

Topic- a Legal Overview of the Public Procurement act, 2007 (as Amended 2016), Laws of the Federation of Nigeria, 2004

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Abstract

The Public Procurement Act of Nigeria is a piece of legislation passed by the Nigerian National Assembly on the 4th of June, 2007 to streamline bidding processes in public procurements and ensure the entrenchment of fairness, inclusiveness, diversity and equality in wealth creation and distribution. Persons and corporations, whether indigenous or allied with foreign partners, are given a level playing field to participate in the economy. This paper discusses the purpose, process and preliminary requirements for bidders to succeed in procurement as well as the bottlenecks in the way of industry practitioners. The paper highlights the obvious gaps in the law and makes recommendations for the improvement of the legal provisions as presently stated in the overall interest of national development and support for local content in Nigerian entrepreneurship.

Keywords - Act, Bidder, Bureau, Bidder, Law, Procurement.

I. INTRODUCTION

Public procurement can be defined as the acquisition, whether under formal contract or not, of works, supplies and services by public bodies. It ranges from the purchase of routine supplies or services to formal tendering and placing contracts for large infrastructural projects [1]

According to Wikipedia, government procurement or public procurement is procurement of goods, services or constructions on behalf of a public authority such as a government agency.[2]. In Nigeria, government procurement or public procurement is governed by the Public Procurement Act 2007 (as amended 2016). The Act established two regulatory authorities to control and supervise government public procurement in Nigeria.

These regulatory bodies are responsible for:
The monitoring and oversight of public procurement;
Harmonizing the existing government policies and practices by regulating, setting standards and;
Developing the legal framework and professional capacity for public procurement in Nigeria;

And for related matters. [3]. The regulatory bodies are:

- The National Council on Public Procurement and
- The Bureau of Public Procurement.

The duties of the Council are spelt out in section 2 of the Act. [3]

The Council is saddled with oversight responsibilities with respect to the Bureau. The Council approves the appointment of the directors of the Bureau, considers for approval the audited accounts of the Bureau, considers and approves public policies on public procurement and approves changes in the procurement process to adapt to improvement in modern technology. The Council also considers, approves and amends monetary and prior review threshold for the application of the provisions of the Act by procuring entities and has the power to give other directives to the necessary agencies and perform any other function necessary for the achievement of the objectives of the Act [3]

The Bureau of Public Procurement is established by section 3 of the Act. [3]. The Bureau is a legal person with all the characteristics of legal personality vested in it. The Act provides for the composition of the Bureau in sections 7, 8 and 9. [3]

II. BASIC PROVISIONS OF THE NIGERIAN ACT

The Act has a total of 61 sections in 13 parts. Part 1 establishes the National Council on Public Procurement which is saddled with the responsibility of overseeing the other agencies and processes involved in public procurement in Nigeria. Part 2 establishes the Bureau for Public Procurement. It spans section 3 to section 14 and spells out the duties and powers of the Bureau, albeit not in exhaustive detail. The Bureau is directly responsible for public procurement in Nigeria. Part 3 has just one section, section 15, which shows the scope of application while part 4, which also has only one section, section 16, makes provision for the fundamental principles for procurement. Part 5 which comprises section 17 to section 24 provide for organization of procurements and part 6 spans section 25 through section 38 and shows the procurement methods for goods and services. Part 7 talks about special and restricted

methods of procurement from section 39 to section 43 and section 44 to section 52 are captured under part which generally handles procurement of consultancy services. Part 9 discusses procurement surveillance and review in sections 53 and 54 while part 10 provides for proper disposal of public property in sections 55 and 56. Part 11 outlines the code of conduct for public procurement in section 57; part 12 highlights the offences relating to public procurement in section 58 while part 13 contains miscellaneous provisions in sections 59, 60 and 61.

III. ADVANTAGES OF PUBLIC PROCUREMENT LEGISLATIONS

Some of the advantages of legislations on public procurement will be briefly highlighted in this segment. They include but are not limited to:

- Improvement of national economy
- Empowerment of entrepreneurs
- Introduction of order in the public procurement process
- Allows for inclusiveness
- Entrenches fairness in the process of public procurement
- Ensures that the rule of law is upheld

IV. QUALIFICATION OF BIDDERS UNDER THE ACT

Generally, for a person to qualify to bid for a contract, section 5 of the Act provides that he must either be a natural person who has come of age or a legal person or a combination of both. [3].

Under the law, natural person under the age of 18 years cannot lawfully enter into contracts. This goes to say that any person under the age of 18 years cannot bid for a contract.

