

An Introduction to Health Care Procurement in Nigeria and Its Relationship to Development

Sope Williams-Elegbe*

Department of Commercial and Industrial Law,
University of Lagos, Akoka

Abstract

Public procurement may be described as the process through which a government purchases the goods, services and 'works' it requires to function and maximise public welfare. Public procurement covers a wide range of activities from the purchase of everyday items such as pens and paper to the construction of dams, hospitals, schools and to contracts for services such as financial and legal services and even research and development contracts. Procurement accounts for a large measure of government spending, especially in developing countries where infrastructure and social needs remain unmet for the vast majority of the population. Despite the importance of procurement to development, there is little academic information on public procurement, especially in relation to health care procurement and its relationship and importance to development. Health care procurement has thus received little attention in Nigeria, either from policy makers or academics despite its importance to the attainment or the non-attainment of the MDGs. This paper adopts a doctrinal analysis of the healthcare procurement law and framework in Nigeria, and using the UK as a case study, illustrates that a holistic approach to healthcare procurement in Nigeria can serve to accelerate our development.

Introduction

Public procurement in Nigeria has had a somewhat checkered history, and the formal regulation of public procurement did not begin until after 1999. Before 1999, there was no formal or coordinated approach to public procurement, which was regulated by means of financial circulars issued by the Minister of Finance. In practice, these circulars were often disregarded as there was no mechanism for ensuring compliance.¹

The absence of formal legal regulation of procurement meant that government contracts were used and abused as a form of patronage for government officials and their cronies. The vast sums of money involved in government contracts presents a temptation for unscrupulous and unethical behaviour in the procurement space.² The kinds of inappropriate, illegal and unethical conduct in Nigerian public procurement ranges from abuse of power and conflicts of interest, to bribery and illicit payments to fraud and misrepresentation.³

The consequence of this was that the government did not always get value for money, leading to a waste of public funds. In addition, it meant that with contracts that were intended to produce a social good, such as in relation to health care, communities were often left bereft as the victims of inappropriate procurement.

* Senior Lecturer in Law, Department of Commercial and Industrial Law, University of Lagos, Akoka-Yaba, Lagos.

¹ Sope Williams-Elegbe, "The Reform and Regulation of Public Procurement in Nigeria" (2012) 41 (2) *Public Contract Law Journal* 339, 341.

² William Sims Curry, *Government Contracting: Promises and Perils* (2010, Taylor & Francis), Ch. 1.

³ Sims, *ibid.*

This article examines the current legislative approach to healthcare procurement in Nigeria and makes suggestions for how Nigeria's procurement in healthcare can be improved to meet our developmental aspirations. It reviews the current changes to healthcare procurement in the UK as a model for Nigeria.

Public Procurement Regulation in Nigeria

In 1999, at the behest of the Obasanjo administration, the World Bank conducted a Country Procurement Assessment on Nigeria and found several weaknesses. The assessment led to a Country Procurement Assessment Report (CPAR), which criticised the transient and superficial nature of the financial regulations; the lack of a coordinating supervisory body for public procurement as well as the absence of a review mechanism where irregularities in the procurement process are alleged.⁴

The CPAR made several recommendations for the reform of the Nigerian procurement regime, many of which were implemented. To counter the perceived shortcomings in the procurement system, CPAR first recommended that Nigeria enact a public procurement law based on the UNCITRAL Model Law on the Procurement of Goods, Construction and Services. This was done as the Public Procurement Act (PPA) was passed in June 2007. The CPAR also suggested that the Nigerian Government establish an independent oversight body to provide policy direction on public procurement and improve the efficiency and effectiveness of public procurement. This was also done by the passage of the PPA, which established the Bureau of Public Procurement (BPP). The establishment of the BPP addresses the earlier issues surrounding the insufficiency of the financial regulations and the lack of coherence, organisation, and policy direction on procurement.

