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IMPACT OF THE PUBLIC PROCUREMENT ACT 2007 ON THE FUNCTIONS OF GOVERNING COUNCILS OF FEDERAL UNIVERSITIES IN NIGERIA

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Abstract

Nigeria's Public Procurement Act 2007 was a response to the World Bank's assessment of Nigeria's Public Procurement system in 1999. The assessment revealed weaknesses in the system which called for urgent reforms. The Country's Procurement Assessment Report (CPAR) showed that Nigeria's public procurement system was without a legal framework, hence the setbacks. This paper investigates the impact of the Public Procurement Act 2007 on the functions of the governing councils of federal universities in Nigeria, applying the doctrinal research methodology. The study finds that there was another federal legislation: Universities (Miscellaneous Provision) Act No 11 of 1993 (as Amended) that established the federal universities' governing councils and vested in them the authority to run these universities. The powers of the vice chancellors under the Public Procurement Act 2007 overlap with the functions of the governing councils under the extant 1993 Act. While the later Act made the Vice Chancellor the accounting officer with special responsibilities on issues relating to procurement, it was silent on the level of authority that the governing councils could exert on the universities. The paper also finds some merits and demerits of the Public Procurement Act 2007 in federal universities and concludes that there are still weaknesses in the enforcement and enforceability of the Act. It recommended chiefly, an amendment of the Public Procurement Act 2007 together with the Universities (Miscellaneous Provisions) Act 1993 to resolve the overlapping mandates.

Keywords: Corruption, due process, public sector, overlapping responsibilities, resource management, vice-chancellors.

1. Introduction

Public procurement is the application of public resources by government, its agencies and institutions for the procurement of goods, services and works. The

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intention of the Public Procurement Act 2007 is to conserve public funds by ensuring that due process is followed in the procurement of goods and services in the public sector. The resultant effect is that the best quality and quantity of goods and services are procured at the best cost, from the right sources and for good purposes.¹ It is the process of acquiring goods and services by public authorities.² This has to do with contractual obligations entered into for that purpose between these institutions of government and the private sector concerns in areas such as military, education, health, infrastructural services and so on. Strong procurement management in the public sector is a tool for achieving political, economic and social goals.³

The Public Procurement Act 2007⁴ has been adjudged as a piece of legislation that has revolutionized the regulation or framework in Nigeria's public procurement arena.⁵ In the whole of the African Continent, Nigeria is one of the countries that have enacted legislation for the purposes of guiding public procurement in line with the set standards by the African Development Bank concept.⁶ This enactment is part of the widely acknowledged activities targeted at the reformation of the public sector for better service delivery by the government.⁷

By the advent of democracy in 1999, the government was met with the realization that there were loopholes in the nation's procurement system in public-owned institutions and government structure generally and that this has continued to fuel corruption in that sector.⁸ In recent times, African states such as Ghana, Lesotho, Kenya, Sierra Leone, etc have also introduced certain reforms in their public sector arena targeted at the creation of more effective and

¹ World Bank, *Public Procurement Reforms*, (Washington DC: World Bank 2012) 2.

² H Kari, F Mona and I Jan, *The Basics of Integrity in Procurement: A Guide Book* (Norway: Michelsen Institute 2010) 1.

³ NSD Nkinga, 'Public Procurement Reform: The Tanzania Experience' (Paper Presented at the Joint WTO-World Bank Regional Workshop on Procurement Reforms and Public Procurement for the English-Speaking African Countries held at the Royal Palm Hotel, Dar Es Salaam, Tanzania from 14–17 January 2003).

⁴ Act No 14, 2007.

⁵ SO Olatunji, TO Olawumi and HA Odeyinka, 'Nigeria's Public Procurement Law-Puissant Issues and Projected Amendments' [2016] 6 *Public Policy and Administration Research* 73.

⁶ Ibid 73.

⁷ Ibid.

⁸ OA Jacob, 'Procurement Law in Nigeria: Challenge for the Attainment of its Objectives' [2010] 12 *University of Botswana Law Journal*, 131; CC Ekwewuo, 'A Case Study of the Nigerian Procurement Monitoring Programme and its Portal and Observatory' [2016] *Wyith Limited and Wyith Institute* 1.

efficient public procurement activities.⁹ With these developments, it would be trite to say that there have been conscious efforts by African states to enhance their policies and laws on public procurement as a means of strengthening their institutions by reducing corruption and costs in government procurement, leading to more effective and efficient delivery of public goods in the society.¹⁰

Incidences have arisen where the Governing Councils of Nigeria's public universities have been embroiled in disagreements and conflicts with the management of these great citadels of learning owing to procurement issues and award of contracts by the management. The most recently pronounced was the one by the University of Lagos Governing Council and the management of that institution that drew the attention of the Federal House of Representatives, which advised the Governing Council of that University to focus on their supervisory functions and to source for improved funding of that institution.¹¹ They further advised that the Federal Minister of Education should call both parties and interpret their various roles as provided for in the Public Procurement Act 2007.¹²

With the current development, it has become expedient that a study is conducted to ascertain the impact of the Public Procurement Act 2007 on the functions of the governing councils of federal universities. This would go a long way in ascertaining whether the functions of the governing councils have changed since the enactment of the Act or whether there has been an abuse of powers and privileges either by the management of the universities or their governing councils. The result of this paper would serve as a guide in the future relationships between these two relevant bodies in their respective roles in the administration of Nigeria's public universities in the future and put an end to the attendant disputes that have occurred from time to time.

2. A Discourse on the Public Procurement Act, 2007

In Nigeria, the reforms leading to the enactment of the Public Procurement Act, 2007 were facilitated by the World Bank in 1999 through an assessment of

⁹ O Familoye, DR Ogunsemi and OA Awodele, 'Assessment of the Challenges Facing the Effective Operations of the Nigeria Public Procurement Act 2007' [2015] 3(11) *International Journal of Economics, Commerce, and Management*, 960.

¹⁰ Olatunji, Olawumi and Odeyinka (note 5) 73.

