PUBLIC PROCUREMENT REFORM IN DEVELOPING COUNTRIES: A CRITIQUE OF THE
REAL ESTATE CONTEXT IN THE NIGERIAN CASE

BY

Authors Details

1) A.C. OGBONNA
B. Tech. (Est. Man.), M.Sc., Ph.D. (Project Mgt.), PGDE, H.Dip. (Q.S.), ANIVS, RSV, MNIM, Senior Lecturer, Department of Project Management Technology, Federal University of Technology, Owerri.

2) I. U. Kalu, Ph.D., FNIVS,
Professor of Estate Management, and Dean, Faculty of Environmental Design, Abia State University, Uturu
Abstract

The Public Procurement Act 2007 in Nigeria mainly aims at economic efficiency and effectiveness consistent with best practices. The Act’s definition of procurement as simply ‘acquisition’ tends to shift attention to goods and services only, contrary to the fact that most public procurements deal with capital assets especially physical infrastructure. This paper therefore sort to determine if a real estate context exists, and its extent, within the enabling Act. Based on a literature review approach, it was found that ‘due process’ still relies mainly on the out-dated traditional design-bid-build model whose major challenges include corruption, bureaucracy, and the absence of the real estate professional in the membership of NCPP and BPP. This paper’s major conclusion is that beyond the functions that can be performed by the real estate professional, under the Act, its definition of “works” equates with land development and hence provides the clearest real estate perspective to ‘due process’

Key words: due process, public procurement, real estate perspective, reform, works.

INTRODUCTION

Like many developing countries of the world, Nigeria is still grappling with the ever present need to increasingly empower its citizens economically. The above need has led the Federal Government of Nigeria to, overtime, institute different reform programmers. It is in the above regard that the banking, and public procurement reforms have gained attention in recent times with the latter dubbed ‘Due Process’, and encapsulated in the Public Procurement Act No. 14 LFN (PPA) 2007, in Nigeria.

Attaining effectiveness and efficiency consistent with best practices have been seen as being central to reforms. Interestingly, ‘due process’ is concerned, in part, with ensuring “best value-for-money (VFM)” (Office of Government Commerce, 2008) in the procurement/project management, and disposal of public capital assets that constitute real estate. The public assets referred to above constitute real estate to the extent that the assets are tangible and immovable and/or permanently fixed to land with their ownership recognized by the laws of the land.

That procuring and recouping investment in, real estate is respectively capital intensive and long-termed in nature is common knowledge in the same way as the existence of some inherent risks (Estache, 2001). Whereas real estate investment requires proper and adequate financing, what is not quite common knowledge is the systemic inter-sectoral linkages arising from executing “works” (Federal Republic of Nigeria, 2007) and their tendency to empower the ordinary citizen, create employment and induce growth and development.
Practically, empowerment is the process which enables individuals/groups to fully access personal/collective power, authority, and influence, and to employ that strength when engaging with other people, institutions or society, and includes empowering previously disadvantaged sections of the population (Wikipedia, 2010). In the final analysis the exchange of goods and services must be done in cost or cost equivalent basis hence the need for financial intermediation (Imala, 2005), a role normally fulfilled by the banking sector of the economy (Adoghame, 2007).

The fundamental objective of reform is to reposition existing status to attain effectiveness and efficiency consistent with best practices in order to achieve consolidation, competition and convergence (Ajayi, 2005; Deccan and Herald, 2004). The increasing global trend of privatization and deregulation especially in developing countries since the 1990s (Israel, 1992) indicates increasing scarcity of state funds for procuring capital public assets and hence the need for better efficiency and effectiveness in public procurement.

In Nigeria, public procurement has remained problematic caused by fiscal irresponsibility, corruption, absence of centralized control, paucity, and non-use, of qualified personnel, all leading to delays, over-runs (cost, time) low quality, and general dissatisfaction and astronomical cost to the economy. It is against the above background that ‘Due Process’ came into being to reform. Since a greater proportion of ‘Due Process’ procurement concerns assets that are tangible and permanently fixed to land, it is only reasonable that the real estate professional be apprised of the relevant implications of the reform.

**PUBLIC PROCUREMENT**

Since the earliest recorded formalized public asset procurement in ancient Syria of 2800-2400 B.C (Thai, 2001), procurement has evolved into a simple theory with a complex process. It is also viewed as an abstract paradigm that represents the conversion of inputs into outputs and as such seen as one of the oldest transactions known to man (Burstone et al, 2007).