The second recommendation in the CPAR was aimed at improving procurement procedures and practices and introducing best practices into the procurement process by requiring advertisements for contracts over a certain threshold; increasing clarity in bid evaluation criteria; eliminating conflicts of interest; developing uniform registration processes for contractors; developing uniform standard bidding documents; improving contract management and oversight; and improving the systems of record keeping. This recommendation was to meet the fragmented and haphazard manner in which procurement was carried out by most procuring authorities and the inadequacies in the methods of contract management and record keeping. This recommendation was again addressed by the passage of the PPA, which provides extensive rules on the procedures governing the award of public contracts.

The third recommendation addressed the organisation of tender boards and the capacity of procurement personnel. The CPAR recommended that politicians should not be involved in the procurement function, which should be left to the civil servants, and that a trained procurement cadre should be established in all government ministries, departments and agencies. Capacity building is of course both a short to long-term goal and the Bureau of Public Procurement in conjunction with the Public Procurement Research Centre at the Federal University of Technology, Owerri regularly conducts training for procurement officials.⁵

At present, the Nigerian procurement system is still emerging and the reform process is by no means over. Much is being done and still needs to be done in relation to capacity building;

⁴ Williams-Elegbe, note 1, 342.

⁵ Sope Williams-Elegbe, *Beyond UNCITRAL: The Challenges of Procurement Reform Implementation in Africa* (2014) 25 (1) Stellenbosch Law Review, 209, 214.

developing supporting ICT infrastructure, a functional enforcement system and strengthening the Bureau of Public Procurement.⁶

Public Procurement and Development

It was mentioned in the introduction to this paper that procurement is intricately connected with a nation's development, given that it is through engaging in procurement that a government is able to maximise public welfare and meet its developmental goals. It may be noted at this juncture that the value of government procurement ranges from millions to billions of naira depending on the functions and the budget of the government department in question. There have been studies that illustrate the potential size of the global public procurement market and the impact it can have on development and socio-economic welfare and growth where procurement funds are properly deployed.⁷

According to Evenett and Hoekman, procurement is important to development as it will be difficult for a state to meet the needs of its citizens without a public expenditure system that includes effective public procurement.⁸

According to the OECD, "good public procurement practices are a major determinant of the effectiveness of public expenditure. On behalf of their citizens, governments typically spend as much as 5–20 percent of their gross domestic product on procurement of goods and services, and effective procurement policies enable better use of government budgets".⁹ Good national procurement practices are therefore an essential element of the poverty reduction initiatives in developing countries.¹⁰

Effective procurement in the World Bank has also been associated with better development outcomes.¹¹ An analysis of World Bank procurement found a positive correlation between procurement performance and project success. Thus in projects where there were unresolved procurement problems at closing the likelihood of unsatisfactory outcomes is more than three times as high as for projects with satisfactory performance at completion.¹²

Although, similar data does not currently exist on Nigerian procurement, given that Africa is one of the largest Bank borrowers by region, one may allude that Nigeria faces similar situation. In 2013, Bank lending to Africa stood at \$8.245 billion, in comparison with the \$4.474 billion loaned to South Asia during the same time frame.¹³ Thus, it can be inferred that information on development outcomes and procurement performance will apply to African countries including Nigeria.

Health Care Procurement in Nigeria

⁶ Williams-Elegbe, *ibid* 210-223.

⁷ Christopher McCrudden, *Buying Social Justice: Equality, Government Procurement and Legal Change* (2007, Oxford University Press); Sue Arrowsmith and Peter Kunzlik (eds.), *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions* (2009, Cambridge University Press); Sope Williams-Elegbe, *Fighting Corruption in Public Procurement* (2012, Hart Publishing).

⁸ Simon J. Evenett and Bernard M. Hoekman, 'International Cooperation and the Reform of Public Procurement Policies' Research Working Paper, August 2005, 21-25.