¹¹ M Alabi, 'UNILAG Crisis: Reps Absolve Management of Corruption Allegation, Fault Governing Council Composition' *Premium Times* (Online, 31 May 2019) 1 <<https://www.premiumtimesng.com/news/top-news/332688-unilag-crisis-reps-absolve-management-of-corruption-allegation-fault-governing-council-composition.html>> accessed 8 September 2021; G Dike, 'Don't Meddle in UNILAG's Internal Affairs, Reps tell Governing Council' *The Sun* (Online, 4 June 2019) 1 <<https://www.sunnewsonline.com/dont-meddle-in-unilags-internal-affairs-reps-tell-governing-council/>> accessed 8 September 2021.

¹² Ibid.

Nigeria's public procurement system. The assessment revealed the weaknesses in the system and made strong recommendations for reforms.¹³ The Country's Procurement Assessment Report (CPAR) showed that the majority of the setbacks in Nigeria's procurement system stemmed from the fact that the country had operated her public procurement system without any legal framework.¹⁴

Under the old procurement regime, the minister of finance was in charge of procurement. This practice beclouded transparency in the process as there was no established direction for the procurement processes leading to the non-availability of the process to the public.¹⁵ The Public Procurement Act 2007 has now become a piece of legislation guiding the public procurement process in the country and it is aimed at promoting the value of public funds, increase 'fairness transparency, accountability, efficiency and effectiveness.'¹⁶

The 2007 Act is primarily tailored in line with the provisions of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Public Procurement.¹⁷ The Act has thirteen parts with each of the parts structured to achieve the desired aims specified above. The Act created the National Council on Public Procurement and the Bureau of Public Procurement, which together acts as the regulatory authorities to monitor and oversee public procurement in the Nigerian public sector. These authorities are also responsible for 'harmonizing the existing government policies and practices by regulating, setting standards and developing the legal framework and professional capacity for public procurement in Nigeria'.¹⁸

¹³SW Elegbe, 'The Reform and Regulation of Public Procurement in Nigeria' [2012] 41(2) *Public Contract Law Journal* 339.

¹⁴ Ibid 340.

¹⁵ Ibid.

¹⁶ AO Enofe, O Okuonghae and OI Sunday, 'The Impact of Public Procurement Act on Government Accountability in Nigeria' [2015] 1(8) *Journal of Political Science and Leadership Research* 116.

¹⁷ EM Ezech, 'Public Procurement Reform Strategies: Achieving Effective and Sustainable Outcomes' [2013] <<http://www.cips.org/Documents/Engr>> accessed 8 September 2021; NM Eze, 'Due Process in the Procurement System: the Nigeria Experience' [2015] (9655) (7) *International Journal of Engineering Sciences & Research Technology* 235; O Familoye, DR Ogunsemi and OA Awodele, 'Assessment of the Challenges Facing the Effective Operations of the Nigeria Public Procurement Act 2007' [2015] 3(11) *International Journal of Economics, Commerce, and Management* 957; KT Udeh, Nigerian National Council on Public Procurement: Addressing the Unresolved Legal Issues [2015] 2(1) *African Public Procurement Law Journal* 1.

¹⁸ Public Procurement Act No. 14, 2007 Introductory Note.

The National Council on Public Procurement is under the chairmanship of the minister of finance with other members as the attorney-general of the federation; secretary to the government of the federation; head of service of the federation; the economic adviser to the president and six other members with part time portfolios drawn from the following bodies: the Nigeria Institute of Purchasing and Supply Management; the Nigeria Bar Association; Nigeria Association of Chambers of Commerce, Industry, Mines and Agriculture; Nigeria Society of Engineers; civil society; and the media with the Director General of the Bureau of Public procurement as the secretary of the council.¹⁹

There is also the provision allowing for attendance to meetings of the Council by any other person which the council deems to be part of it but with limitations on voting and quorum rights.²⁰ The President has the prerogative to appoint members of the council.²¹ This provision limits the independence of the government from the activities of the council. Since the President has already appointed certain statutory officials as members, the professional bodies involved, not the president, should have the prerogative of nominating their members.

The Council under the Act is empowered to perform the following functions:

- (a) consider, approve and amend the monetary and prior review thresholds for the application of the provisions of this Act by procuring entities;
- (b) consider and approve policies on public procurement;
- (c) approve the appointment of the Directors of the Bureau;
- (d) receive and consider, for approval, the audited accounts of the Bureau of Public Procurement; and
- (e) approve changes in the procurement process to adapt to improvements in modern technology;
- (f) give such other directives and perform such other functions as may be necessary to achieve the objectives of this Act.²²

It is clear that the Council has the power to oversee and make public procurement policies and also to determine who the directors at the Bureau of Public Procurement (BPP) might be.²³ The objectives of the BPP include the following:

¹⁹ Ibid s 1.

²⁰ Ibid s 1(3).

²¹ Ibid s 1(4).

²² Ibid s 2.

²³ Ibid s 3.

- (a) the harmonization of existing government policies and practices on public procurement and ensuring probity, accountability and transparency in the procurement process;
- (b) the establishment of pricing standards and benchmarks;
- (c) ensuring the application of fair, competitive, transparent standards and practices for the procurement and disposal of public assets and services; and
- (d) the attainment of transparency, competitiveness, cost effectiveness and professionalism in the public sector procurement system.²⁴

The functions of the BPP were further provided in the Act to include: making policies and guidelines for public procurement in the country with approval from the Council;²⁵ publicizing and clearing any grey issues regarding the Act;²⁶ granting certificate of procurement as approved by the Council;²⁷ supervision of procurement related policies;²⁸ oversee tender costs and store national data on it;²⁹ publication of procurement journal containing huge contracts in hard and soft copy and archiving it;³⁰ sustain a database nationally of categories of contractors and providers of services;³¹ archive all information and plans set for procurements.³²

Other functions include: conducting research and surveys on procurement;³³ training and developing professionals in procurement;³⁴ conducting reviews per period on procurement policies and render advise to the Council;³⁵ preparation and updating of threshold of bidding and contracts;³⁶ eschewing procurement which is unfair and tainted with fraud and also to apply sanctions administratively if the need arises;³⁷ reviewing of procurement and contract processes for all institutions affected by the Act;³⁸ auditing of procurements and submission of the reports to the National Assembly twice yearly.³⁹ Furthermore, creation, updating and keeping of database relating to

²⁴ Ibid s 4.