In the above direction, several views have been expressed about procurement ranging from the general to the specific and with varying emphases. The PPA 2007 sees it simply as acquisition. On the other hand, some sources tend to mix up the concept of procurement with contracting strategy, and tendering/bidding which itself is a stage in procurement (Morledge et al, 2006).

The general group of views of procurement models the acquisition of goods and/or services at the best possible cost of ownership, in the right place and from the right source for the direct benefit or use of corporations, individuals or even governments generally via a contract (Wikipedia, 2010).

More relevant to this paper however is the view of procurement as a “full range of activities related to purchasing goods, services and works…and a process that does not end at the commissioning or contract award stage, but spans the entire life cycle of the product or service from inception and design through to
contract management and disposal of any redundant assets (City of London, 2010). The above view captures the components of a process, life cycle and disposal (including sale) which this paper considers important components in real estate procurement and of great economic, political and legal significance (Arrowsmith and Hartley, 2010) if procurement must target economic development and citizen empowerment.

The ‘disposal’ in the above view clearly suggests the complete recoupment of investment in the procured asset and hence a recourse to the idea of going beyond the cost of procurement, to the valuation of the ‘redundant assets’ which can be done properly only by a valuer in the futuristic context of a market.

No wonder then that the Bureau of Public Procurement (2008) sees it as the “process by which governments buy inputs for vital public sector investments … both in physical infrastructure……”

Following from the above, and by implication, procurement includes the ideas of buying/purchasing, hiring/renting/leasing, and manufacturing or creating goods (tangible) and services (intangible).

Based on the input/output paradigm earlier, inputs should be represented by financial prudence, technical soundness and equity in distribution. The output can be summarized as “government buying better” in a system model of inter-related components (Norton and Kaplan, 2001), forces (Thai, 2001), and demands (external, internal, context, and process) (Telgen, 2006) that make up the remaining system’s components.

The process view of procurement presents it as comprising conceptualization, advertisement, prequalification, short-listing, invitation, tender action, and project execution (Olatunji, 2008). As a strategic element of purchasing (University College Dublin, 2010), procurement takes a number of forms which this paper thinks can simply be summarized as the traditional, modern and post-modern methods.

**PROCUREMENT METHODS**

Based on the process view of procurement, the above named methods are briefly presented below as derived from Berry (2005), Delmon (2010), etcetera.

**Traditional Methods**

In the area of real estate/infrastructure especially, this group of methods is represented by the design –bid–build (DBB) form in which the client provides a business case based on a brief and budget. He also appoints a team of consultants to prepare a design/tender documents, and administer the contract on client’s behalf as well as advice on specific aspects (design, construction, cost management, disposal/management, etc).

In addition the client appoints the contractor (where nil in-house contractor capacity or diseconomies exist) to construct, and retain liability for, the works with much of the work done by sub-contractors (ordinary
and nominated. Where in-house constructor capacity exists, and its use is deemed economical, especially for low-technology assets, the client tends to undertake the entire procurement (including design—sometimes) using such resources, otherwise, external labour, via labour-only agreements, may be used to procure the required capital asset.

**Modern Methods**

The modern methods are made up of two sub-groups. The first sub-group houses what this paper calls the ‘B-O-O-T’ group and its variants with the acronym representing build, operate, own, and transfer. The essential components of this group of methods is that a private agency intermediates in the procurement of an asset on behalf of a public entity under a contract or franchise that is time-period bound, and with the private agency providing some or all of the finance and recovering investment through a lump-sum pay off, user charges, tax exemptions, etcetera. The second sub-group houses the design-build, design-build-maintain, design-build-operate, and design-build-finance-operate species. The essential ingredient here is that the private entity is responsible for facility design and production on behalf of the public body and may, in addition, only operate or maintain or finance and operate the resulting asset, recovering investment as agreed while title is retained by the public entity.

**Post-modern Methods**

The post-modern methods are products of this “age of project management” (Maylor, 2003) and corporate relationship re-engineering resulting in the contemporary paradigm shift in procurement risk management, that is, from risk allocation and transfer to risk absorption and sharing. This shift has given rise to the models now recognized as alliancing, and partnering. The basic concept in these approaches is the pooling of resources in various forms by stakeholders according to their strengths and operating advantages and the recoupment is done pro-rata.

Following from the above, it can be said that the importance of public procurement lies in its constituting a significant proportion of the economic activity in most countries (Arrowsmith and Hartley, 2010). It can also be said that viewed technically, good public procurement goes beyond mere acquisition to include soundness of the process, which must incorporate transparency, integrity, and competition (Yukins, 2007) as probably the most important considerations. While transparency and competition are perceived as the hallmarks of global commerce (World Trade Organisation, 2008) the latter is seen as the cornerstone of public procurement (Office of Government Commerce, 2008).