⁹ OECD, *A Practical Guide for Transforming Procurement Systems*. Paris: OECD, 2011)

¹⁰ World Bank, *The World Bank and Public Procurement: An Independent Evaluation* (2014), 1

¹¹ *ibid.*

¹² *ibid.*, 2.

¹³ The World Bank Annual Report, 2013.

Although, Nigeria now has in place an Act regulating public procurement, health care procurement is not treated as a distinct or special category of procurement. Health care procurement in Nigeria is governed and regulated by the PPA 2007.

This approach of regulating health care according to general procurement rules, without providing a specialised policy or approach for health procurement is at odds with the practice in developed nations and has implications for the efficacy of health care procurement, given that some rules which apply to generalised procurement are unsuitable for health care procurement.¹⁴

It should be noted that efficient procurement in the health sector requires “specialised knowledge of and expertise in essential medicines and consumables, and the markets where quality products can be obtained.”¹⁵ This is even more so in a county with a limited manufacturing base in relation to health care products. Thus, at a minimum, health care procurement ought to be designed to take into account the complexity of healthcare procurement, which involves coordination between multiple agencies, decentralised agencies, international and local health polices and multiple health financiers.

As mentioned above, the PPA 2007 applies to the procurement of healthcare. The PPA is a comprehensive statute which created new institutions- the National Council on Public Procurement and the Bureau of Public Procurement; strengthened new and existing obligations on procuring authorities in relation to the procurement function; provided for the use of competitive procurement procedures; created a system of supplier remedies; created a debarment (disqualification) mechanism and created several procurement related offences. The PPA governs the procurement of goods, construction works and services and also applies to the disposal of state assets.

To fill in the gaps in the PPA and clarify any areas of ambiguity,¹⁶ the Bureau of Public Procurement also issued a set of regulations, which provide more detail on the regulation and management of the procurement function.

i. Application of the PPA

The PPA applies to all procurements carried out by the Federal Government of Nigeria and all procuring authorities.¹⁷ A procuring entity is defined to mean any public body engaged in procurement and includes a Ministry, Extra-Ministerial office, government agency, parastatal and corporation. The PPA also applies to entities outside this definition, which derive at least 35% of the funds appropriated or proposed to be appropriated for the procurement from the Federation share of Consolidated Revenue Fund.¹⁸ From the above provisions, it can be seen that health care procurement comes within the ambit of the PPA.

Although, health care is governed by the PPA, defence procurement is excluded from the ambit of the PPA and the PPA accordingly provides that it does not apply to the procurement of “special goods, works and services involving national defense or national security unless the President’s

¹⁴ See generally, Rao Raja, Peter Mellon and David Sarley, *Procurement Strategies for Health Commodities: An Examination of options and mechanisms within the commodity security context* (2006, USAID); Department of Health, UK, *Better Procurement, Better Value, Better Care: A Procurement Development Programme for the NHS* (2013).

¹⁵ Rao Raja, Peter Mellon and David Sarley, *Procurement Strategies for Health Commodities: An Examination of options and mechanisms within the commodity security context* (2006, USAID).

¹⁶ Public Procurement (Goods and Works) Regulations, Official Gazette No. 109 Vol. 94, 31 December 2007.

¹⁷ Section 15 (1) PPA.

¹⁸ The Consolidated Revenue Fund was created by the 1999 Constitution and is comprised of all revenues received or raised by the Federation. See section 80, 1999 Constitution.

express approval has been first sought and obtained.”¹⁹

The PPA also applies to the disposal of “public property”²⁰ and as is the case with procurements, requires open competitive bidding as the method by which a government agency shall receive offers for the purchase of public property.²¹

ii. Procurement procedures

The PPA for the first time introduced mandatory procedures to be used in the procurement process. As discussed earlier, the CPAR recommended that Nigeria adopt a procurement law based on the UNCITRAL Model Law. The PPA as eventually adopted contains elements of the UNCITRAL Model Law and the World Bank Procurement Guidelines.²²

There are five procurement procedures provided by the PPA, which may be used by government agencies in all procurements including healthcare procurement. These are open competition, two-stage tendering, restricted tendering, request for quotations and sole-source procurement.

