.

The Ad-hoc Committee hereby submits the above **Recommendations** to the House for further legislative action and hopes that if they are adopted and implemented would go a long way towards the improvement of the power sector in the country.

A part of the status report on project implementation reads as follows:

S/ N	Name of Project	Name of Contractor	Project Cost (₦)	Amount Released (₦)	% Completion	Remarks
	NIPP PROJECTS					
	Generation Projects (Power Plant)					
1	Calabar	Marubeni	19,592,879,930.00	19,817,276,850.00	Cumulative completion – 77.81% Engineering – 99.54% Procurement - 100% Manufacturing – 98% Site Construction 40.73%	
2	Egbema	Rockson Engineering	16,687,677,726.20	15,881,489,984.50	Cumulative completion – 51.3% Engineering – 65% Procurement - 59% Manufacturing – 44.05% Site Construction 38.3%	
3	Ihovbor	Marubeni	14,871,235,133.30	15,039,345,499.30	Cumulative completion – 75.23% Engineering – 84.08% Procurement - 100% Manufacturing – 93.56% Site Construction 53.41%	
4	Gbarain	Rockson Engineering	18,027,766,849.30	17,255,520,614.50	Cumulative completion – 42% Engineering – 62% Procurement - 51% Manufacturing – 26.75% Site Construction 28%	
5	Sapele	Manubeni	15,688,285,133.30	15,867,954,920.80	Cumulative completion – 73.07% Engineering – 83.38% Procurement - 100% Manufacturing – 98.80% Site Construction 38.34%	
6	Omoku	Rockson Engineering	20,935,387,330.00	12,643,930,000.00	Cumulative completion – 38.9% Engineering – 60% Procurement - 53% Manufacturing – 29.2% Site Construction 16%	
7	Alaoji Phase II	Rockson Engineering	356,627,638.30	356,627,638.30	Cumulative completion – 68% Engineering – 100% Procurement - 90% Manufacturing – 80% Site Construction 15%	
8	Omotosho Phase II	CMLC	410,546,460.00	410,546,460.00	Engineering, Design Meetings Concluded	

9	Papalanto Phase II	SEPCO111	410,809,141.38	410,809,141.38	Cumulative Completion %	PC Contract not yet signed
10	Geregu Phase II	Siemens	356,627,638.30	356,627,638.30		Contract awaiting signature

E. Comments and Conclusion

This report finds the method adopted by the Ad-hoc Committee very strange as it seems to be working from a preconceived answer to the question. The first 13 findings out of 23 were geared to demolish and destroy the foundations of the report by the Committee on Power. In the specific report, the Ad-hoc committee rejected the recommendation of the Committee on Power for the thorough investigation by the EFCC and ICPC of the principal persons who were involved in the procurement process, from former president Obasanjo to Liyel Imoke, Olusegun Agagu and Alhaji Abdullamid Ahmed, all former Ministers of Power. The request for the thorough investigation of other officers numbering over 20 was also rejected by the Ad-hoc Committee. Even the recommendation that a company (Lahmeyer International) already blacklisted by the World Bank for its procurement practices which do not meet best standards, but got a contract under the NIPP, which had serious question marks should be further investigated by EFCC and ICPC was rejected.

In another instance, a well documented recommendation of the Committee on Power based on the report of the Auditor-General of the Federation was rejected with the following caveat: *This recommendation, having been lifted from the submission of the Auditor-General to the Committee and the Committee on Power failing to adduce reasons for adopting it, should be referred to the Committee on Public Accounts for further legislative action.* Thus, it is contradictory that at some point, the Ad-hoc Committee notes that the recommendations of the Committee on power are not supported by evidence, why reject this recommendation which it agrees is supported by evidence?

For the Ad-hoc Committee, the answers to the following questions still agitate the minds of Nigerians:

- ❖ Who in government was responsible for delivering project sites to contractors?

- ❖ How many years did it take other countries that invested in power upgrading to complete engineering, procurement and construction?
- ❖ Why were the charges for the Letters of Credit not included in the original contract sum?
- ❖ If projects were implemented within a framework that lacked clear and formalized governance structures, how did it impact on public resources expended in the projects?
- ❖ Have we had value for the monies so far expended?

Shrouding a very straightforward assignment in legalese and technical jargons makes no sense to the tax payer whose monies were frittered away and is an unconscionable exercise in futility which compounds the misery of the average Nigerian occasioned by the poor electricity situation.