Classification as “major or minor” notwithstanding, both government and private sector procurement suffer from fraud and similar issues” and go through the basic stages of “pre-procurement, tender process/contract preparation, and contract management with any chosen procurement approach being driven by repeatability, complexity, value and risk, and commonality” (Office of Government Commerce, 2008).

It also needs to be understood however that public procurement must contend with some challenges deriving from the market structure, legal framework, and political environment (Carpineti, et al, 2006) as
part of the evolution process hence the constant need for reforms as exemplified by Nigeria’s ‘Due Process’

PUBLIC PROCUREMENT: NIGERIA’S ‘DUE PROCESS’ REFORM

Public procurement, before now, was mainly covered by the various inter- and intra-ministerial/public service rules and ‘government orders’ (GOs) under which the tenders boards of the various ministries, departments and agencies (MDAs) operated. Shrouded in the ‘official secret’ and ‘establishment’ culture, the entailed process lay, as it were, outside ‘public’ knowledge and was clogged by ‘red-tapism’ and public service inertia while its numerous challenges were common and, again, ‘unofficial’ knowledge.

The attendant challenges gleaned from the literature (USAID, 2005, 2009; Elumilade, 2006; Usman, 2007) can be summed up as including fiscal irresponsibility, outdated procurement system, inadequate regulation/legislation, ineffective supervision/enforcement, and poor procurement/business culture (corruption). This paper is therefore persuaded to posit that the above stated challenges were mere symptoms while the real problem lay with the attitude of the operators. The operators perpetrated consistent and “flagrant abuse of contract award procedures in a way that lacked transparency, competency based competition and merit resulting in the inflation of contract costs and other problems” (Bureau of Public Procurement, 2005).

It was in the above circumstances, coupled with continued use of the traditional design-bid-build procurement model that the Public Procurement Act 2007 was enacted. The Act was complemented with the following: Procurement Procedures Manual, 2008; Budget Monitoring and Price Intelligence Unit (BMPIU) as a ‘watch-dog’ agency; National Council on Public Procurement (NCPP); and Bureau for Public Procurement (BPP) as the supervising, and implementing organs of government, respectively. It is strictly speaking, the BPP that has the mandate to create a ‘Due Process’ based on three components – contract award, oversight, and certification as parameters for any procurement to benefit from public funding.

It is informative to note that other pieces of legislation have added impetus to the ‘Due Process’ including the Economic and Financial Crimes Commission Act, Fiscal Responsibility Act and the Independent and Corrupt Practices Act.

According to Afemikhe (2008), the PPA 2007 was meant to entrench BPIU budget implementation procedures, ensuring their sustainability beyond any particular government regime; empanel a body to deal with procurement policy guidelines, regulation and enforcement. In particular the Act sort, in part, to encourage/empower local contracting and manufacturing capacity as well as engender process transparency, economy, efficiency, fairness, reliability, accountability, and ethical standards.

Public procurement via ‘due process’ seeks uniformity and transparency through the use of three groups of standard documents for the following: national shopping; selection of consulting firms (complex lump-
Some issues that can be identified in the public procurement reform include corruption, central legislation, bid evaluation, competition, transparency, fiscal irresponsibility, bureaucracy, and conceptualization. The above named issues shall presently be dealt with briefly.

**Corruption:** Considered endemic and pervasive around the world, corruption is seen as the single greatest obstacle to economic and social development (Dreher et al, 2007). It inhibits the provision of public services and in so doing increases inequality and therefore heavily impacts the public procurement market which is estimated at more than 15% of global Gross Domestic Product (GDP) (Organisation for Economic Cooperation and Development 2007).

Within the context of public procurement, corruption can simply be viewed as undue business practices (Soreide, 2004), earlier referenced to in this paper as the 'business culture'.

**Central Legislation:** The absence of a common central legislation hitherto gave room for varied interpretation/application of existing procurement rules by the different levels of government, and their agencies. On the other hand, commonality and centralization tends to generate bureaucracy bottlenecks. At other times rules of exception come into being to cater for unforeseen circumstances as provided in Part VII of the PPA 2007, a situation that can be abused considering that every procuring entity has responsibility for all aspects of procurement.