- (a) Open competitive bidding: This is the primary procurement method to be used by procuring entities under the PPA. It may take the form of national or international competitive bidding and is described in the PPA as “the process by which a procuring entity based on previously defined criteria, effects public procurements by offering to every interested bidder, equal simultaneous information and opportunity to offer the goods and works needed.”²³ Where open competition is used, the winning tender shall be the lowest evaluated responsive bid.²⁴ Under the PPA, where open competition is used, the contract opportunity shall be advertised in national (and international, where international competitive bidding is used) newspapers for a period of six weeks.²⁵

For open competitive bidding, bids are required to be submitted in English, in writing and are required to be deposited in a tamper-proof box before the deadline specified in the tender documents.²⁶ No communication is permitted between the procuring agency and the bidder once a contract opportunity is advertised. Received bids are required to be opened in public in the presence of bidders or their representatives and interested members of the public.²⁷ As a matter of course, procuring agencies are provided with a list of interested Civil Society Organisations (CSOs) who are invited to be present at bid openings to ensure transparency and fairness in the procurement process.

- (b) Two-stage tendering: Under the PPA, two-stage tendering shall be used in a number of situations.²⁸ These are: (i) where it is not feasible for the procuring entity to formulate detailed specifications for the procurement and it seeks proposals on various ways of meeting its needs; or (ii) where the nature of the goods or works are subject to rapid technological changes; or (iii) where the procuring entity seeks to enter into a contract for research, experiment, study or development; or (iv) where national security concerns mean

¹⁹ S 15 (2) PPA. The Director-General of the Bureau of Public Procurement stated in the Fourth National Procurement Forum 25-26th July 2011, Abuja, Nigeria, that the President of the Federal Republic of Nigeria, Goodluck Jonathan routinely acquiesces in the use of competitive procurement procedures for defence contracts.

²⁰ Section 55 PPA.

²¹ Section 55 (3) PPA.

²² WORLD BANK, GUIDELINES: PROCUREMENT FOR GOODS, WORKS AND NON-CONSULTING SERVICES UNDER IBRD LOANS AND IDA CREDITS AND GRANTS BY WORLD BANK BORROWERS (JANUARY 2011).

²³ Section 24 (2) PPA.

²⁴ Section 24 (3) PPA.

²⁵ Section 25 (2) PPA.

²⁶ Section 27 PPA.

²⁷ Section 30 PPA.

²⁸ Section 39 (2) PPA.

that two-stage tendering is the most appropriate method of procurement; or (v) where open competitive procurement procedures have been utilised but were not successful.

The procedures for two-stage tendering under the PPA are the same for open competitive bidding, except that the invitation to bid shall require suppliers in the first stage to submit proposals without a price.²⁹ Such proposals may relate to the technical and other characteristics of the goods, works or services in question. Such proposals may also include contractual terms and conditions of supply and stipulate the professional competence and technical qualifications of suppliers. At the first stage, a procuring authority may also engage in negotiations with suppliers on the merits on their bid.³⁰

At the second stage, the procuring entity shall invite suppliers whose tenders have not been rejected to submit final tenders with prices on a single set of specifications.³¹ The final tenders shall be evaluated and compared in order to ascertain the successful tender and the successful bidder shall be that with the lowest evaluated tender as is the case in the open competitive procedure.³²

- (c) Restricted tendering: The PPA also provides for restricted tendering as a method of procurement.³³ The use of this procedure is however subject to the approval by the BPP and a procuring entity may engage in procurement by means of restricted tendering where the goods, works or services are available only from a limited number of suppliers or contractors; or the time and cost required to examine and evaluate a large number of tenders is disproportionate to the value of the goods, works or services to be procured; or the procedure is used as an exception rather than norm.³⁴

