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Enhancing Horizontal Accountability:
The Key to addressing the Conflict of
Interest Loopholes in Public
Procurement in Nigeria

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Statement

I hereby declare that this thesis has not been and will not be, submitted in whole or in part to another University for the award of any other degree.

Signature:.....

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Abstract

This thesis argues that the current dual accountability model in Nigerian public procurement model is one with *vertical accountability* and *horizontal accountability* which is weakened by an inefficient horizontal accountability system, and in order to unleash the true benefits of a dual accountability system there needs to be an enhancement of horizontal accountability. It argues that the key to this enhancement lies in *improved access to information* and *enhanced legal empowerment* of certain actors in the public procurement process.

This thesis tackles one of the most critical sectors in the Nigeria public sector – public procurement, specifically because of the effect that this sector has on the general development of a country. The thesis argues that in order to reduce corruption in the sector, the focus needs to be placed on ensuring accountability in the stage before corruption – conflict of interest. It puts forward the position that in order to ensure accountability at the conflict of interest stage, horizontal accountability can be extremely beneficial, and therefore the thesis creates a theoretical model - the Transparency and Accountability Matrix (TAM) to determine the level of horizontal accountability within certain interactions in the Nigerian public procurement process. Using the TAM as a baseline measurement for horizontal accountability, solutions are proffered on how to enhance the efficacy of horizontal accountability and this is applied to specific conflict of interest scenarios within the Nigerian public procurement process.

The key contributions of this thesis are the creation of the TAM – a theory backed model as a horizontal accountability measurement tool; and a very thorough analysis on the accountability framework of the Nigerian public procurement process with a focus on the surrounding access to information legislations, which has been a hitherto unexplored gap in the research on Nigerian public procurement.

List of Abbreviations

BON	Broadcasting Organisation of Nigeria
BMPIU	Budget Monitoring and Price Intelligence Unit
BPP	Bureau of Public Procurement
CBN	Central Bank of Nigeria
CCB	Code of Conduct Bureau
CAC	Corporate Affairs Commission
CPI	Corruption Perception Index
CPAR	Country Procurement Assessment Report
EFCC	Economic and Financial Crimes Commission
ECHR	European Court of Human Rights
ECJ	European Court of Justice
FHC	Federal High Court
FOI	Freedom of Information
HLE	High Legal Empowerment
LLE	Low Legal empowerment
NCPP	National Council on Public Procurement
NITDA	National Information Technology Development Agency
NGO	Non-Governmental Organisation
OAGF	Office of the Attorney General of the Federation
OGD	Open Government Data
OECD	Organization for Economic Cooperation and Development
PPDC	Public & Private Development Centre
TAM	Transparency and Accountability Matrix
TDef	Transparency by Default
TReq	Transparency by Request
UNCITRAL	United Nations Commission for International Trade Law
UNIDO	United Nations Industrial Development Organisation

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European Convention of Human Rights

European Union Data Protection Directive 95/46/EC

Freedom of the Press Act 1766 (Sweden)

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United Nations Commission on International Trade Law Model Law on Public Procurement 2011

United Nations Convention Against Corruption 2003

Chapter 1 - Introduction

1.1 Introduction

Consider the following real-life scenarios that occurred in Nigeria:

- In 2013, the Nigerian Federal Minister of Aviation was investigated by the Economic and Financial Crimes Commission (EFCC) over her alleged involvement in the N9.4 billion (£18.9 million) contract for the supply of security equipment to twenty-two (22) airports across the country. The investigation was instigated by a petition made by a company claiming that the Minister *hijacked* a contract which had been previously awarded to them. The company alleged the contract was then awarded to a different company (a firm they allege the Minister had interests in) without following due process. It claimed that the Minister made extortionate demands which included engaging a newly incorporated company to act as their technical partners, and a request that the petitioner issue post-dated cheques totalling several billions of Naira (millions of pounds) in favour of a company they allege were front companies belonging to a friend and business partner of the Minister. The Minister denied all the allegations; however, a strong case was made, and the investigation is still active and has not been closed¹.
- In 2016, the Director General (DG) of the Pension Transitional Arrangement Directorate (PTAD) was suspended indefinitely, and then arrested by the EFCC over allegations of fraud of N2.5 billion (£5.5 million), the DG allegedly awarded several suspicious contracts to cronies and staff of PTAD, who served as fronts for businesses owned and controlled by the DG². The case is yet to go to trial, and the investigation is still ongoing.

¹ Eniola Akinkuotu and Leke Baiyewu, 'EFCC Seizes Stella Oduah'S Passport Over Alleged Fraud' (*Punch Newspapers*, 2018) <<https://punchng.com/efcc-seizes-stella-oduahs-passport-over-alleged-fraud/>> accessed 25 October 2019.

² Akintayo Eribake, 'EFCC Arrests Pension DG, 3 Others Over N2.5Bn Fraud' *Vanguard* (2016) <<https://www.vanguardngr.com/2016/04/efcc-arrests-pension-dg-3-others-n2-5bn-fraud/>> accessed 25 October 2019.

- In March 2016, a Senate Report indicted the Secretary to the Federal Government for awarding a contract to a company which he had at one time been a Director and had incorporated but ceased to be a Director in, just a few weeks before the contract was awarded. He was suspended by the Federal Government after a Senate Report indicted him, and thereafter arrested by the special procurement fraud unit of the EFCC. He is yet to be charged and the investigation is still ongoing³.

All the above have a common theme - they are stories of alleged breach of the public duty and trust by public officers in the public procurement sector in Nigeria. These are anecdotal instances⁴, however what they do represent is an indication of a system that is failing to ensure adequate transparency and accountability, and one in which public officials seem to be acting in breach of their public duty when there is a conflict of interest. In this thesis we will highlight and address how the system is failing, and what can be done to address these failings.

Specifically, this thesis puts forward the position that under the current Nigerian procurement model, the accountability and transparency model for public officials is a dual accountability model – it operates both *vertical accountability* and *horizontal accountability*; with the *vertical accountability* system being the primary system; and in order to unleash the true benefits of transparency and accountability there needs to be an enhancement of the horizontal accountability system. Only by having a strong horizontal accountability system which complements the vertical accountability model, can there be true accountability within the public procurement process in Nigeria. In other words, this thesis will show that when a public procurement system enhances horizontal accountability mechanisms in order to support its vertical accountability model, it fosters better transparency and accountability and serves to better manage and control the issues of conflict of interest which arise within the public procurement process.

³ Editorial - The Guardian, 'Babachir Lawal: A Matter of Honour' (2017) <<https://guardian.ng/opinion/babachir-lawal-a-matter-of-honour/>> accessed 25 October 2019.

⁴ Anecdotal instances are used in this introduction in order to set the tone for the discussion that will follow, in the sense that these anecdotal instances referenced serve to illustrate the perception which the ordinary Nigerian has about the pervasiveness of the accountability problem in Nigerian public office. These anecdotal instances, and ones similar to them, are what make the headlines and are the examples that people frequently point to when speaking about the lack of accountability in the system.

To give a basic illustration of the argument of this thesis, we will use a five-person family unit with a live-in nanny. A father, mother, two daughters, and one son. The parents give the son the duty of keeping the living room tidy, and when he does not do his duty at all or doesn't do it properly, the parents punish him, either by making him do it again or by reducing his weekly allowance. The parents check on the living room once a day. The boy's sisters use the living room every day, and when they see that it is untidy, they sometimes remind the boy to clean it, or they report to their parents. Now, when the parents are not available, the sisters can report their brother to the nanny, and the nanny can tell the boy to clean the living room, or to clean it properly.