**Competition/Responsive Bid:** Intended to keep procurement cost as low as possible, the idea of “lowest evaluated responsive bid” (Part IV (17) fails to capture the essence of competition and optimization. It is also incapable of preventing bidding games such as front loading, unbalancing, unrealistic bids, etcetera.

**Transparency:** The preponderance and preference by most operators (Asekhame, 2010), of the traditional design-bid-build method in public procurement conflicts with the earlier noted global privatization/deregulation trend in developing countries. It also limits private sector involvement, and understanding by the ordinary citizen of government’s procurement system thereby encouraging the existence and sustenance of cabals and cliques.

**Fiscal Irresponsibility:** This can simply be said to be the inability to be rational in spending hence this paper agrees that the subject is the most severe problem facing public institutions in Nigeria (Akindale et al, 2002) and by extension, public procurement. The Fiscal Responsibility Act 2007 (Federal Government of Nigeria, 2007), patterned after its 24 years older United States of America version was enacted to arrest this problem. To this paper, fiscal irresponsibility in the Nigerian context manifests in two main forms: “unrealistic capital budgeting and poor public expenditure management” (Elumilade et al, 2006) resulting in...
in extra-budgetary expenditure sustained by recurrent deficit budgeting and leading to general macro-
economic instability (Okonjo-Iweala and Osafo-Kwaako, 2007).

As noted earlier, in this paper, and by definition of “works “ in the PPA 2007, public procurement and due
process deal substantially with capital assets which, in turn, are substantially land-based and therefore
clearly related to real estate development/project management.

**NIGERIA’S DUE PROCESS: A REAL ESTATE PERSPECTIVE?**

This section is concerned with the need to “run procurement as a project” (Office of Government
Commerce, 2008). This follows the sense of the procurement of land-based capital assets defined as
“works” in Part XIII, No. 60 of the PPA 2007 (Federal Government of Nigeria, 2007) and the philosophy
of perspectivism, developed by Friedrich Nietzsche, and which suggests in part that “it is our needs that
interpret the world” (Wikipedia, 2010) and hence the, basis for pursuing the remaining objectives of this
section. “Perspective” derives from a root perspicere (Latin) and perspectivum (medieval Latin) meaning
to see through, depicting relationship and giving rise to visual, literature, psychological and cognitive
(choice of context for opinion) contexts, to which this paper is referenced. The extent of the real estate
context is parameterized via what this paper calls ‘relevant reference’ meaning the identification of
provisions/practice of the PPA 2007, as the flagship of public procurement in Nigeria, that can be
construed, to refer to either real estate management or the legal practice of the profession in Nigeria.

It is important to note at this juncture that the PPA 2007 is a 13 part, 61 section, and 43 page piece of
legislation properly cited as the Public Procurement Act No. 14 of 2007 with a commencement date of 4th
June, 2007. Following the relevant reference rule earlier established in this paper, the real estate
perspective is presented below in as much order of precedence of the Act’s provisions as possible and with
comments and explanations where necessary.

**PART I:** Establishment/membership of National Council on Public Procurement (NCPP): s.13 – may co-
opt into membership any person who shall not have a casting vote nor count to quorum. The estate
surveyor and valuer can be so co-opted as above for purposes of real estate advice.

**PART II:** Establishment of the Bureau of Public Procurement: s.14 – presents one of the objectives of the
Bureau as the procurement and disposal of public assets and services. A possible implication is market,
and value implications of the concept of a ‘sale’ for an asset that is land or permanently fixed to land

hence the need for the professional input of the land professional who is best trained in this circumstance;
s.6 (I) (IV) – power of the Bureau to transfer disposal function …to a third party or consultant who should
rightly be a qualified real estate professional if the best value for money is to be achieved; s.6 (f)(m)(3)(c)
– liaise with relevant bodies or institutions to effectively perform its functions . Where this function
involves real estate, the Nigerian Institution of Estate Surveyors and Valuers (NIESV) becomes a possible
candidate for this type of liaison since it is required by law to regulate practicing members.
PART III: Scope of Application: s.15 (l) (a) – all procurement “of . . . works”, is a reference that implies a real estate perspective that needs to be noted.

PART IV: Fundamental Principles for Procurement: s.6(a) (i) – adequacy of professional and technical qualifications can be seen to relate to qualifications of the professional, and/or his practice especially if “works” are involved in the procurement; s.28 – similarly, the requirement of warranties for exercise of requisite skills is a professional practice liability issue which may be required under the Act.