Where a procuring entity engages in restricted tendering on the basis that the goods, works or services are available only from a limited number of suppliers, it shall invite tenders from all the suppliers who can provide the goods, works or services.³⁵ Where restricted tendering is used on the basis that the time and cost required to examine and evaluate a large number of tenders is disproportionate to the value of the goods, works or services, it shall select in a non-discriminatory manner, a number of suppliers or contractors to ensure effective competition.³⁶ In either case, the contract opportunity shall be advertised and the provisions of the PPA in relation to open competitive bidding shall be utilised once the selected bidders have been nominated.³⁷ In other words, the bids shall be opened in public and the lowest evaluated responsive tender selected.

- (d) Request for quotations: Under section 41 of the PPA, a procuring entity may carry out procurements by requesting for quotations from suppliers where the value of the goods or works to be procured does not exceed a sum that shall be set in the procurement regulations.³⁸ Where this method of procurement is used, quotations shall be obtained from at least three unrelated suppliers,³⁹ who shall give only one quotation and shall not be

²⁹ Section 39 (4) PPA.

³⁰ Section 39 (5) PPA.

³¹ Section 39 (6) PPA.

³² Section 39 (7) PPA.

³³ Section 40 PPA.

³⁴ Section 40 (1) PPA.

³⁵ Section 40 (2) (a) PPA.

³⁶ Section 40 (2) (b) PPA.

³⁷ Section 40 (4) PPA.

³⁸ The Public Procurement Regulations however omitted to specify a sum for the use of the Request for quotations procedure.

³⁹ Section 41 (2) PPA.

allowed to change or vary the quotation. In addition, no negotiation shall take place between a procuring entity and a supplier with respect to a quotation.⁴⁰ As is the case with open competitive bidding, the contract shall be awarded to the qualified supplier that gives the lowest priced responsive quotation.⁴¹

- (e) Sole source procurement: Section 42 of the PPA provides the conditions for the use of sole source procurement, referred to in the PPA as “direct” and “emergency” procurement. Under the PPA, a procuring entity may carry out sole source procurement in the following situations: (i) where the goods, works or services are only available from a particular supplier, or (ii) if a particular supplier has exclusive rights in respect of the goods, works or services and no reasonable alternative or substitute exists; or (iii) there is an urgent need for the goods, works or services, which is not the result of dilatory conduct on the part of the procuring entity; or (iv) owing to a catastrophic event, there is an urgent need for the goods, works or services, making it impractical to use other methods of procurement; or (v) where a procuring entity has procured goods, equipment, technology or services from a supplier and determines that additional supplies need to be procured from that supplier because of standardisation or the need for compatibility with existing goods, equipment, technology or services or (vi) where the procuring entity seeks to enter into a contract with the supplier for research, experiment, study or development, except where the contract includes the production of goods in quantities to establish commercial viability or recover research and development costs or (vii) national security concerns mean sole source procurement is the most appropriate method of procurement. Subject to the approval of the BPP, the Procurement Regulations also authorise the use of sole source procurement when buying “small or off-the-shelf items of small value.”⁴²

The PPA by s 43 also permits the use of sole source procurement in situations of emergency. Thus, (i) where the country is either threatened or confronted with a disaster, catastrophe, war, insurrection or Act of God or the condition or (ii) the quality of goods, equipment, building or publicly owned capital goods may seriously deteriorate unless action is urgently and necessarily taken to maintain them in their actual value or usefulness; or (iii) a public project may be seriously delayed for want of an item of a minor value, a procuring authority is permitted to use sole source procurement.