This basic family analogy where multiple people try to keep the boy accountable to his task of cleaning the living room is the public procurement process. The parents are the vertical accountability system that have the ultimate power to tell him what to do, when to do it, and sanction him if he does not do it. The sisters are in the horizontal accountability system, in some cases they can remind him to do it, but if he refuses, they can report him to their parents, or report him to the nanny, they have no direct power over him but because he knows they are watching and can take him up on it if he does not do his duty, he is wary and tries not to slack in his duties. The parents (vertical accountability system) are the primary and most effective way to ensure the boy does his duty, however they cannot be there all the time, and therefore to ensure the boy does his duty when the parents are unavailable, the sisters (horizontal accountability) are watching and can report to either the parents or the nanny (the courts). For the system to work effectively, all the members of the family (and the nanny) must play their part. This thesis therefore focuses on how the job of the sisters can be enhanced and improved so that even if the parents start to slack in their vigilance, the sisters are there to pick up the slack.

The focus of this thesis will be on public procurement, not because that is the only area where conflict of interest manifests itself, but because it is a very important aspect of a country's economy. It allows the government to carry out its role in the

society. Due to the sheer volume of operations which go on in public procurement its activities have immense economic benefits and wide-ranging implications throughout the economy. Public goods and services have a direct or indirect effect on economic performance and living standards, especially the living standards of the poor as they have to depend on the government since they have very limited access to private alternatives for things like education, healthcare etc.⁵ Therefore, ensuring a smooth and efficient public procurement process should be a priority for every country. In fact, organisations like the Organization for Economic Cooperation and Development (OECD) and the World Bank are very keen proponents of ensuring countries have efficient and transparent public procurement processes. A recent United Nations Industrial Development Organisation (UNIDO) report⁶ emphasised the potential for Government procurement to be used as a tool for industrial development. This is due to the large sums spent on public purchasing making government activities in the marketplace, the purchase of goods and services or sometimes the marketing thereof, to have a tremendous impact and in some cases shape the market itself. Based on the most recent budget in Nigeria, the size of the government procurement for capital expenditure and recurrent expenditure is N6.1 Trillion (£13.5 billion)⁷. This is a sizeable sum and that is why the process and procedure through which the government spends these funds is so important.

As mentioned above, the thrust of this thesis is that in order to manage conflict of interest within the public procurement process, there has to be the enhancement of *horizontal accountability* to complement the current dominant system of *vertical accountability*. This thesis therefore examines the ways in which horizontal accountability can be enhanced within the public procurement process and argues that the key to this lies in improved access to information and enhanced legal empowerment of certain actors in the public procurement process. Using public procurement in Nigeria as the locus to understand the underlying issues which exist,

⁵ Kamala Dawar and Simon Evenett, 'Government Procurement', *Preferential Trade Agreement Policies for Development: A Handbook* (The World Bank 2011).

⁶ Kamala Dawar and Seung Chul Oh, 'The Role of Public Procurement Policy in Driving Industrial Development' (2017), UNIDO Working Paper 8/2017. < https://www.unido.org/sites/default/files/2017-07/WP_8_FINAL_0.pdf > accessed 31 October 2019

⁷ '2019 Budget - Budget Office of the Federation - Federal Republic of Nigeria' (Budgetoffice.gov.ng, 2019) <<https://www.budgetoffice.gov.ng/index.php/2019-budget>> accessed 31 October 2019.

and the challenges which exist, this research will answer the following sub-questions:

- Does Horizontal Accountability improve the management of conflict of interest within public procurement?
- Can a theoretical model be created to identify the level of horizontal accountability within the public procurement process in Nigeria?
- How can Transparency be guaranteed within the public procurement sector in order to enhance the effectiveness of horizontal accountability?
- What are the potential regulatory and legal challenges to the improvement of horizontal accountability in the Nigerian procurement process?
- How can these challenges be managed effectively?

1.2 Summary of Chapters

Chapter one sets out the aim of this thesis and the methodology that has been adopted for this research. It provided foundational knowledge across the thematic areas which the thesis straddles – public procurement, conflict of interest, transparency and accountability, and access to information, and sets the foundation for the argument that the enhancement of horizontal accountability is the key to managing the conflict of interest problem in public procurement in Nigeria.

Chapter two provides a historical view of the evolution of public procurement regulation in Nigeria, and the challenges that have continued to bedevil the system leading up to the current challenges being faced, and this is made evident when the current loopholes within the public procurement process which facilitate conflict of interest are highlighted and discussed. In chapter three, the thesis introduces the transparency and accountability matrix as a framework within which to address the issue of horizontal accountability and how to determine which aspects of the

horizontal accountability equation need to be strengthened in different scenarios, it introduces us to the terms declaratory accountability, conditional accountability, and full accountability, as representing the varying degrees of horizontal accountability obtainable in the Nigerian public procurement process based on the transparency and accountability matrix.

The thesis then moves in chapter four to a discussion on the first aspect of the transparency and accountability matrix – access to information, and its importance to the accountability process. It introduces access to information as having two levels – transparency by request and transparency by default. It identifies the Nigerian public procurement system as having one of transparency by request, and therefore analyses the efficacy of this transparency by request system. It highlights the failings and suggests solutions for improvement. Ultimately arguing that a move to transparency by default should be the goal of the system, but that move should only be made when the relevant structural safeguards around data access, data reliability and data protection have been addressed.

Chapter five addresses the second half of the horizontal accountability equation, legal empowerment, and emphasizes its importance and the legal framework governing its accessibility, issues like locus standi and the available remedies are addressed, and the impact which properly engaging with legal empowerment can bring on the conflict of interest loopholes identified in the Nigerian public procurement process, arguing that the actors within the process need to exercise their legal empowerment rights more as a number of the tools would be addressed in this way. Chapter six is the concluding chapter and provides a conclusive summary of the arguments made in the thesis, sets forth some recommendations, and sets an agenda for future research.

1.3 Research Methodology

In answering our research questions, this research adopts a doctrinal approach. The reason why this research will adopt a doctrinal approach is because, a doctrinal study seeks to understand a legal system and to create a well-reasoned body of information from that which has been produced by legislation, court decisions,

academics and researchers, and international bodies and institutions. It seeks to identify the legal position, identify gaps in the law and suggest features of it that can be improved⁸. In this method, the essential features of the legislation and case law are examined critically and then all the relevant elements are combined or synthesised to establish a comprehensive statement of the law on the matter in hand⁹. The research being conducted for this thesis involved reviewing legislation, regulations, and case law in order to synthesise an accurate position on conflict of interest specific to public procurement, this information was not readily available in one document and a doctrinal approach to obtaining this information was therefore critical.

Doctrinal research, at its best, involves rigorous analysis and creative synthesis, the making of connections between seemingly disparate doctrinal strands, and the challenge of extracting general principles from an inchoate mass of primary materials¹⁰. This thesis in its doctrinal approach adopts an 'inside-out' approach as explained by Brownsword¹¹ as an approach which works with the values that are already recognised by a particular legal regime, organise those values in the most defensible way, and then assess whether the practice is consistent with the best interpretation of the legal system's own values. In this research we use the doctrinal method to evaluate whether or not the public procurement system in Nigeria is faithfully adhering to its own commitments, specifically those of transparency and accountability.

The research for this thesis consisted primarily of desk-based research, reviewing the relevant laws – domestic and international, and an academic literature review. The approach for deciding which cases to review and include was two-fold – for cases which discussed general principles of law applicable in Nigeria, cases which are considered *locus classicus* cases within the Nigerian legal system were specifically chosen when analysing the legal principles of law. However for specific

⁸ Jenny Steele, 'Doctrinal Approaches' in Simon Halliday (ed), *An Introduction to the Study of Law* (W Green 2012)

⁹ Terry Hutchinson, 'Doctrinal Research' in Watkins and M Burton (eds) *Research Methods in Law* (Routledge 2013)

¹⁰ Council of Australian Law Deans Statement on The Nature of Legal Research - submissions to the Department of Education, Science and Training (DEST) in relation to the Research Quality Framework (RQF), May and October 2005

¹¹ Roger Brownsword, 'An Introduction to Legal Research' (2006) <https://docgo.net/detail-doc.html?utm_source=an-introduction-to-legal-research> accessed 31 October 2019.

areas, for example in Freedom of Information litigation, due to the fact that there is no centralised database for cases, and that most freedom of information cases are not adjudicated beyond the High Court (where cases are not reported in any main law reports), reliance had to be placed on the cases which had been undertaken by non-governmental organisations, details of which were shared on their websites. For information about investigations and prosecutions for procurement fraud, the organisation responsible for conducting the investigations and prosecutions – the EFCC refused requests for the information, and therefore most of the cases referenced are high profile cases which were reported in the print, news and online media. Finally, for information regarding bid review decisions by the Bureau Public Procurement, this was obtained and analysed from data published on the Bureau of Public procurement website – annual reports filed.