²⁵ Ibid s 5(a).

²⁶ Ibid s 5(b).

²⁷ Ibid s 5(c).

²⁸ Ibid s 5(d).

²⁹ Ibid s 5(e).

³⁰ Ibid s 5(f-g).

³¹ Ibid s 5(h).

³² Ibid s 5(i).

³³ Ibid s 5(j).

³⁴ Ibid s 5(k).

³⁵ Ibid s 5(l).

³⁶ Ibid s 5(m).

³⁷ Ibid s 5(n).

³⁸ Ibid s 5(o).

³⁹ Ibid s 5(p).

procurement and technology;⁴⁰ and the setting up of an internet portal in line with section 16(21) of the Act which stipulates the responsibility of procurement and accountability on the chief accounting officer or any other delegated officer.⁴¹

The general powers of the BPP with regards to the enforcement of the provisions of the Act are provided for in section 6. The Act applies strictly to the activities that relate to the procurement of commodities, services, and works as embarked upon by the Federal Government of Nigeria and all bodies responsible for procurement under it or any other body which gets at least 35 per cent of funds for the appropriation of the procurement from the Federal Government's share of Consolidated Revenue Account.⁴²

The Act does not apply to procurements in relation to special commodities, services, and works relating to national security or defence except with the approval of the president.⁴³ That is to say that state and local governments and their agencies are not covered under this Act, except where such particular procurement is done through the federation consolidated account to the threshold of at least 35 per cent of the cost of the contract or procurement. All activities of agencies of the government under the Act must follow the fundamental principles of procurement as established under the Act⁴⁴ subject to the exceptions stated above in the award of contracts and procurements, otherwise, a breach will occur. In instances where the BPP has set review thresholds, there shall be no disbursement for contracts or procurement from federal funds except where such a cheque or other form of payment document is accompanied by a 'no objection certificate' to an award granted by the Bureau.⁴⁵ The BPP shall set the conditions for the award of a 'no objection certificate' when such situations above arise and any procurement in that category not accompanied by the certificate shall be null and void.⁴⁶

All persons bidding for procurement contracts must, apart from the provision of all documents required in the bid, also be professionally and technically qualified for the job, possess the required financial strength, and have the equipment and other infrastructure required and the due personnel for its execution.⁴⁷ Furthermore, they must possess the adequate legal capacity, not be insolvent, bankrupt or involved in the winding up process, and must be tax,

⁴⁰ Ibid s 5(q).

⁴¹ Ibid s 5(r).

⁴² Ibid s 15(1)(a-b).

⁴³ Ibid s 15(2).

⁴⁴ Ibid s 16(1).

⁴⁵ Ibid s 16(2).

⁴⁶ Ibid s 16(3)-(4).

⁴⁷ Ibid s 16(6)(a).

pension and social security contributions up to date.⁴⁸ Such persons must also not have any of its directors having been convicted in any jurisdiction for any crime tainted with fraud, finance-related offences, criminal deceit, or falsifying of facts on any issue.⁴⁹

There must also be a disclosure of clash of interest through an affidavit relating to whether any officers of the procurement body and of the BPP are in any way formerly or currently related and a confirmation of the authenticity of all information in the bid.⁵⁰ Other relevant parts of the fundamental principles are provided in section 16 (7) - (28). The approving authority for procurements as provided in the Act is the Parastatal Tenders Board in the case of agencies of government, parastatal, or corporation as the case may be, and the Ministerial Tenders Board in the case of ministries or extra-ministerial bodies.⁵¹

The Act defines the accounting officer as one who is responsible for the oversight of procurement processes as in permanent secretaries in the ministries and the director-general in extra-ministerial agencies or officer of coordinate status.⁵² He/she shall be fully responsible for the planning, organization, and assessment of tenders and the execution of procurement contracts. He/she has a duty to ensure compliance with the provisions of the Act and failing which he/she shall bear liability even if he/she delegated the duty and did not perform it personally. He/she constitutes the procurement committee, endures adequate appropriation is provided, and integrates his/her entity's procurement expenditure into its yearly budget. Also, he/she insists on the use of appropriate procurement methods, constitutes the evaluation committee and liaises with the BPP to ensure the implementation of the procurement regulations.⁵³

Under the above provision, the liability for breach of the provisions of the Act is strict on the accounting officer. The Act makes it mandatory for every procurement entity to set up a procurement planning committee for every financial year and the members of such committee include the accounting officer who chairs it and the representatives of the following units in that establishment: the procurement unit whose representative shall be the secretary; the particular unit that requests the procurement; the finance unit; the unit in charge of planning, research and statistics; technical staff in the entity whose competence is on the area of that specific procurement; and the legal unit.⁵⁴

⁴⁸ Ibid s 16(6)(b)-(d).

⁴⁹ Ibid s 16(6)(e).

⁵⁰ Ibid s 16(6)(f).

⁵¹ Ibid s 17(a).

⁵² Ibid s 20(1).

⁵³ Ibid s 20(2).

⁵⁴ Ibid s 21.

The tender's board established under the Act shall have responsibility regarding the procurement of commodities, works and services and the BPP has the onus of creating guidelines for this board.⁵⁵ In all prequalification issues, the tender's board chair shall set up a technical sub-committee which shall constitute the staff with professional qualifications in the procurement entity and the secretary of the board shall be the chair for the purpose of evaluation of bids. The decision of the tender's board shall be sent to the minister for the purpose of implementing it.⁵⁶

Each procurement entity shall make choices regarding the basic qualification for the contractors, suppliers of goods and the service providers and these qualifications shall be made available in the advertisement for prequalification and the prequalification criteria made by the planning committee of the procurement body must be strictly adhered to and only those bids which fall in line with that criteria will be considered.⁵⁷ Upon request, the procuring entity shall supply the prequalification criteria to the bidders and can only charge the cost of printing and sending them.⁵⁸

The procurement entity has the burden of replying any demand for further clarification made by the bidder ten days to the deadline for submission.⁵⁹ Open competitive bidding is prescribed by the Act and it defined this form of bidding 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.'⁶⁰ The bid that is the least responsive in evaluation in terms of the specification of work and the quality shall be declared the winner.⁶¹

Both national competitive and international competitive bidding are acceptable under the Act and the onus to set financial thresholds for the bidding shall rest on the BPP and this is to be done from time to time.⁶² The invitation for bids is to be advertised. In the case of national competitive bidding, advertisement shall be on the notice board of the procuring entity, its official website, and the procurement journal.⁶³ In the case of international competitive bidding, the advertisement shall be in at least two national newspapers, the official website of the procuring entity and the BPP, the procurement journal as

⁵⁵ Ibid s 22(1)-(3).