Where sole source procurement is used, the procuring entity may procure the goods, works or services by inviting a proposal or price quotation from a single supplier⁴³ and shall include in the record of procurement proceedings a statement of the grounds for its decision and the circumstances in justification of sole source procurement.⁴⁴ Furthermore, where the procurement relates to an emergency, and the emergency has ceased, the procuring authority shall file a detailed report with the BPP, which shall verify the report and if appropriate (if the contract is above the relevant threshold) provide a “Certificate of No-Objection” for the completed contract.⁴⁵

A New Approach to Health Care Procurement in Nigeria: The Case of the UK National Health Service (NHS)

⁴⁰ Section 41 (4) PPA.

⁴¹ Section 41 (5) PPA.

⁴² Regulation 62 (d).

⁴³ Section 42 (2) (a) PPA.

⁴⁴ Section 42 (2) (b) PPA.

⁴⁵ Section 43 (4) PPA.

As was mentioned above, many jurisdictions adopt a specialised approach to health care procurement, given the sensitive, specialised nature and importance of the health sector. This is an approach that ought to be considered by Nigeria, given our health development indicators,⁴⁶ which illustrate that Nigeria's health sector is facing severe challenges. Some of these challenges are expressed in the high infant and maternal mortality rate, low vaccine penetration and continued prevalence of diseases such as malaria and HIV/AIDS. Thus, in 2013, Nigeria's HDI rank was 153 out of 187 countries. According to the UNDP, life expectancy is 52.3 years.

In recognition of the potential benefits and savings of a coordinated approach to health care procurement, in 2013, the UK Department of Health developed a Procurement Development Programme (PDP) for the NHS. The objectives of the PDP are to better manage the vast resources spent on healthcare procurement which is around £20 billion, to bring coherence into health procurement, improve procurement capabilities across the NHS and increase transparency in health procurement. The PDP intends to maximise care, whilst also maximising value for money, by achieving economies of scale.

Some of the salient aspects of the PDP include:

- a. Contribution to economic growth: The NHS intends to ensure that it can contribute to economic growth by ensuring that SMEs have access to NHS procurements. In addition, the NHS intends to develop a more collaborative relationship with suppliers and manufacturers to foster innovation.
- b. Reducing expenditure: Collaborative procurement between hospitals and primary care providers can dramatically reduce costs as will increased reliance on generic (non-brand) products. An investigation revealed that if hospitals switched from the known brand of medical gloves to another lesser known product, the NHS would save £5 million. These kinds of savings can affect front-line delivery of medical services and cause savings to be used in other areas. Other identified ways of reducing expenditure are to offer suppliers of high value medical equipment a commitment in exchange for lower prices.
- c. Investing in procurement capability and the sharing of best practices.
- d. The creation of a NHS Procurement Development Oversight Board and the appointment of a private sector procurement champion, whose role is to drive the modernisation of procurement and greater accountability.
- e. The PDP will achieve these through (i) the delivery of efficiency and productivity gains (ii) improving data, information and transparency (iii) action to improve patient outcomes through clinical procurement review partnerships (iv) a longer term partnership to improve procurement leadership and capability.

From the above, it can be seen that the UK is undergoing significant reform of its approach to health care procurement. It may be noted that similar to Nigeria, health care procurement is not exempted from the general laws regulating UK procurement, however, within the ambit of those laws, the Department of Health intends to leverage on partnerships, collaborative procurement, better information sharing and transparency to maximise value and improve patient outcomes.

This is definitely an approach that can be adopted by Nigeria, both at the federal and state level. As a start, health agencies within a state can collaborate to buy common or off the shelf

⁴⁶ UNDP, Human Development Report 2013: Nigeria.

items in bulk as a way of driving down prices. Improving relationships with key suppliers and better market research can also assist to help to promote innovations in the health sector. In addition, and similar to the approach in the UK, increasing transparency and data on prices paid can also help to maximise value.

Conclusion

This article has presented the current legal approach to procurement in the health sector in Nigeria and shown through an analysis of the trends in the UK that Nigeria needs to adopt a specialised approach to health care procurement in order to maximise value and improve patient outcomes, in the light of Nigeria's poor human development indicators especially as they relate to health.