1.4 Key Concepts of this Thesis

Throughout the course of this thesis, certain key concepts will be discussed to contribute towards our ultimate understanding of the promise of enhanced horizontal accountability as a solution to the conflict of interest problem in public procurement in Nigeria. Therefore, for clarity of thought and to set a foundation for the basis of this thesis, it is important that these key concepts are understood in the context of this research, and to guide us along in the chapters of this thesis.

1.4.1 Public Procurement

Public procurement or Government procurement¹² has been defined as the purchase of goods and services by the public sector, at all levels of government. This may include providing defence, law and order, health, education, and other public services¹³. The Nigerian Public Procurement Act defines public procurement as ‘the acquisition by any means of goods, works or services by the government’¹⁴. In other words, public procurement is when the government enters contracts for goods/works/services.

¹² These terms are used interchangeably in this thesis; however, they should be taken to mean the same thing.

¹³ John Black, Nigar Hashimzade, and Gareth Myles, *A Dictionary of Economics*: Oxford University Press, 2012.

¹⁴ Public Procurement Act 2007 (PPA 2007), s 60

The reality is that public procurement is more complex than this, as public procurement in some countries includes disposal of government assets, public/private partnerships with private individuals etc. However, in order to properly address the issue of conflict of interest in public procurement in Nigeria, the approach taken here will be to start from this simplified basis - when the government enters contracts for goods/works/services.

As we will be examining public procurement within the Nigerian context, it is important to give a brief background of the development of public procurement in Nigeria. There are two key events that had a profound impact on the development of the Nigerian public procurement process, firstly, in the year 1999, a team comprising of members of the World Bank, and a Government Task Force representing public and private sector organisations in Nigeria with the assistance of consultants financed by the World Bank and the Government of Denmark conducted a Country Procurement Assessment Report (CPAR) on Nigeria¹⁵, with the primary objective of reviewing and assessing the public sector procurement structure, and to develop a detailed action plan for reform to achieve institutional improvements. The CPAR discovered various critical issues with the procurement process in Nigeria¹⁶ which needed to be addressed and recommended amongst others the introduction of a public procurement law based on the United Nations Commission for International Trade Law (UNCITRAL) model, and the establishment of an independent public procurement regulatory body. The CPAR was important to the development of Nigerian public procurement because it was the first in-depth analysis that identified the failings within the procurement process and created a roadmap for how they could be addressed. Prior to the CPAR the procurement process was fraught with so many inefficiencies and loopholes for conflict of interest and corruption, and these inefficiencies were exploited at will by public servants involved in the procurement process so much so that as at the year the CPAR was conducted, it was estimated that 60% of funds spent by government was being lost

¹⁵ 'Nigeria - Country Procurement Assessment Report (CPAR)' (World Bank 2000).

¹⁶ Issues discovered included: Lack of a body specifically charged with regulating the procurement process; Lack of an oversight body to control public procurement; Lack of clarity and transparency in the *Financial Regulations* - an internal set of rules for financial/economic control of the Federal administration and the activities of Tender Boards (TB), and regulations concerning the procurement process.; Proliferation and ineffectiveness of Tender Boards; Lack of professionalism in procurement; Lack of an effective piece of legislation regarding public procurement

to corruption and procurement fraud. The Federal Government of Nigeria was losing an estimated US\$10 billion annually due to fraudulent practices in the award and execution of government contracts. The CPAR signalled an attempt to stem this tide, and that is why it is an important event in the history of procurement in Nigeria.

The second key event was the passage of the Public Procurement Act (PPA) in the year 2007, this was Nigeria's first legislation dedicated solely to the public procurement process and it revolutionised the procurement process in Nigeria. The law, as with many other procurement laws in developing and emerging countries around the world was modelled on the UNCITRAL Model Law on Procurement of Goods, Construction and Services, 1994. Apart from the obvious benefit of the existence of a law for managing the procurement process, one of the most critical interventions of the PPA was the creation of the Bureau of Public Procurement (BPP), an independent agency tasked with the regulation of the public procurement sector. This event is important because it is the bedrock of the current public procurement process and will be the basis for the legal analysis concerning public procurement in this thesis.

1.4.2 Conflict of Interest

The term *conflict of interest* is a quite common term, and its applicability is not limited to only the public sector. Generally, it refers to situations where individuals' professional responsibilities converge with other interests, and there is a clash. Conflict of interest is common in the legal sector, medical and healthcare sector, accounting and financial services sector etc. In fact, it may be said that one of the very first documented instances of a conflict of interest was in the Bible when Rebekah used privileged information to advise Jacob about how to get Esau's blessings¹⁷. While this might seem a trivial analogy to make, it goes to the root of what exactly a conflict of interest is, it is the use of a privileged role to further other interests - Rebekah used information obtained in her role as a wife to unfairly benefit Jacob in her role as a mother, to the detriment of Esau. The modern day understanding of conflict of interest is not too dissimilar to the situation with

¹⁷ Genesis 27: 1- 41 New International Version (NIV)

Rebekah, where two roles have collided and in giving primacy to one over the other, there has been a detriment suffered.

As can be seen from this illustrative analogy, conflict of interest is a term that is ubiquitous and can be seen in our everyday lives. However, in the context of this research, conflict of interest will be limited to conflict of interest within the public procurement process, and how it arises when public officials are exercising their duties.

A question that causes some measure of confusion when discussing conflict of interest, is with respect to the nature of conflict of interest, and whether it is a type of corruption or a state of affairs which precedes it. This discrepancy was highlighted by Reed¹⁸, specifically, in the conflict of interest law in force in the Czech Republic between 1992 to 2006, the law provided thus:

A conflict between the public interest and personal interest is understood to be conduct [of a public functionary] or failure [of a public functionary to act] which undermines trust in his/her impartiality or by which a public functionary misuses his/her position in order to obtain unauthorized benefit for him or herself or another individual or legal entity.

In other words, the Czech Law on conflict of interest took the approach that conflict of interest is an act that involves the misuse of a position for unauthorized benefit – an illegal act. Therefore, that characterization seemed to suggest it is a *type of corruption*. The view of conflict of interest as a type of corruption however seems to be in the minority, there is agreement among scholars of conflict of interest that conflict of interest is not a type of corruption, but rather it is *a state of affairs which can serve as a precursor to corruption*. Speck explains that the “*the concept of conflict of interest does not refer to actual wrongdoing, but rather to the potential to engage in wrongdoing.*”¹⁹ He believes that conflict of interest describes role conflicts with an uncertain outcome, a risk from the viewpoint of fulfilment of public interest. Speck’s view is very important in understanding the essence of a conflict of interest, in fact it is that uncertainty or probability for separate outcomes that is the essence

¹⁸ Quentin Reed, 'Sitting on The Fence: Conflicts of Interest and How to Regulate Them' (U4 Anti-Corruption Resource Centre 2008) <<https://www.cmi.no/publications/file/3160-sitting-on-the-fence.pdf>> accessed 31 October 2019.

¹⁹ Bruno W. Speck, 'Conflict of Interest: Concepts, Rules and Practices Regarding Legislators in Latin America' [2008] *The Latin Americanist* 49

of conflict of interest. Reed²⁰ believes that conflict of interest is a situation, not an action, and a public official may find him or herself in a conflict of interest situation without behaving corruptly. Also, Rose²¹ states that conflict of interest does not necessarily entail an actual abuse of power, private gain, or any sort of actual transaction, as the mere existence of incompatible private and public interests may be sufficient to create a conflict of interest. Catchick²² summarises the widely held view succinctly, when he explains that a conflict of interest therefore exists where an official *could abuse* their position for private gain, whereas corruption exists where an official *does abuse* their position for private gain. In other words, a conflict of interest doesn't always lead to corruption, but corruption always requires a conflict of interest.