⁵⁶ Ibid s 22(4)-(5).

⁵⁷ Ibid s 23(1).

⁵⁸ Ibid s 23(2).

⁵⁹ Ibid s 23(4).

⁶⁰ Ibid s 24(1)-(2).

⁶¹ Ibid s 24(3).

⁶² Ibid s 25(1).

⁶³ Ibid s 25(2)(ii).

well as in one publication recognized internationally. All advertisements shall be done not less than six weeks before the deadline for the submission of the bid.⁶⁴

A bid security of not more than two per cent of the price of the bid is to be issued through a bank guarantee from a reputable bank which the procuring body accepts.⁶⁵ Every bid is to be in a written form and in line with the specified form for that particular bid and this has to be signed by an official empowered to create a binding contract with the bidder and conveyed in an envelope which must be sealed.⁶⁶ The bids must be submitted in a secured box and must be in English language and a receipt is to be issued upon submission showing the date and time it was delivered.⁶⁷ Bids received after the deadline must be sent back to the contractor or supplier and no communication is allowed between the supplier and the procuring body after the advertisement for the bid.⁶⁸

Procurement bodies are free to reject any bid prior to acceptance or cancel the bidding process due to public interest without any liability arising in either of such rejection or cancellation.⁶⁹ The validity period of a bid shall be as stated in the document of tender and the procurement entity may choose to extend such a period for a specific period.⁷⁰ The Act allows the bidder to reject any such extension, upon which the extension fails and the original expiry date still holds.⁷¹ The bidder may also amend or call back his/her bid at the pendency before the expiration date and this would be successful if received by the entity before the expiry date.⁷²

There are laid down procedures under the Act for the opening of the bids which meet the deadline or extended deadline criteria and also the laid down procedure for the examination of bids.⁷³ In evaluating the bids, the method adopted shall remain that which is stated in the document soliciting for the bids and the aim of evaluation shall be for the selection of the 'lowest responsive bid' amongst the bids that met the deadline for submission.⁷⁴ The procedures for evaluation are also specified in the Act.⁷⁵ For the acceptance of bids, the standard remains the bidder who bids the lowest cost amongst the

⁶⁴ Ibid s 25(2)(i).

⁶⁵ Ibid s 26(1).

⁶⁶ Ibid s 27(1).

⁶⁷ Ibid s 27(2)-(4).

⁶⁸ Ibid s 27(5)-(6).

⁶⁹ Ibid s 28(1)-(2).

⁷⁰ Ibid s 29(1)-(2).

⁷¹ Ibid s 29(3).

⁷² Ibid s 29(4)-(5).

⁷³ Ibid ss 30 and 31.

⁷⁴ Ibid s 32(1)-(2).

⁷⁵ Ibid s 32(3).

responsive bidders but it may not necessarily have to be the lowest bidder in so far as the entity shall show cause for their selection in line with the provisions of the Act.⁷⁶

The letter of acceptance must then be sent to the bidder who won the bidding.⁷⁷ Preferences may be granted to domestic bidders rather than foreign bidders with certain conditions.⁷⁸ On the issue of mobilization, not more than 15 per cent of the fees can be paid to the contractor cum supplier and must be supported by a bank guarantee or insurance bond for a domestic person and a bank guarantee alone for a foreigner and no further fees shall be granted the person except there is an 'interim performance certificate' issued in line with the contract.⁷⁹

A 'performance guarantee' of not less than ten per cent of the contract sum or the sum of money equalling the mobilization fee as demanded by the supplier in procurement contracts shall be a *conditio sine qua non* for such awards.⁸⁰ The payment of executed contracts is to be made timeously and with due diligence. If such a payment delays for more than 60 days, it shall be deemed delayed.⁸¹ If payment is delayed, an interest rate as stated in the contract shall be applicable and all such specifications for interest payments shall be stated in the contract.⁸² It is also obligatory for the procuring entity to keep records of procurement proceedings and this shall be made available on demand to those bidders who failed to secure the contract.⁸³

Two-stage tendering or restricted tendering may be adopted by the procuring entity under certain conditions under the Act.⁸⁴ The procedure for the request of quotations is specified in the Act as well as the provision for direct procurement as well as emergency procurements in certain circumstances.⁸⁵ In circumstances requiring the hiring of consultants for ascertained needs as well as unascertained needs, the Act makes provisions for that in sections 44 and 45 respectively. The relevant documents required in the proposals are also specified as well as that for clarifying and modifying such requests.⁸⁶

⁷⁶ Ibid s 33(1)-(2).

⁷⁷ Ibid s 33(3).

⁷⁸ Ibid s 34.

⁷⁹ Ibid s 35.

⁸⁰ Ibid s 36.

⁸¹ Ibid s 37(1)-(2).

⁸² Ibid s 37(3)-(4).

⁸³ Ibid s 38(1)-(3).

⁸⁴ Ibid ss 39 and 40.

⁸⁵ Ibid ss 41, 42 and 43.

⁸⁶ Ibid ss 46 and 47.