PART V: Organization of Procurement: s.19 (b) (c) – deals with credibility as a procurement observer and/or representative of a professional organisation. The real estate perspective here relates to the estate surveyor and valuer who can be an observer or represent NIESV in procurement of land-based items; s.23 (8), (10) (11) – refers to prequalification of service provider or consultant especially if the service is real estate management service.

PART V: Procurement Methods: the real estate perspective here relates to the need for the real estate professional to ensure adherence to best professional practices and ethical conduct.

PART VI: Special and Restricted Methods of Procurement: s.4(b) – proposal solicitation involves technical, quality and other characteristics of works and professional competence/technical qualifications of suppliers/contractors who can be real estate professionals.

PART VIII: Procurement of Consultancy (Services): This can arise where a procuring entity requires the services of real estate professionals for land/land-based investment hence presenting a clear real estate perspective.

PART IX: Procurement Surveillance and Review: s.53 – the possibility of investigation demands that documents such as field records, valuations of real estate, etc be properly done and preserved

PART X: Disposal of Public Property: Property disposal implicates a market situation which emphasizes value rather than cost and hence a fundamental consideration in securing value-for-money in the disposal of “works”; s.55(1) – application of PPA 2007 is modified by the Public Enterprises Act 1999; s.55(2) – defines intangible, and tangible items, with the real estate connotations of the latter. s.56(1) – deals with preparation of valuation report by an independent evaluator or such professional with appropriate competence to undertake the valuation; s. 56 (3) – talks about timing disposal for most advantageous returns. The last two sections provide real estate perspectives to the value process when it involves capital assets.

PART XIII: Miscellaneous: This ‘definitions’ section of the Act is misleading in seeing ‘value’ as the monetary value set by the Bureau, instead of being derived by a valuer qualified under the law in Nigeria. This paper also notes the absence of the estate surveyor and valuer in the membership of both the National
Council on Public Procurement, and the Bureau of Public Procurement (Part I and II of the Act). Considering that the estate surveyor and valuer is the person professionally qualified, and legally permitted to value interest in land, the above oversight needs to be addressed if the best value-for-money is to be secured from the disposal of public capital assets, in addition to its statutory implications. The provision for possibility of the estate surveyor being co-opted, is unsatisfactory especially where the co-opted person has no voting right nor counts towards quorum.

The idea in Part X, s.56 (1) of preparing a valuation report by an “evaluator” or such professional with appropriate competence reflects a poor real estate perspective that is not only open to varied interpretation and hence abuse, but needs correction in favour of specific mention, and the naming especially of the estate surveyor and valuer as the only person qualified under law in Nigeria to put value on capital assets.

Generally speaking, the real estate professional needs to note some salient aspects of ‘due process’ functions and powers of both CNPP and BPP (power to debar), scope of application (Part III, s.15(1)); liability for non-performance (Part IV, s.16(3); exclusion from participation (s.16(18); and professional/technical qualifications (s. 16(6)).

Finally, the provisions of the code of conduct (Part XI), offences (Part XII) and miscellaneous (Part XIII) sections of the PPA 2007 need to be taken to heart while contemplating the real estate perspective to public procurement in Nigeria.

SUMMARY AND CONCLUSION

The need for economic empowerment of citizens is growing especially in developing countries of the world leading to reforms aimed at achieving efficiency and effectiveness in the national economy and increasing citizens’ purchasing power and quality of life in tune with global best practices. The paper also reviewed, and presented the general intendment of the Public Procurement Act No. 14 of 2007, highlighting the aspects that relate, and/or should relate, to real estate management as legally practiced in Nigeria.

It was also found that good public procurement goes beyond mere acquisition to include soundness of the process and must incorporate competition, transparency, and integrity. The literature also shows that the choice of a procurement approach should be driven by repeatability, complexity, value and risk, and commonality, while the major challenges tend to originate from the market structure, legal framework, and political environment implicated in corruption, fiscal irresponsibility, increasing private sector participation, and poor procurement culture. Other drawbacks include bureaucracy, use of ‘lowest evaluated responsive bid’, preference for traditional design-bid-build model by most stakeholders/operators, and its definition of value that actually means cost.
and hence confirming the emphasis only of fiscal responsibility to the disregard of value enhancement.

Finally, this paper opines that the absence of the real estate professional in the membership of both the NCPP, and BPP constitute a serious omission that diminishes the reform, and therefore needs to be rectified. It is further concluded that beyond the functions which can be performed by the real estate professional in ‘due process’, the definition of “works” in the PPA 2007, provides the clearest and most direct real estate perspective to the reform by its specification of land-based development, in its entirety.

References