In the context of the public official, there have been several attempts at defining conflict of interest, this thesis however posits that for a public official to have a conflict of interest, there must be three key elements – the first is that the public official must have a *public duty* i.e. a duty or obligation to act in fidelity to his/her official role as a public officer and act in the interests of that role. The second element which should exist is that there must be the existence of a *private interest(s)*, in the context of other external factors outside of the public duty which the public official has - he/she is an individual who has other responsibilities outside of the public office responsibilities as a family member, society elder or religious leader etc. The final element is the fact that these private interests when put within a certain context could have the capacity to *improperly influence* the performance of the official duties and responsibilities.

Rose-Ackerman defines²³ conflict of interest as conflicts between public roles and private financial interests, she believes that the complexity of modern society means that individuals play multiple public and private roles with accompanying tensions between their conflicting demands. Therefore, as a result of these complexities of

²⁰ Reed (n 17)

²¹ Cecily Rose, 'Corruption and Conflicts of Interest in The United Kingdom' in Jean-Bernard Auby, Emmanuel Breen, and Thomas Perroud (eds), *Corruption and Conflicts of Interest. A Comparative Law Approach* (Edward Elger 2014).

²² Paul Catchick, 'Conflict of Interest: Gateway to Corruption' (ACFE European Fraud Conference, 2014).

²³ Susan Rose-Ackerman, 'Corruption and Conflicts of Interest' in Jean-Bernard Auby, Emmanuel Breen, and Thomas Perroud (eds), *Corruption and Conflicts of Interest. A Comparative Law Approach* (Edward Elger 2014).

modern society whenever there are competing demands, a conflict of interest arises. Guzzetta²⁴, in discussing conflict of interest in the public sector believes that a conflict of interest could be defined as a situation where an individual's pursuit of private interest conflicts with a public interest for which he or she has the entitlement and obligation to discharge. Outlining the basic elements of a conflict of interest situation as: a) a legally qualified position, b) two different interests in actual or potential contrast, and c) a 'power-duty' to discharge. He asserts that the default assumption when public interests are at stake is that there is always a coexistence (within the same person) of at least two different sets of interests- public and private. The Organization for Economic Co-operation and Development (OECD) has provided a widely accepted²⁵ definition of conflict of interest as involving a '*conflict between the public duty and private interests of a public official, in which the public official has private-capacity interests which could improperly influence the performance of their official duties and responsibilities*'²⁶.

All three definitions are important to our understanding of the concept of conflict of interest throughout the course of this thesis. Rose-Ackerman's definition makes a key point in that it acknowledges the many hats which individuals in public life wear, they are not cardboard cut-outs created specifically for just their public role, they are social beings who interact with their environment as others would, having friendships, relationships and other roles outside of their daily lives as public officials. This *humanisation* of the public official is key in our discussion, as it sets the foundation properly for how conflict of interest occurs. Further, she conceptualises conflict of interest as only having a private interest which is financial in nature. This narrow outlook on a conflict of interest, though the most obvious type, is by no means the only type of private interest which is capable of coming into conflict with a public interest/duty.

²⁴ Giovanni Guzzetta, 'Legal Standards and Ethical Norms: Defining the Limits of Conflicts Regulations' in Christine Trost, Alison L. Gash (eds), *Conflict of Interest and Public Life: Cross-National Perspectives* (Cambridge University Press 2008)

²⁵ Jan Christoph Richter, 'Conflict of Interest of Heads of State: The Example of Madagascar' in Anne Peters (ed), *Conflict of Interest in Global, Public and Corporate Governance*: (Cambridge University Press 2012); Carolyn Moser, 'Conflict of interests of government members and the risk of corruption: An assessment of pre-revolutionary Tunisia and Egypt' in Jean-Bernard Auby, Emmanuel Breen, and Thomas Perroud (eds), *Corruption and Conflicts of Interest. A Comparative Law Approach* (Edward Elger 2014); Bernardo Mattarella, 'The conflicts of interests of public officers: Rules, checks and penalties' in Jean-Bernard Auby, Emmanuel Breen, and Thomas Perroud (eds), *Corruption and Conflicts of Interest. A Comparative Law Approach* (Edward Elger 2014).

²⁶ Organisation for Economic Co-operation and Development, 'Managing Conflict of Interest in The Public Sector: A Toolkit' (OECD 2005) <<https://www.oecd.org/gov/ethics/49107986.pdf>> accessed 31 October 2019.

Guzetta's definition introduces the fact that the public role which the public official has is one where there is the entitlement/obligation to discharge. Therefore, a conflict of interest is not merely one where two interests are at morally diametrically opposite positions, it is one in which the public role carries with it certain legal obligations or expectations. The private interest is therefore cast as an interloper into the sphere of the legal public duty.

Finally, the OECD definition has three key elements which are quite instructive and indicative of what a conflict of interest is. It states that there is a *public duty*, there must be *private-capacity interests*, and that it is a conflict of interest if the private-capacity interests *could improperly influence* the performance of the public duty.

These three definitions seem to echo the same attributes with varying layers of emphasis, and the definitions therefore provide the bedrock of our understanding and discussion on conflict of interest. Throughout this thesis, the concept of a conflict of interest will be analysed through the prism of *two separate interests – public and private, with the potential that the public can be improperly influenced by the private*.

1.4.3 Transparency and Accountability

The terms 'transparency' and 'accountability' are frequently used together in conversations about good governance, however there is some debate as to whether these concepts are two peas in a pod which are one and the same, or are complimentary concepts wherein the success of one naturally feeds into the other, or even that they are concepts which are at odds with each other. Hood²⁷ believes that the relationship could exist in three possible ways. Firstly, they could be considered as '*siamese twins*' in the sense that they are interlocked and linked to the point where a meaningful distinction between them cannot be made. The second viewpoint would be that of an *awkward or incompatible couple* with diverse goals and elements which could frequently be said to be in tension with each other. The

²⁷ Christopher Hood, 'Accountability and Transparency: Siamese Twins, Matching Parts, Awkward Couple?', (2010), *West European Politics*, 33:5, 989-1009

third viewpoint of the relationship would be that accountability and transparency exist as *matching parts* – as complementary parts in the good governance equation.

This thesis will adopt the position that transparency and accountability are *matching parts*, and that transparency (access to information) is a critical element of the accountability process. Accountability without transparency makes it difficult for there to be proper accountability because all the relevant information is not available; and transparency without an accountability mechanism is mere provision of information, with no liability or consequences attached to the information.

1.4.3.1 Transparency

The immediate link most people make when they hear the word ‘transparency’ in the context of good governance is to associate it with the International organisation – *Transparency International*²⁸, and the reason is that organisations like Transparency International have been at the forefront of the fight to use transparency as a tool to foster good governance and fight corruption. Due to this focus on good governance, transparency is therefore generally defined as the principle of enabling the public to gain information about the operations and structures of a given entity²⁹. It is often considered synonymous with openness and disclosure, although one can find some subtle differences among these terms³⁰. It refers to the degree to which information is available to outsiders that enables them to have an informed voice in decisions and/or to assess the decisions made by insiders³¹.

The term ‘transparency’ is a derivative of the word ‘transparent’, which the Oxford English Dictionary³² defines as ‘*having the property of transmitting light, so as to render bodies lying beyond completely visible*’. Therefore, transparency meaning the

²⁸ An International organisation created to stop corruption and promote transparency, accountability and integrity at all levels and across all sectors of society

²⁹ David Heald, ‘Varieties of transparency’ in Christopher Hood and David Heald (eds), *Transparency: The Key to Better Governance?* (Oxford University Press, 2006), pp. 23–45 at p. 26;

³⁰ Bernard I. Finel and Kristin M. Lord, ‘The Surprising Logic of Transparency’, *International Studies Quarterly*, 43 (1999), 315–39 at p. 316.