The guidelines for the submission of proposals and the criteria for evaluating the proposals as well as the procedure for selection generally and the selection in conditions where the price is a determinant and in cases where price does not determine are also provided.⁸⁷ It is incumbent on the BPP to review and issue recommendations for investigation by any relative agency in circumstances where it deems fit or where there is a palpable suspicion that a crime has been committed in breach of the Act and may take further actions in respect to that as stipulated.⁸⁸ There are provision and guidelines for an administrative review to be sought by a bidder in circumstances of the breach of the provisions of the Act or on any delegated legislation made under the Act or in the particular contract by a procurement disposing entity.⁸⁹

For the cases concerning the disposal of properties belonging to any government entity, the procuring entity shall also be the disposing entity and the provisions under this are subject to the provisions of the Public Enterprises (Privatization and Commercialization) Act 1999.⁹⁰ The rules concerning the planning for disposals are also specified under the Act.⁹¹ The Code of Conduct for all parties involved in the procurement and disposal processes shall be set by the BPP and approved by the Council.⁹²

The Act prescribes certain actions that constitute offences⁹³ and prescribes punishments including the general punishment for contravention by a non-public officer which creates a criminal liability punishable with a term of imprisonment of not less than five years but not more than ten years and this comes without an option of fine.⁹⁴ It is an offence to enter or attempt to enter a collusive agreement with a contractor, supplier, or consultant that results in increased procurement sum. Procurement by fraud, splitting of tender, bid-rigging, influencing the procurement process, altering procurement documents, using fake documents, and refusing the BPP access to procurement records are also offences under the Act.⁹⁵ The Federal High Court has exclusive jurisdiction to try offenders under the Act.⁹⁶

Any officer of the BPP or any other public officer in the procuring entity who commits an offence under the Act shall be liable to imprisonment for a term of not less than five years without an option fine. Such an officer would

⁸⁷ Ibid ss 47-52.

⁸⁸ Ibid s 53.

⁸⁹ Ibid s 54.

⁹⁰ Ibid s 55(1)-(2).

⁹¹ Ibid s 56.

⁹² Ibid s 57(1).

⁹³ Ibid s 58.

⁹⁴ Ibid s 58(1).

⁹⁵ Ibid s 58(4).

⁹⁶ Ibid s 58(2).

also be dismissed summarily from service.⁹⁷ This does not state the upper threshold of the punishment in the case of such contravention by a non-public officer. If the offender is a juristic person, it shall be liable to be barred from taking part in any procurement for a term of not less than five years and also be fined for an amount of money which is 25 per cent of the value of the procurement sum.⁹⁸ Upon the conviction of a juristic person, the directors of such a juristic person shall be liable to a minimum of three and a maximum of five years' prison term without an option of a fine.⁹⁹

From the foregoing, the Act is quite elaborate and comprehensive with its provisions on issues regarding public procurement by the ministries, departments, and agencies of the Nigeria government. If the institution overseeing the Act possesses the willpower to effectively ensure the enforcement of the provisions of the Act, it would go a long way in reducing corruption in public procurement. Unfortunately, political and parochial interests in the system still remain a cog in the wheel of progress as public servants remain easily compromised in the Nigerian system, coupled with a judiciary that is not sufficiently effective. The fact that punishments under the Act (imprisonment) are without the option of a fine is a pointer to the intendment of the lawmaker to curb corruption and ineffectiveness in public procurement in the country.

3. Structure, Functions and Powers of Governing Councils of Federal Universities

Nigerian Universities have been structured in such a way that there is a governing council at the apex of University governance.¹⁰⁰ It is the highest ruling organ of the Universities from which other powers are devolved. The function, contributions, and roles played by the governing councils in the governance of Universities are enormous, pivotal and cannot be underestimated. The governing councils make policy decisions in areas of recruitment of teaching and non-teaching staff, criteria for admission of students for various programmes in the Universities, processes leading to the graduation/award of degrees of the Universities, sourcing, and management of funds for physical infrastructural development in the Universities and more importantly recruitment and employment of principal officers of the Universities.¹⁰¹ The fact that the major role played by the governing councils of Universities revolves

⁹⁷ Ibid s 58(5).

⁹⁸ Ibid s 8(6).

⁹⁹ Ibid s 58(7).

¹⁰⁰ See University of Nigeria Act, *Laws of the Federation of Nigeria (LFN)* 2004 s 5; AT Adetunji and BA Mojeed-Sanni, 'Problems Posed by the Governing Council in the Development of Nigeria University' [2015] 3(9) *GE-International Journal of Management Research* 33.

¹⁰¹ Ibid 42.

around policy formulation and not direct implementation of decisions most times results in their functions and activities being masked and are not easily recognized by the undiscerning public.¹⁰² Over the years, the quality of membership of the governing councils especially the appointment of external members of the governing councils by the government has been bedevilled with corruption, nepotism, favouritism, political interference and outright disregard of the extant rules and regulations guiding the setting up of the governing councils to the effect that non-qualified and inexperienced people are appointed into the councils leading to unnecessary bitterness, rancour and acrimony in the relationship between the governing councils and the University management.¹⁰³

These governing councils of federal universities are established by law and have the ability to sue and be sued as legal persons/entities.¹⁰⁴ The principal Act establishing the governing councils of Nigerian Universities is the Universities (Miscellaneous Provisions) Amendment Act 2003 (As Amended).¹⁰⁵ This Act applies to Universities under the control of the Government of the Federation as confirmed by such a University is listed in the schedule in the Act.¹⁰⁶ The governing council is made up of the Pro-Chancellor; the Vice-Chancellor; the Deputy Vice-Chancellors and one person from the federal ministry responsible for education. Others are four persons representing a variety of interest and broadly representative of the whole federation to be appointed by the National Council of Ministers; four persons appointed by the Senate from among its members; two persons appointed by the Congregation from among its members; and one person appointed by Convocation from among its members of proven integrity, knowledgeable and familiar with the affairs and tradition of the University.¹⁰⁷

The membership of the council may be categorized in two ways, viz: the ex-officio members who are members by virtue of their offices such as the vice-chancellor, the representative of the federal ministry of education *etc* and the non-ex-officio members whose membership is not as a result of their offices.¹⁰⁸ The second category is the external and internal members, the

¹⁰² Ibid 42.

¹⁰³ Ibid 43.