For legal personality to be vested in a person, that 'person' must be qualified under the Company and Allied Matters Act, 1990 (CAMA). Sections 18 to 37 of the CAMA spell out in great detail the process of incorporation and acquisition of corporate personality. Generally speaking, corporate personality is acquired when two or more persons, qualified under the law with respect to age, citizenship or the appropriate permit, in the case of foreigners, and a couple of other considerations, come together and register a company under the Company and Allied Matters Act, 1990. The registered company has a separate personality from the members who registered it and is seen as a legal person. [4].

For the purpose of this paper, the qualification for bidders will be discussed under three headings vis professional, technical and financial.

A. *Professional Qualifications- S. 16(6)(a)(i&iv), S. 16(6)(b), PPA.* [3]

All bidders must possess the necessary professional qualifications to carry out particular

procurements. The nature of the contract, to a large extent, affects this qualification. Where the contract requires that the person performing it have a particular professional qualification or specialization, the bidder must show evidence of such qualification or specialization. For instance, if the contract is related to construction, whether goods or services, it goes without saying that the presence of engineers, with specialization and experience in construction is required. This qualification therefore depends on the nature and specifications of the contract.

B. *Technical Qualifications- S. 16(6)(a)(i&ii) PPA.* [3]

All bidders must possess the necessary technical qualifications to carry out particular contracts. This implies that there are certain contracts that require certain technical expertise. For such contracts, the bidder must show evidence of such qualifications. Bidders must also possess the necessary equipment and relevant infrastructure required for the particular contract. Some contracts need specialized equipment to carry out. The bidder needs to show evince of possession of such to show capacity to handle such contracts.

C. *Financial Qualifications- S.16 (6) (a) (ii) and S. 16(6) (c) PPA.* [3]

Again, a bidder must possess the necessary financial to carry out the contract. A corporation in liquidation or in danger of liquidation cannot bid for contracts for public procurements. This implies that a bidder must show:

- Present bank statements showing that it has the financial capacity to carry out the contract;
- Documents from Federal Inland Revenue Service (FIRS) showing that he has fulfilled all his obligations to pay taxes- S. 16(6)(c)
- Documents from Pension Commission (PENCOM), showing that it has fulfilled all its obligations of paying all its pensions and other social obligations.

Furthermore, by S. 16(6)(e), a bidder must not have any director who has been convicted in any country for any criminal offence relating to fraud, financial impropriety, criminal misrepresentation or falsification of facts relating to any matter.

V. CONFLICT RESOLUTIONS FOR PUBLIC PROCUREMENTS

Offences relating to public procurements are spelt out in S. 58 PPA. [3]. The law lists out the activities that amount to offences under the Act. The law goes ahead to provide for offences to be tried in the Federal High Court in the name of the Federal

Republic of Nigeria by the Attorney General of the Federation or any legal officer representing him. Appeals from the Federal High Court usually go to the Court of Appeal and thereafter, to the Supreme Court. The law however failed to make allowance for Alternative Dispute Resolution or any other form of resolution apart from court litigation in the event of a conflict.

Again, the law failed to give contractors and bidders a way out should any conflict arise. The language of the law presumes that the only conflict that may arise will take the form of a contravening of the law by offenders. This is a major lacuna as there is a possibility of contractors or bidders being dissatisfied with the provisions of the law or the regulating authorities.

VI. CONCLUSION

The Public Procurement Act governs the bidding process for public procurement in Nigeria to enhance and ultimately ensure the entrenchment of diversity, inclusiveness, fairness and equality in wealth creation and distribution in the Nigerian economy. A cursory look at the Act has shown its advantages and areas of strength. It has also shown a couple of areas that need to be looked into to achieve fair play in the bidding process. If these areas are attended to, the Nigerian service provider or contractor will have more boldness and confidence in the justice system of the law. This overview is however not exhaustive.

VII. RECOMMENDATIONS FOR IMPROVING THE LEGISLATIVE CARE FOR PUBLIC PROCUREMENT

The 21st century justice system is gradually towing the line of alternative dispute resolution. It is therefore recommended that:

- The law is widened to include different means of alternative dispute resolution first whenever a dispute arises. This will make for peaceful dispute resolution and harmony in the contractual relationship.
- The law makes provision for contractors to initiate court proceedings in the event of failure of the alternative dispute resolution and not just lay at the mercy of the regulating authorities.

REFERENCES

- [1] Public Procurement Environmental Agency, Ireland-
www.epa.com.
[2] <https://en.m.wikipedia>.
[3] [Public Procurement Act, 2007.]
[4] Company and Allied Matters Act 1990