³¹ Ann Florini, ‘The Battle Over Transparency’ in Ann Florini (ed), *The Right to Know: Transparency for an Open World*, (Columbia University Press, 2007)

³² ‘transparent, n’ (*OED Online*, OUP November 2018) < <http://www.oed.com/view/Entry/204969> > accessed 15 November 2018.

quality/condition of being transparent. Importing this definition into the context of good governance and public administration therefore would suggest that for a public official/agency to be one with transparency, then a key attribute is for people outside to be able to know what is going on within the agency and how it conducts its operations. This is why the term is used synonymously with 'openness' and 'disclosure'. For an organisation to have transparency, then there has to be a high level of openness of its activities.

Transparency is one of those mystic concepts that have attained almost magical connotations in that when people use the word, they seem to suggest that it would be an elixir for the good governance problem. It is a term that has in the last few decades attained what Hood³³ refers to as 'quasi-religious significance in the debate over governance'. He argues that transparency figured in numerous twentieth century doctrines of governance, well before the word itself came into current prominence in the last three decades. He further states that it is possible to identify at least three strains of pre-20th century ideas as partial forerunners for modern ideas about transparency – the *notions of rule-governed administration, candid and open social communication, and ways of making organisation and society knowable*.

With respect to the notions of rule-governed administrations, he traces this to Chinese doctrines of *Shen Puhai*, and classical Greek ideas that laws should be stable or documented, the idea of a government of laws and not men (contained in Article XXX of the Massachusetts Constitution of 1780), the notions of *Rechtsstat* in 19th Century Germany, and Adam Smith's argument in *Wealth of Nations* in 1776 that '*taxes ought to be certain and not arbitrary. The time of payment, the manner of payment, the quantity to be paid, ought all to be clear to the contributor and to every other person*'. Hood argues that these early conceptions of a rule governed administration were intellectual and theoretical forerunners for the modern-day conception of transparency which we see today. This notion of rule-governed administration as highlighted by Hood is also evident in the thought process and words of one of the framers of the American Constitution, James Madison, who

³³ Christopher Hood, 'Transparency in Historical Perspective' in Christopher Hood and David Heald (eds), *Transparency: The Key to Better Governance?* (Oxford University Press, 2006)

wrote compellingly on the importance of information in a democracy, he argued that '*a popular Government, without popular information, or the means of acquiring it, is but prologue to a farce or a tragedy; or perhaps both. Knowledge will forever govern ignorance; and a people who mean to be their own governors must arm themselves with the power which knowledge gives.*'³⁴

Concerning the notion that that social affairs more generally should be conducted with a *high degree of frankness, openness, and candour*, Hood draws references to views espoused by Immanuel Kant when he argues against secret treaties in his 1795 essay '*Toward Perpetual Peace*'³⁵, and ideas put forward by the philosopher Jean-Jacques Rousseau in his treatise - '*Social Contract*'³⁶ where he argues that public servants should operate in the eyes of the public. Hood then traces the final strain to views that the social world should be made knowable by methods analogous to those used in the natural sciences, as espoused by Nicolas de La Mare in *Traite de la Police*³⁷. Hood believes that all three strains of thought coalesced in the ideas of Jeremy Bentham when in the 1790s he declared '*I do really take it for an indisputable truth and a truth that is one of the corner stones of political science – the more strictly we are watched, the better we behave*'³⁸, and in his famous essay '*On Publicity*'³⁹, Bentham boldly declared that '*secrecy being an instrument of conspiracy, ought never to be the system of regular government.*' Therefore, Hood seems to be suggesting that Bentham is one of the founding thought leaders and proponents of the modern-day concept of transparency.

Meijer⁴⁰ also believes that Bentham's ideas on transparency being the key to prevention of abuse of power⁴¹ have had a strong influence on the development of the modern public sector. Transparency measures have potentially altered the

³⁴ Letter from James Madison to W. T. Barry (August 4, 1822), in Philip R. Fendall, *Letters and Other Writings of James Madison Published by Order of Congress* (Philadelphia: Lippincott, 1865), III:276, available at <www.jmu.edu/madison/center/main_pages/madison_archives/quotes/great/issues.htm> accessed 31 October 2019.

³⁵ Immanuel Kant, *Toward Perpetual Peace* (first published 1795, Cambridge University Press 1996)

³⁶ Jean-Jacques Rousseau, (first published 1762, Penguin 1950)

³⁷ Nicolas Delamare, *Traité de la police, où l'on trouvera l'histoire de son établissement, les fonctions et les prerogatives de ses magistrats; toutes les loix et tous les reglemens qui la concernent...* (Paris: J. et P. Cot, 4 vols., 1705-38).

³⁸ Writing on the Poor Laws' – a collection of initially unpublished manuscripts from the 1790s

³⁹ The Collected Works of Jeremy Bentham: The Correspondence of Jeremy Bentham, Vol. 1: 1752–76 T. L. S. Sprigge (ed.) (Athlone Press 1968)

⁴⁰ Albert Meijer, 'Transparency' in Mark Bovens, Robert E. Goodin, and Thomas Schillemans (eds), *The Oxford Handbook of Public Accountability* (Oxford University Press 2014)

⁴¹ Ibid.

accountability landscape in a fundamental manner by rearranging access to official information, and that the availability of relevant information is one of the prerequisites for the information phase of any accountability process, he argues that transparency essentially facilitates accountability.

Transparency can mean different things in different contexts, a point which Heald makes when discussing the ‘varieties of transparency’⁴², he sketches out an anatomy of transparency, exploring directions and varieties of transparency and how they interact with their habitat and with each other. He does this with the aim of identifying different directions and varieties of transparency in relatively neutral terms. Heald’s approach identifies four directions of transparency – *transparency upwards* where the hierarchical superior/principal can observe the conduct, behaviour, and/or results of the hierarchical subordinate/agent; *transparency downwards* where the ruled can observe the conduct, behaviour and/or results of their rulers; *transparency outwards* when the hierarchical subordinate or agent can observe what is happening outside the organisation; *transparency inwards* where those outside can observe what is going on inside the organisation. This approach taken by Heald is beneficial for this thesis, as it makes the point very clearly that not all transparency is the same, and each transparency mechanism might be set up specifically to achieve one of the varieties of transparency. This is quite instructive for our discussion on managing conflict of interest within the public procurement process and the role of access to information in achieving that outcome.

The relationship between all the above understandings and explanations of the word transparency lies in the fact that they all are at their core espousing the same things - allowing people outside of governance to see and know how things work (or should work) on the inside.

In Nigeria, notions of transparency have long since existed, and been a cornerstone of traditional Nigerian societies. Ayo Obe discusses Peter-Okoye’s description of the village of *Enugwu-Uku* in precolonial Igboland in Nigeria where whenever anything

⁴² Heald (n 30)

important was to be done, the *ekwe*⁴³ would be beaten by the designated person in order to alert the village people that something was to be done, and they should come to the village square for information and so they may be involved in the decision making process⁴⁴. The *transparency* in traditional Nigerian societies therefore seemed to be of the variety that pushed for *transparency inwards*.

This thesis takes the position that the current regulatory model within the public procurement sector in Nigeria allows for both *transparency upwards* – a process which is adopted within the vertical accountability system, and *transparency inwards* – a process which exists within the horizontal accountability framework. During the course of this thesis, the argument that will be made is for the strengthening of this transparency inwards model, by improving access to information to allow more stakeholders the ability to monitor the operations of the public officials and therefore lead to a state of affairs, where there is a higher possibility for conflict of interest to be identified and the public official held accountable within a horizontal accountability system because of the improved transparency inwards framework.