¹⁰⁴ J Shu'ara, 'Governance of Federal Universities in Nigeria: General Responsibilities of the Governing Council' (Text of a Paper Delivered at the Retreat for the Governing Council of the Federal University of Agriculture, Abeokuta at the Lagos State Resource Centre, Akodo-Lekki, Epe Road on the 13th of May 2010).

¹⁰⁵ Act No. 11, 1993, as amended in 2012.

¹⁰⁶ Universities (Miscellaneous Provisions) Act No. 11 of 1993 (As Amended) s 1.

¹⁰⁷ Ibid s 2.

¹⁰⁸ Ehi Oshio, 'Composition and Tenure of Governing Councils of Federal Universities Under Nigerian Laws' 2

<<https://www.nigerianlawguru.com/articles/labour%20law/COMPOSITION%20AND>

external members being those members who are not part of the University community like the Pro-Chancellor, representative of the federal ministry of education, and so on while the internal members are the vice-chancellor and so on.¹⁰⁹

The council has a statutory tenure of 4 years, except if a situation arises in which the council is adjudged to be ‘incompetent and corrupt,’ it would then undergo a formal dissolution by the visitor of the University and thereafter, a fresh council shall be set up for effectiveness.¹¹⁰ There is no uniformity in the powers of the council of each University; rather, the powers of the council are applicable in line with the statutes establishing each University. To this end, any law or regulation that is not consistent with the laws of any University shall not be applicable to such University.¹¹¹ That is to say that this Act with regards to the powers of the council of any particular university is subject to the individual statutes and regulations guiding such a university. The council shall independently perform her functions and obligations for the ‘good management, growth and development of the university.’¹¹² They shall ensure that the distribution of funding in the university is in compliance with the budgeted threshold for personnel; overhead; research and development; development of library; and equity in expenditure as it relates to both academic and non-academic issues.¹¹³ The governing council and their roles are defined under the Act which establishes their existence and as such, it is expected that they abide by them.

The council is the body that governs every university and has the custodial rights, power of control, and can dispose of all property and finances that the university owns.¹¹⁴ Among others, it is the functions of the council to participate in the making, amendment or revocation of statutes; to govern, manage and regulate the finances, accounts, investments, property, business, *etc* of the University and for that purpose appoint bankers, solicitors to audit the accounts of the university; to borrow money on behalf of the university and to invest any money belonging to the university; to sell, buy, exchange, lease or accept lease or dispose of real or personal property on behalf of the University; to enter into, vary, perform and cancel contracts; to determine in consultation with the Senate all University fees; to establish after considering the

[%20TENURE%20OF%20GOVERNING%20COUNCILS%20OF%20FEDERAL%20UNIVERSITIES%20UNDER%20NIGERIAN%20LAWS.pdf](#)> accessed 12 September 2021.

¹⁰⁹ Ibid 2.

¹¹⁰ Universities (Miscellaneous Provisions) Act No. 11 of 1993 (As Amended) s 2A.

¹¹¹ Ibid s 2AA.

¹¹² Ibid s 2AAA(1).

¹¹³ Ibid s 2AAA(2)(a)-(e).

¹¹⁴ Shu’ara (note 104) 16.

recommendations of Senate, faculties, institutes, departments and prescribe their organizations, constitution and functions; to authorize after considering the recommendation of Senate the establishments for both academic and administrative staff and with the approval of Senate suspend, or abolish any academic post; and to regulate the salaries and to determine the conditions of service of staff. The functions of the council also include to exercise powers of removal from office and other disciplinary control on staff; to institute in consultation with Senate, fellowship, scholarship, prizes and other endowments; to promote and to make provision for research; to award honorary degrees and other distinctions in consultation with Senate; to supervise and control the residence and discipline of students and to make arrangements for their health and general welfare; as well as to provide for the welfare of all staff and their spouses, children, and dependents including payment of pensions and other retirement benefits.¹¹⁵

The foregoing powers and functions of the governing council under the Universities (Miscellaneous Provisions) Act 2003 seem inconsistent with the Public Procurement Act 2007, especially the function of ‘entering into, varying, performing and cancelling contracts.’¹¹⁶ This is obviously a function of the accounting officer under the 2007 Act. Even the function of acquiring and disposing of property by the governing council is also inconsistent with the provisions of the Public Procurement Act 2007 section 55, which empowers the procurement entity, not the governing council, to also serve as the disposal entity. Thus, this overlap in the roles of the management of the Universities and those of the governing council may have been fostered by the assumption of duties not specified in the enabling laws. This may be responsible for the unhealthy rivalry and acrimony between the governing councils and management in some Universities.

4. Impact of the Public Procurement Act 2007 on the Functions of Governing Councils

There are usually issues bothering on several interests of persons and groups which play relevant or in some cases untoward roles in any university system especially as it relates to the administration of the University by the management team vis-a-vis the governing councils.¹¹⁷ At times, these interests lead to serious acrimonies, rancour and utter disagreement between the University management led by the vice-chancellor who is the chief executive of the University on one the hand and the pro-chancellor who is the chairman of the governing council on the other hand. A recent case in point was the rift

¹¹⁵ Universities (Miscellaneous Provisions) Act 2003 (as amended) ss 2AA and 2AAA; Shu’ara (note 104) 16-18.

¹¹⁶ Public Procurement Act 2007 s 15.

¹¹⁷ Adetunji and Mojeed-Sanni (note 100) 35.

between the vice-chancellor and the Pro-Chancellor of the University of Lagos. Another case in point was the rift between the vice-chancellor and the governing council of the University of Port Harcourt. In both cases, the governing councils were dissolved by the Federal Government citing councils' highhandedness as the reason for the dissolution.¹¹⁸

These conflicts have caused frictions in the running of these Universities and have cast doubt on the quality of leadership that exists in these Universities.¹¹⁹ The Academic Staff Union of Universities (ASUU) has always taken sides as it benefits them when such disagreements arise. For instance, they took sides with the vice-chancellor during the University of Lagos debacle.¹²⁰ The registrar of that University was suspected to have taken sides with the governing council based on the statement citing wrong-doing by the erstwhile vice-chancellor, which he made to the press after the vice-chancellor was purportedly sacked from office by the council.¹²¹