It is the contention of this Report that the House of Representatives through its actions and omissions wasted tax payers' monies on these probes since it contributed nothing to the bottom-line, which is increased access to electricity by Nigerians.

Chapter Six

CONCLUSIONS AND RECOMMENDATIONS

6.1 CONCLUSIONS

This Report is based on the need for an independent review of the implementation of the PPA in the year 2009r, to determine whether it has lived up to the promises of improved service delivery through enhanced accountability, transparency, competition, fitness of purpose, etc. It is also based on the need to identify strengths, weaknesses and best practices and to correct any flaws in implementation. Ultimately, improved implementation of the PPA will translate to improvements in the living conditions of the generality of Nigerians. Thus, this Report is designed as a policy guide to all actors in the executive, legislature, civil society and the private sectors.

The Act has given policy making roles to the National Council on Public Procurement. Unfortunately, the Council has not been constituted by the President after three years of implementation. The implications of this development is the usurpation of the powers of the Council by other bodies and authorities, denial of a platform for enhanced popular participation and greater professional input to public procurement reforms. The powers and functions of the Bureau are broad enough to guarantee the reforms needed to take Nigerian procurement to the next level. They include capacity building, promotional and protection powers. Essentially, the Bureau has developed manuals and standard bidding documents, undertaken public sensitisation and information dissemination, built the capacity of MDA personnel, hosted a website, etc. However, all actions taken by the Bureau which the law indicated should have been with the approval of Council are of doubtful legal validity. The Bureau is yet to engage in procurement audits.

The House of Representatives Committee on Public Procurement has played a crucial role in the implementation of the Act. They have devised a legislative agenda to enhance the oversight functions of the Committee. The Committee has also hosted a website and engaged in investigative hearings and oversight visits.

Civil society organizations played crucial roles in the campaign for the enactment of the Act. Since the commencement of the Act, they have been involved in

awareness raising and sensitisation, capacity building, observation and monitoring and action research. The Act envisages the involvement of civil society in the procurement process. However, the Bureau and MDAs have reduced CSOs to mere observers of bid opening sessions. MDAs have also restricted access to procurement information despite the clear provisions of the Act. Their reliance on Civil Service Rules and Financial Instructions to deny access to information, cannot absolve them when faced with the unambiguous provisions of the PPA which overrides those subordinate legislation. Steps so far taken by some governmental agencies to deepen the involvement of CSOs have been fraught with irregularities and the lack of transparency in selecting pilot stakeholders. There is however, the need for more advocacy, capacity building and civil society action to hold the state accountable to its obligations under the PPA.

The PPA governs the implementation of the capital budget. Late President Yar'Adua had directed that the PPA should apply to all procurements including special goods and services. Weak capital budget implementation has been recorded by MDAs in the year 2009. During the year, the federal capital budget was not implemented above 43.9%. Some of the challenges are institutional and due to lack of capacity while others can be attributed to corruption and lack of integrity. Return of monies to the Treasury was the norm over the reporting period. Budget implementation also witnessed delayed payment to contractors. A number of procurement scams were recorded or continued during the review period. They include the Siemens bribery scandal and the unimaginable presidential pardon, Rural Electrification Agency N5 billion Scam, Universal Basic Education and Haliburton scandals, and the CBN/Australian Firm Polymer Note scam, the Nigeria Television Authority scam and the latest N64 billion Airport Runway Scam. The unfortunate thing about these scandals is the lack of political will to diligently prosecute the offenders and bring them to justice. This has reinforced the culture of impunity.

There have been a number of violations and implementation challenges. These include usurping the power of Council to make policy regulations. In the implementation side, MDAs are still doing prequalification for projects below N300 million for works and N100 million for non works; the system throws up contractors with unequal capacity, or that do not possess the capacity to do the work; interest on delayed payments (60 days) is still not the norm; MDAs utilise funds meant for particular projects for so called priority projects; delayed award after certificate of no objection; and variation/review of contract rate, etc.

Other challenges include the fact that the EXCOF has constituted itself into an approving authority in defiance of the law; timelines for advertisement and preparation of bids are honoured in the breach; activation of dispute resolution mechanism could frustrate procurement implementation; the gender blind nature of the PPA and extant procurement proceedings.

Most of the proposals for the amendment of the PPA were apparently made in bad faith. The proposal to remove the media, CSOs and the Nigeria society of Engineers from the yet to be constituted Council would not add value to procurement policy formulation. Also hiring the Director General of the Bureau in a non-competitive process would not facilitate transparency and value for money. Increasing mobilisation fees or leaving it at the discretion of the procuring entity is a sure way to enhance corruption and contract abandonment.