1.4.3.2 Accountability

The term accountability has its historic origins in the word '*accounting*⁴⁵'. According to Dubnick⁴⁶, it can be traced to the 11th Century in England, when King William I required that all property holders render *a count* of what they possessed, the possessions were then assessed and listed in the so-called *Domesday Books*. The Domesday Books listed what was in the King's realm, and it was done both for taxation purposes and to establish the foundations of royal governance as the landowners were made to swear fealty to the King, and by the early 12th century, this practice had evolved into a highly centralised administrative kingship that was ruled through centralised auditing and semi-annual account giving. This literal notion of 'giving a count', points to a more traditional concept of accountability, a

⁴³ This is an *Igbo* traditional musical instrument. It is a type of drum with rectangular cavity slits in the hollowed out wooden interior, made out of wood and most commonly a tree trunk.

⁴⁴ Ayo Obe, 'The Challenging Case of Nigeria' in Ann Florini (ed), *The Right to Know: Transparency for an Open World* (Columbia University Press 2007)

⁴⁵ Also, the old French word - *acontable*

⁴⁶ Melvin J. Dubnick, 'Seeking Salvation for Accountability', (Annual Meeting of the American Political Science Association 2002), pp. 7–9. < <http://mjdubnick.dubnick.net/papersrw/2002/salv2002.pdf>> accessed 31 October 2019

notion in which the relation between sovereign and subjects, principal and agents, forum and actor, is the defining element⁴⁷. In the hundreds of years since the time of King William I however, accountability has shifted from a system of subjects being held to account by their sovereign, to the authorities being held to account by the citizens⁴⁸. However, the core concept has remained the same, the concept that accountability involves a process wherein an agent is obliged to provide information to their masters/principals – accountability has a relational core to it, it refers to the obligation to provide an account *to*, usually, a superior or at least someone with a legitimate stake⁴⁹.

1.4.3.2.1 Accountability as a Virtue and Accountability as a Mechanism

As a virtue, accountability is used as a set of standards for the evaluation of the behaviour of public actors, it is seen as a positive quality to maintain or to aspire to. This is the adjectival meaning of the word, and it is connotative of a desire or willingness to act in a transparent, fair, and equitable way. Bovens⁵⁰ believes that accountability in this context bears a close confluence with the concept of morality – a concept which has long been a highly debated and disputed area as a yardstick for setting standards⁵¹, as people's understandings and expectations of morality tend to differ based on culture, society and context.

On the other side of the argument, some have explained accountability as a mechanism, here accountability is used in a more analytical sense, it is viewed as an institutional obligation where an individual or institution is held to account by a '*forum*'. The focus here not being in the way the individual or institution acts, but the methods in which the relationship between the forum and individual/institution operates, specifically the institutional mechanism within which the

⁴⁷ Mark Bovens, 'Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism', (2010) 33:5 West European Politics, 946-967 < <https://www.tandfonline.com/doi/full/10.1080/01402382.2010.486119> > accessed 31 October 2019

⁴⁸ Mark Bovens, 'Analysing and Assessing Public Accountability. A Conceptual Framework', (2006) European Governance Papers (EUROGOV) No. C-06-01, <http://www.connex-network.org/eurogov/pdf/egp-connex-C-06-01.pdf>. Accessed 31 October 2019

⁴⁹ Mark Bovens, Thomas Schillemans & Robert E. Goodin, 'Public Accountability' in Mark Bovens, Thomas Schillemans & Robert E. Goodin (eds), *Oxford Handbook on Accountability*, (OUP 2014)

⁵⁰ Bovens (n46)

⁵¹ See Fuller v Hart debate - The Hart-Fuller debate demonstrates the divide that exists between the positivist and the natural philosophy of law regarding the role of morality in law. Hart argued that law and morality are separate from each other and they can be termed as mutually exclusive. Fuller was of the view that there exists a deep connection between law and morality and the authority of law is derived from its consistency with morality. Read both views – H.L.A Hart, ("Positivism and the Separation of Law and Morals", (1958) Harvard Law Review. 71 (4): 593–629; Lon Fuller, "Positivism and Fidelity to Law — A Reply to Professor Hart". (1958) Harvard Law Review. 71 (4): 630–672.

individual/institution can be held accountable to the forum. The issue is not whether or not the individual/institution have acted in an accountable way, but whether based on the institutional arrangements, they can be held accountable after the fact by the forum. Bovens⁵² believes that accountability as a mechanism implies a relationship between an actor and a forum, he suggests that before a relation can be qualified as an accountability relation, it is important that the actor is, or feels, obliged to inform the forum about his or her conduct, through various means. Also, there needs to be a possibility for the forum to interrogate the actor and to question the adequacy of the information or the legitimacy of the conduct; and finally, the forum may pass judgement on the conduct of the actor. From the above therefore, the critical constituent elements of accountability as a mechanism are – *the (actor's) obligation to report, the (forum's) capacity to interrogate, and, the forum's sanction/control power*. In fact, Bovens, Mulgan⁵³ and Strom⁵⁴ believe that the possibility of sanctions of some kind forms a critical constitutive element of accountability as a mechanism. The possibility of sanctions makes the difference between the non-committal provision of information and being held to account.

Both concepts of accountability – as a virtue and as a mechanism are important, however for the purposes of this thesis in order to interrogate the potential for accountability to be used as a check on conflict of interest, we will focus on accountability as a mechanism, because the goal is to identify mechanisms that can be put in place to manage conflict of interest, and therefore this is from an institutional arrangement point of view. If we were to adopt the conceptualisation of accountability as a virtue, then the result would be the introduction of umbrella concepts (as characterized by Bovens) to a discussion when trying to understand an already nebulous term – accountability, this would only serve to further obscure the understanding of the word and make it very difficult to establish empirically whether an official or organisation is subject to accountability⁵⁵. Further, in accepting this nexus between morality and the understanding of accountability as a virtue, it becomes quite difficult to determine with some level of exactness whether

⁵² Bovens (n.46)

⁵³ Richard Mulgan, *Holding Power to Account: Accountability in Modern Democracies* (Pelgrave, 2003).

⁵⁴ Kaare Strøm, 'Parliamentary Democracy and Delegation' in Kaare Strøm, Wolfgang C. Müller, and Torbjörn Bergman (eds), *Delegation and Accountability in Parliamentary Democracies* (Oxford University Press, 2003), pp. 55–106.

⁵⁵ Koppell (n.51)

a public official/institution has lived up to this virtue. Using such an understanding which is fraught with so much uncertainty is therefore not ideal as it would mean that there will be varying standards and yardsticks for measuring the accountability or lack thereof of a public official/institution. across a range of individuals and public organisations. The use of accountability as a virtue, is basically an evaluative, not an analytical, concept. It is used to qualify positively a state of affairs or the performance of an individual/organisation.

For those reasons therefore this thesis will be adopting an understanding of accountability as a mechanism and will be using that conceptualisation in the discussion on how accountability can be used to manage the conflict of interest problem in public procurement. Flowing from that therefore is this concise description of accountability as: '*the obligation of one party to explain and justify its conduct to another party, under the threat of sanction by that other party*'. This implies a relationship between an actor - the *accountor*, and a forum - the *accountholder* or *accountee*. In the context of this thesis, accountability therefore presupposes the existence of a mechanism in place to check occurrences of conflict of interest by empowering a party to request justification for the other party's conduct under the threat of some sanction. Sanction in this sense is used broadly to refer to legal liability but is also broad enough to include reporting malfeasance to an authority with the power to enforce some kind of legal liability or sanction.

1.4.3.2.2 Vertical and Horizontal Accountability

In this thesis, the understanding of vertical accountability will be limited to a hierarchical situation wherein the agent purporting to exercise said accountability possesses all three critical constituent elements of accountability- *the (actor's) obligation to report* to that agent/forum, *agent/forum's capacity to interrogate*, and, *the agent/forum's ability to sanction or make a binding decision*. For example, within the public procurement process in Nigeria, when a procuring entity grants a contract award which does not follow the laid down procedure, the procuring entity has the obligation to *report* on its awards to the Bureau of Public Procurement (BPP), the BPP in turn has the capacity to *interrogate* the information provided and seek clarification when necessary, and if the BPP determines that the proper process

has not been followed, it has the power to *sanction* the entity and reverse the award decision. As can be seen the BPP has all three constituent accountability elements, and therefore there is *vertical accountability*.