Looking at the functions of the governing councils side by side with the Public Procurement Act 2007, one sees that the Act does not have any provision for the recognition of the governing council in any public procurement capacity. The Act has cognizance only of the functions of the vice-chancellor, who is an accounting officer, being the responsible officer in issues of public procurement.¹²² The Act vests the vice-chancellor with the responsibility of overseeing the processes of public procurements, as his position is akin to that of the director-general of extra-ministerial departments.¹²³

That is to say that if any of the provisions of the Public Procurement Act 2007 is contravened, the accounting officer who happens to be the vice-chancellor in the case of these federal Universities would be liable. This is notwithstanding whether the contravention arose from his subordinates or those he delegated such function that led to the contravention.¹²⁴ Thus, if the vice-chancellor abdicates such responsibility to the governing council or seeks their directive for the exercise of such powers granted him under the Public Procurement Act 2007, and then he has committed a breach of that Act. If any further breach arises, in terms of accountability, the liability would be on him

¹¹⁸ Ibid 35; A Wahab and others, 'Breaking: Governing Council sacks UNILAG VC' *Vanguard* (Online 12 August 2020) 1 <<https://www.vanguardngr.com/2020/08/breaking-governing-council-sacks-unilag-vc>> accessed 12 September 2021.

¹¹⁹ Adetunji and Mojeed-Sanni (note 100) 35.

¹²⁰ Wahab and others (note 108) 1.

¹²¹ Ibid 1.

¹²² Public Procurement Act 2007 s 20(2).

¹²³ Public Procurement Act 2007 s 20(1).

¹²⁴ Ibid s 20(2)(a).

and not on the council except there are evidence of misappropriation by the council, then the liability may be joint, as the court may deem fit.

The Universities (Miscellaneous Provisions) Act 2003 states clearly that ‘the powers of the council shall be exercised, as in the law and statutes of each University’.¹²⁵ This provision makes the powers of the governing councils as provided in the above cited 2003 Act subject in its application to the law and statutes of each university. If such provisions in the procurement Act are inconsistent to the law and statutes of any of these Federal Universities, then such laws shall not apply. The specific law of the university takes precedence.¹²⁶ This confirms the legal principle that specific provisions of the law take precedence over the general provisions.¹²⁷ This is founded on the principle – *generalia specialibus non derogant* – specific provisions derogate from general ones.

Owing to the periods of the enactments of many of the statutes establishing most of these federal Universities, especially those of them that were enacted long before 2007 when the Public Procurement Act was enacted, it is obvious that the law-maker did not envisage that a time would come when there would be a procurement legislation guiding federal Universities. Even the amendments in the Universities (Miscellaneous Provisions) Act 2003 did not take care of this challenge. The law-maker in enacting the Public Procurement Act 2007 had more focus on how the Act would be applied in the civil service, mostly ministries, departments and agencies. The law-maker might not have considered its application to the University system. Otherwise, the Act should have had specific provisions to resolve this imbroglio explicitly and reduce issues of overlapping responsibilities between the vice-chancellors and governing councils of the Universities. As it stands, the Public Procurement Act appears to undermine the powers of the governing councils.

The governing councils are empowered by the Universities (Miscellaneous Provisions) Act 2003 to ‘be free in the discharge of its functions and exercise of its responsibilities for the good management, growth, and development of the university.’¹²⁸ This provision that grants autonomy to these councils may have necessitated the struggle by the governing councils to take total control of these universities, thereby trying to usurp the powers of the vice-

¹²⁵ Universities (Miscellaneous Provisions) 2003 s 2AA.

¹²⁶ Y Akinpelu, ‘UNILAG Crisis: What the Law says on the Removal of the Vice-Chancellor’ *Premium Times* (Online 12 August 2020) 1 <<https://www.premiumtimesng.com/news/headlines/408564-unilag-crisis-what-the-law-says-on-removal-of-vice-chancellor.html>> accessed 12 September 2021.

¹²⁷ *Orubu v NEC* [1988] 5 NWLR (Pt 94) 323; *Akpan v State* [1986] 3 NWLR (Pt 27) 288; *Tsume v Peveraga* [2001] 2 NWLR (Pt 698) 556 at 572.

¹²⁸ Universities (Miscellaneous Provisions) 2003 s 2AAA.

chancellors and other principal officers of the universities as the case may be. The mention of the fact that the governing councils are to ensure ‘good management’ may have pushed these governing councils to view the management function which they are contesting as being legitimate and as such, the award of procurement and contract services in their own opinion should be a part of it. Furthermore, it is still arguable that the governing councils’ role to ensure good management is only limited to ensuring the disbursement of funds in compliance with the approved budgetary allocation for specific items like the personnel cost, research and development, and other such issues necessary for the development of the University.¹²⁹

The Federal Government as of 2021, through its minister of education, seems to have taken a position on the side of the University management as the minister was quoted as handing out a warning to the governing councils of universities not to meddle in the daily administrative functions of universities.¹³⁰ He further threatened sanctions for council members who explore other functions aside from the mandate given to them.¹³¹ Likewise, the House of Representatives, in 2019, asserted that the vice-chancellors are the accounting officers within the meaning of the Public Procurement Act 2007. The governing councils should not meddle with this role, but focus on their supervisory role of policy formulation and fund generation for the University.¹³²

A cursory look at the Financial Regulations of the University of Lagos confirms that the vice-chancellor is the chief accounting officer while the council takes general control and superintendence of policies, finances and properties of the University.¹³³ On the other hand, it says that the vice-chancellor ‘shall be responsible to the council for the overall management and control of the funds of the University and shall be the chief accounting officer of the University.’¹³⁴ These provisions of the University of Lagos Financial Regulations can be said to be in line with both the Public Procurement Act 2007 and the Universities (Miscellaneous Provisions) Act 2003 and is similar with the financial regulations of other federal Universities in the country. If the provisions of these Regulations are inconsistent with these Acts, then the Regulations are void to the extent of their inconsistency.

¹²⁹ Ibid s2AAA(2).

¹³⁰ Johnbosco Agbakwuru, ‘FG Cautions Governing Councils of Varsities’ *Vanguard* (Online 11 May 2017) 1 <<https://www.vanguardngr.com/2017/05/fg-cautions-governing-councils-varsities/>> accessed 12 September 2021.