Procurement reforms under the PPA have started and are making impact on the public expenditure management system. There are however institutional resistance and failure of some authorities to perform their assigned roles. What is needed is the extra push and measures that will ensure that the full gamut of the reforms is in place. The push has to come from a number of actors i.e. civil society including the media, academia, NGOs, the legislature, the Bureau, contractors and service providers. And this extra push is addressed under recommendations.

6.2 RECOMMENDATIONS

The following recommendations flow from the analysis in this report.

G. The President

The President leads the executive arm of government and provides direction for overall governance in the country. He should lead by example through the:

- ❖ Immediate constitution of the National Council on Public Procurement;
- ❖ De-commissioning the EXCOF as an approving authority for procurements above a certain threshold;
- ❖ Clear instructions to the executive on access to procurement information according to the PPA. This may entail amendments and repeals of

relevant sections of the Public Service Rules through the Head of Service and the Financial Regulations through the Minister of Finance;

- ❖ Withdraw the Amendment Bill of the PPA at the National Assembly;
- ❖ Periodic review of the implementation of the Act;
- ❖ Ensure that the Minister of Finance and the Director General of the Budget Office of the Federation start the preparation of the Medium Term Expenditure Framework and the annual budget on time to ensure that the budget gets to the legislature before the end of August every year. Late presentation of budgets and their concomitant late approval facilitates poor capital budget implementation.

H. The Bureau

The Bureau needs to be more proactive to facilitate the implementation of the Act through the following measures:

- ❖ Establishment of the internet portal which is the definitive source of all information on government procurement;
- ❖ Enhance access to information by publishing procurement records on its website as stipulated by law;
- ❖ Engage in procurement audit of MDAs;
- ❖ Direct MDAs to give at least one week notice to CSOs who monitor bid opening sessions; grant access to procurement plans, bid solicitation documents, bid opening documentation and information on contract award to CSOs to enable them properly monitor procurement proceedings;
- ❖ Begin to exercise its powers to debar suppliers, contractors and service providers that manifestly contravene the PPA;
- ❖ Exercise disciplinary sanctions against erring accounting officers and other staff of MDAs. This will facilitate greater capital budget implementation and reduction of procurement misdemeanours;

- ❖ Further engage in the development and revision of manuals and standard bidding documents for areas not presently covered;
- ❖ Continued public sensitisation on the provisions of the law.

I. The Attorney General of the Federation, Economic and Financial Crimes Commission and Independent Corrupt Practices Commission

- ❖ Ensure the diligent investigation and prosecution of all reported procurement offences - the Siemens and Haliburton need the urgent attention of the Attorney-General.

J. Ministries, Departments and Agencies

- ❖ MDAs should decentralise their procurement process and allow parastatals under them to undertake procurements related to their agency;
- ❖ MDAs should proactively seek to acquire knowledge on procurement reforms and plan their procurements in advance of cash releases;
- ❖ Ensure that beneficiaries and communities are consulted and carried along in the location of projects in their communities. Essentially, government projects/contracts should be based on a needs assessment and identification of community needs. To this end, adequate stakeholder participation in the design of Medium Term Sector Strategies is recommended.
- ❖ Completion of all engineering designs and acquisition of sites before the award of procurement contract;
- ❖ Timely payment of contractors who have worked and delivered according to contract specifications.

K. The National Assembly

In view of its powers of lawmaking, appropriation and oversight, the legislature should:

- ❖ Stop the proposed amendments to the PPA;
- ❖ Develop a framework through collaboration with the executive to ensure that appropriate amounts are appropriated for capital projects. This could be done by the legislature taking more interest in the development of Medium Term Sector Strategies of the respective MDAs and the overall Medium Term Expenditure Framework;
- ❖ The passage of the Freedom of Information Bill to enhance access to procurement information;
- ❖ Enhanced oversight over capital project implementation;
- ❖ Improve collaboration with CSOs in the exercise of oversight functions;
- ❖ More regular updating of the Procurement Committee's website.

L. Civil Society including the Media and Academia

- ❖ Engage in detailed studies and action research for the enhancement of the implementation of the Act;
- ❖ Engage in advocacy against violations of the Act including litigation;
- ❖ Engage in capacity building of the populace for a better understanding of procurement reforms;
- ❖ The media should devote more time to investigations of procurement malfeasance and its related matters;
- ❖ The academia should consider the introduction of courses on public procurement in legal, economic, social and business related courses.