On the other hand, horizontal accountability in this thesis will refer to a system wherein one agent on its own is unable to exercise all three constituent elements, and in order to exercise accountability, would need to introduce one or more other agents into the accountability transaction. As an illustration, if a contractor wants to challenge a bid award decision by a procuring entity, it will have to call upon the BPP or the courts in order to enforce accountability. In this case the contractor has the right to information (as a bidder in the process it is entitled to request for a debrief), it has the right to *interrogate* the information in the debrief, but it cannot unilaterally *sanction* the procuring entity, to do this, it needs the involvement of the courts. As can be seen the accountability journey for a contractor will be lacking one of the three elements, and therefore the need to involve another agent of accountability moves it from *vertical accountability* to *horizontal accountability*.

1.4.4 Access to Information

When we refer to data in relation to governance, we are speaking about public information which is in control of the government or its agencies. Data as a concept can be viewed as the lowest level of abstraction from which information and, then, knowledge are derived. In general terms, data is a set of values of qualitative or quantitative variables⁵⁶. Collection and dissemination of information and data are key tools of government administration, as a regular course of governance governments gather large amounts of data and hold significant national datasets, this include information like population numbers, birth registrations, marriages etc. Hood and Margetts offer a functional model of government as operating through two sets of tools: detectors and effectors. Detectors gather information (and data) from society, and effectors seek to influence individuals and society⁵⁷, therefore the gathering of data falls under the detector tool of government as put forward by the authors. From the moment a child is born until he/she dies there is one long

⁵⁶ Bridgette Wessels, Rachel L. Finn, Kush Wadhwa, Thordis Sveinsdottir, Lorenzo Bigagli, Stefano Nativi and Merel Noorman (eds), *Open Data and the Knowledge Society*, (Amsterdam University Press 2017) pp. 45-46

⁵⁷ Christopher Hood and Helen Margetts, *The Tools of Government in the Digital Age*, (Palgrave Macmillan 2007)

continuum of giving data to the government. From registration of birth and being issued with a birth certificate, to immunization for vaccines, to registration in schools, to obtaining means of identification (e.g. international passport), to paying taxes, the list is endless. All this information is gathered by the government and is stored by the government. The government in effect is the largest repository of data in a country and gathers large amounts of data and hold significant national datasets.⁵⁸

Open government data is therefore a system of the government making available to the public the data which it has gathered. It is publicly available data that can be universally and readily accessed, used and redistributed free of charge. It is structured for usability and computability. The proponents of open government data therefore advocate that these datasets held by the government should be made openly available to members of the public through technology. A report published by the Open Data for Development Network suggests that open data is central to the goals of “enabling widespread economic value, fostering greater civic engagement and enhancing government transparency and accountability to citizens⁵⁹”. The term - *open government data* became widely used after 2008, it emerged in the United States of America, from the work of a group of open data advocates who met in 2007 to develop some open data principles and discuss how they could mobilise people who were interested in developing citizen training and data management, curation and use. They developed eight principles that underpin the main elements of open government data, arguing that government data can only be considered open if it is made public by complying with those principles. The principles are that all public data should be made available, the data made available should be data that is collected at source with the highest possible level of granularity, in other words, with as much detail as possible. and should be made available as quickly as necessary to preserve the value of the data. Further, the principles state that the data should be accessible and available to the widest range of users for the widest range of purposes with no requirement for registration and be reasonably structured to

⁵⁸ Tim Davies, ‘Open data, democracy and public sector reform’ (MSc Dissertation, University of Oxford 2010) <https://www.academia.edu/988533/Open_Data_Democracy_and_Public_Sector_Reform> accessed 31 October 2019

⁵⁹ Open Data for Development Network, *Open Data for Development: Building an inclusive data revolution*, (Annual Report, 2015) <http://od4d.com/wp-content/uploads/2016/06/OD4D_annual_report_2015.pdf>

allow automated processing. Finally, that the data should be available in a non-proprietary format over which no entity has exclusive control and not be subject to any copyright, patent, trademark or trade secret regulation. The eight principles are not a rigid list and in fact have since then be further developed⁶⁰. While the open government data movement initially started as a mainly UK and US driven initiative, it has increasingly gathered attention in many other countries around the world. Open government data is an important part of the Open Government Partnership, an international initiative launched by eight founding governments⁶¹ and currently including seventy-nine participating countries and twenty subnational governments⁶². To become a member of Open Government Partnership, participating countries must endorse a high-level Open Government Declaration, deliver a country action plan developed with public consultation, and commit to independent reporting on their progress going forward.

At the core of open government data is the *Right-To-Information* which promotes access to government information as a fundamental right, Birkinshaw⁶³ argues that access to government information deserves to be listed as a human right as it is instrumental to realizing other human rights such as freedom of speech, access to justice etc. The right to information also encompasses the right of the public to access government information, often also referred to as freedom of information in national legislation. The right to information was first recognised in national legislation in Sweden in 1766⁶⁴ when the Freedom of the Press Act was passed. This Act created a right of the Swedish citizen to access official documents in order to encourage the free exchange of opinion and the availability of comprehensive information. Fast-forward almost two hundred and fifty years later and there are currently around ninety countries around the world that have adopted freedom of information legislation in one form or the other, and fifty more countries have legislation pending⁶⁵. In addition, freedom of information has been recognised as a

⁶⁰ In 2011 by the US Federal Chief Information Officer Vivek Kundra and by the UK's Public Sector Transparency Board in 2012. These have extended the eight principles but are based on the recommendations made in the original Sebastopol List.

⁶¹ Brazil, Indonesia, Mexico, Norway, Philippines, South Africa, United Kingdom, and United States

⁶² OGP Members - <https://www.opengovpartnership.org/our-members/> accessed 31 October 2019

⁶³ Patrick Birkinshaw, 'Transparency as a Human Right', in Christopher Hood and David A. Heald (eds.), *Transparency: The Key to Better Governance? Proceedings of the British Academy* (Oxford University Press 2006)

⁶⁴ The Freedom of the Press Act is one of the four fundamental laws that make up the Constitution of Sweden - the Instrument of Government, the Act of Succession, the Freedom of the Press Act and the Fundamental Law on Freedom of Expression

⁶⁵ Access to Information Laws" Overview and Statutory Goals <https://www.right2info.org/access-to-information-laws/access-to-information-laws#_ftnref7>accessed 31 October 2019

constitutional right in more than thirty countries, and it is increasingly considered as a human right⁶⁶. There has been research which talks about the potential of open data to increase trust, enhance civic engagement, counter corruption and increase accountability⁶⁷. Open government data is considered vital for transparency and accountability, the rationale being that in order to hold government accountable for its acts, the public needs to be well informed/know what the government is doing on a continuous basis. Therefore, one way this can be provided in an unbiased and non-watered-down way is for there to be open government data. In other words, the data must be truly transparent in order for the public to be able to hold the government to account. Open government data focuses on the ways that seamless access to data can improve relationships between citizens and their governments, advocates of open government data aspire towards attaining more open and transparent government and facilitating citizens to use public data to improve their knowledge and engage with public issues in a more informed way.

Right to information proponents argue that the right is indispensable in a democracy, and that access to government information is a key component of any transparency and accountability process for government activities and processes⁶⁸. In addition to that, Peled and Rabin⁶⁹ introduce a 'proprietary justification' dimension into the conversation in that, since the information held by public authorities is the property of the state's citizens and residents, then as owners of the information, they should clearly have access to it irrespective of whether or not they are the ones who actually gathered the data. This thesis will argue that improved access to information through functioning freedom of information laws and open government data can be the catalyst for improved horizontal accountability in the procurement process.

⁶⁶ Birkinshaw (n. 64)

⁶⁷ Marijn Janssen, Yannis Charalabidis and Anneke Zuiderwijk, 'Benefits, Adoption Barriers and Myths of open data and Open Government', (2012) *Information Systems Management* 29(4) 258–268.

⁶⁸ Mark Bovens, 'Information Rights: Citizenship in the Information Society' (2002) *The Journal of Political Philosophy* 10(3), 317–341.