¹³¹ Ibid 1.

¹³² Alabi (note 11) 1; Dike (note 11).

¹³³ University of Lagos, *University of Lagos Financial Regulations* (Lagos: University of Lagos Press and Bookshop Ltd 2016) 1.

¹³⁴ Ibid 1.

Thus, the Public Procurement Act 2007 may not have changed much with regards to the functions of governing councils of federal Universities, except as these functions overlap with the statutory duties of vice-chancellors. Yet, the Act has provided the much-needed statutory framework for public procurement in Nigeria's federal Universities. Just like every other thing in life, there seems to be some advantages and disadvantages of the application of the Public Procurement Act 2007 by the federal Universities in Nigeria.

As part of the advantages, the application of the Act discourages corruption in the university system and enhances effectiveness. Poor funding has been the bane of the Nigerian University system and as such, the application of the Public Procurement Act 2007 helps in encouraging frugality in expenditure and limiting bogus wastage of resources. It promotes 'competitiveness, value for money and professionalism in the public sector procurement system'.¹³⁵ It promotes transparency and fairness in the award of procurement contracts in the sense that regular issues such as nepotism and corruption could be reduced to the barest minimum. It gives room for academics to run the universities and this would in turn help the universities to achieve their mandate in research and development easily and reduce the burden of having to pass through the council headed by a pro-chancellor, who, most times, may not be a seasoned academic. It reduces the influence of external forces from meddling with the procurement processes in the Universities. It reduces the bottlenecks that may arise due to long bureaucracies of having to pass through the council at all times in the award of contracts for the development of the University in line with its core mandates.

On the downside, the disadvantages of the application of the Act may include the fact that the institution that is tasked with the enforcement of the Act, namely: the BPP may not have the capacity in terms of staffing and the spread of its offices nationwide to be able to actually oversee the effective enforcement of this Act. The prosecution of offences under the Act is left to the Attorney-General of the Federation who may delegate it to any Attorney-General of a State or any other legal practitioner so appointed by the Attorney-General of the Federation.¹³⁶ This may hinder the quick and effective prosecution of offenders under the Act as the office of the Attorney-General of the Federation is deeply encompassed with many responsibilities that may not enable it to actually drive the prosecutions effectively. The BPP should have been granted powers to prosecute offenders just as is applicable to agencies such as the Economic and Financial Crimes Commission (EFCC), Independent Corrupt Practices and other Related Offences Commission (ICPC), and so on,

¹³⁵ Olatunji, Olawumi and Odeyinka (note 5) 75.

¹³⁶ Public Procurement Act 2007 s 58(3).

subject to the overriding powers of the Attorney-General of the Federation as provided for in the Constitution.¹³⁷

Still on the downside, since the Public Procurement Act 2007 places the implementation of the provisions of the Act and liability for contravention thereof on the accounting officer, the vice-chancellor alone,¹³⁸ he may take advantage of the provision to manipulate the award of procurement contracts without due process in line with the Act. The period and processes for administrative review for a bidder who is dissatisfied with the bidding process is not encouraging. He has to, first of all, seek review from the accounting officer and then to the BPP if he is dissatisfied and finally to the Federal High Court.¹³⁹ This process may discourage a bidder from seeking review. The Act has no provision for the assessment of the viability of procurements and contracts through a distinct cost-benefit analysis.¹⁴⁰ This may encourage the vice-chancellor to appropriate procurements and contracts only on areas where he has pecuniary interests and neglect other areas, thereby militating against the overall development of the University's mandate.

5. Conclusion

The Public Procurement Act 2007 is a revolution in the area of public sector procurement in Nigeria. The Act has done a lot in providing a legal guide and probable sanctions that would ensure transparency, fairness, and accountability in public procurement. Although corruption is still ravaging the entire Nigerian system, the situation would have been worse if such an Act was not enacted. However, the National Council on Public Procurement, the BPP and the Office of the Attorney-General of the Federation, and the federal judiciary still have a long way to go in the enforcement of this noble legislation especially during this period of economic downturn in the country.

Despite the existence of this federal legislation, there is still a high level of corruption in public procurement in the country leading to wastages by the three tiers of government. Public procurement laws must be replicated at the state and local government levels. It also has to be strictly enforced at these three levels of government to realize the full gains. Although this paper analyses the impact of the Public Procurement Act 2007 on the functions of the governing councils of federal Universities, unfortunately, little or nothing has been done on this subject matter as it affects state government-owned Universities as well.

¹³⁷ The Constitution of the Federal Republic of Nigeria 1999 (As Amended), s174.

¹³⁸ Public Procurement Act 2007 s20.

¹³⁹ Ibid s54.

¹⁴⁰ KA Wahab, 'Importance of Due Process in University Governance' [2006] <http://www.unijos.edu.ng/Partnership/Advancements/Advancemen%20home_files/JOS%20SPEECH.ppt> accessed 13 September 2021.

The study finds that the governing councils of federal Universities in Nigeria seem not to be at ease with the provisions of the procurement Act with respect to the limits of the power of autonomy granted to them under the Universities (Miscellaneous Provisions) Act 2003. However, the intervention of the Federal Government through the minister of education seems to have laid the matter to rest for now. It is expedient that the National Assembly amends both the Public Procurement Act 2007 and the Universities (Miscellaneous Provisions) Act 2003 to separate the functions of the governing councils from those of the vice-chancellors of federal universities in the country. This will provide a lasting resolution to the imbroglio in the relationship between the university management and the governing councils. It will also help to curb corruption and entrench efficiency in management.

It is also recommended that the BPP be strengthened and given a nationwide spread so as to enhance its supervision and enforcement of the provisions of the Public Procurement Act 2007. Again, the Bureau should be granted the powers to prosecute alleged offenders under the Act so as to strengthen its enforcement mechanism. All the stakeholders in the universities should be continuously enlightened on the provisions of the procurement Act so as to assist in checking the vice-chancellor and his subordinates from manipulating procurement procedures under the Act for corrupt and pecuniary purposes.