⁶⁹ Roy Peled and Yoram Rabin, 'The Constitutional Right to Information, (2011) *Columbia Human Rights Law Review* 42, 357–401.

1.5 Key Contribution of this Thesis

This thesis tackles one of the most critical sectors in the Nigeria public sector – public procurement, specifically because of the effect that this sector has on the general development of a country. The focus of the thesis is on determining how to ensure the procurement sector is achieving its goals and objectives, the biggest obstacle to this being the rampancy of corruption within the sector. The thesis argues that in order to reduce corruption, the focus needs to be placed on ensuring accountability in the stage before corruption – conflict of interest. It argues that in order to ensure accountability at the conflict of interest stage, horizontal accountability can be extremely beneficial, but in order to enjoy the benefits of horizontal accountability, it is important to understand how horizontal accountability works within the Nigerian public procurement process. The key contributions of this thesis are the creation of the TAM – a theory backed model as a horizontal accountability measurement tool; and a very thorough analysis on the accountability framework of the Nigerian public procurement process with a focus on the surrounding access to information legislations, which has been a hitherto unexplored gap in the research on Nigerian public procurement.

1.6 Conclusion

This introductory chapter has set out the aim of this thesis and the methodology that has been adopted for this research. It has provided foundational knowledge across the three thematic areas which the thesis straddles – conflict of interest, transparency and accountability, and access to information; and ultimately what contribution this thesis will make to the body of knowledge. Over the next five chapters this thesis will argue for the enhancement of horizontal accountability in the public procurement process in Nigeria, and it will do so by firstly identifying the current problems and loopholes faced within the public procurement process currently based on the public procurement legislation and other related legislation, the next step will be to introduce the TAM and explain its theoretically underpinnings and potential usefulness of the model to solving the horizontal accountability effectiveness problem. Finally, in the later chapters of this thesis, the TAM will be put to practical use to address some of the loopholes which have been identified as existing in the public procurement process. The TAM will highlight

where the structural and legislative shortcomings exist in the process, and using the TAM, this thesis will be able to provide suggestions and recommendations for improvement of the system, and ultimately the enhancement of horizontal accountability.

Chapter 2 - The Conflict of Interest Loopholes in Public Procurement Regulation in Nigeria

2.1 Introduction

In this Chapter we will discuss the current public procurement regulations in Nigeria and analyse the effect and effectiveness of these laws, regulations and codes vis-à-vis managing conflict of interest in the system. The laws created in Nigeria have several sections which deal with controlling and managing conflict of interest either frontally or tangentially, and it will be the aim of this chapter to identify and analyse structural deficiencies and loopholes within the system as it currently exists which militate against the goal of transparency and accountability, and further precipitates the problem of conflict of interest within the procurement process in Nigeria. Ultimately, this thesis argues that these loopholes are representative of the broader problem of the shortcomings and limitations of the current hierarchical accountability mechanism – *vertical accountability*, towards ensuring transparency and accountability within the public procurement process. It is only in adopting more tools to solve the problems, specifically by broadening the scope and efficacy of *horizontal accountability* that lasting solutions can be created for the improvement of the procurement process in Nigeria. This Chapter therefore serves to lay the groundwork on this discussion by either highlighting loopholes where vertical accountability is failing and would benefit from the introduction of horizontal accountability; or where horizontal accountability has been introduced but there are loopholes which limit its efficacy.

It is important to set out here, that this thesis will be analysing public procurement in Nigeria from the Federal level, and will not be looking at the various State processes that govern the procurement process, this is because of the sheer number of States in Nigeria – thirty-six, and the impracticality of being able to sufficiently analyse each one within the confines of this thesis. Therefore, any references made to State laws, regulations and procedures for public procurement will be made in passing and will not be subject to any in-depth analysis.

2.2 Brief History of the Nigerian Public Procurement System

As was briefly discussed in the introductory chapter of this thesis, the foundation of the current public procurement process in Nigeria is the Public Procurement Act 2007 (PPA). The PPA was created as a result of the Country Procurement Assessment Report (CPAR) carried out on the Nigerian procurement system which was done in 1999. The issues it discovered included lack of an agency specifically charged with regulating the procurement process, lack of an oversight body to control public procurement, lack of clarity and transparency in the use of Financial Regulations (FR)¹, proliferation and ineffectiveness of Tender Boards, lack of professionalism in procurement, lack of an effective piece of legislation regarding public procurement, and many more shortcomings in the process. The legal system for procurement operated through FRs, and it was one which was fraught with weaknesses and shortcomings, the CPAR identified numerous issues with the procurement process. Firstly, regarding the use of the FRs, it was outlined that the FRs had no details on the application of the tendering methods to be used, and this was largely left to the discretion of the purchasing public entity, there was no requirement in the FR for using standard bidding documents and different models of standard contracts were constantly used. The entire bid and contract process also had very little information or direction on guidance for things like bid opening in

¹ The Ministry of Finance was vested with the authority to issue 'Financial Regulations' (FR), which were essentially an internal set of rules for financial/economic control of the Federal administration and the activities of Tender Boards (TB), and regulations concerning the procurement process. On a State level, the process mirrored the Federal level, with the procurement regulations in the States consisting mainly of local Financial Regulations based on the Federal FRs, supplemented with circulars and guidelines from within the administration in the State governments. Each State had the authority to issue its own regulations concerning procurement, and while most State regulations were identical or similar to the Federal FR, this did not change the fact that the States could implement their own regulations independently of the Federal FR. Circulars and Guidelines regarding procurement issued by administrative bodies were used to supplement the FRs on procurement, this therefore meant a proliferation of circulars at different levels of government by different public bodies with the purpose of clarifying elements of the FR. The initial stage of the procurement process was the use of registration lists. In order to be eligible to bid for procurement contracts, it was a precondition to be registered at the Tender Board/Registration Board. This registration system was decentralised, with States having their own registration list and process, and even larger agencies having theirs as well. When deciding what procurement method to use, the general practice was to use three different variations of tendering methods – *direct placement, selective tendering, and open tendering*. The decision on what method to use was generally determined by individuals rather than as a result of criteria or fixed principles. There were also no clear rules for determining when advertisements should be used, FR No. 3406 provided a general clause on advertising of tenders, a Circular from the Ministry of Finance stressed the importance of advertising, but however left the decision of *when* and *how* to advertise up to the implementing units. There were no specific instructions on how bid evaluation should be organised and carried out. The process for bid opening was not regulated, bid opening in many cases was done in closed sessions. Also, the bid evaluation and award criteria were not usually described in detail in bidding documents, therefore there was a lack of transparency, parties entered negotiations of the contractual conditions on price bids, timeframes for performing the work, amount of advance payment etc. This procurement process was fraught with so many inefficiencies and loopholes for conflict of interest and corruption, and these inefficiencies were exploited at will by public servants involved in the procurement process.

terms of timing, location and participation, conditions of payment (advance payment and guarantee for advance payment, penalty for late payments etc.)² There were no provisions to guard against conflict of interest in the bid evaluation process, and therefore there was always the risk that a member of the evaluation committee on a tenders board could have very close connections with a bidder, with the ability to influence the committee member in the discharge of his/her functions.³

The CPAR determined that there was no centralised process for controlling the procurement process, each ministry or department was often a siloed procurement centre, with little or no oversight from an overarching agency, thus leading to a lack of transparency⁴. Another critical issue was the volatility and unstable nature of the process, because the FRs were merely administrative documents and not a Law or an Act of the legislature, they could be amended by the Minister of Finance unilaterally, sometimes to the detriment of suppliers/contractors, this process cultivated a climate of uncertainty about government contracts⁵. The process of using FR was also criticised because there was no central policy making entity in the area of public procurement and this was left to ad-hoc circulars issued by the Ministry of Finance (and in some cases the Presidency), and these FRs and circulars frequently did not contain any provisions for the filing of complaints concerning the public procurement process, there was no permanent body independent of the procuring entity where contractors/suppliers could file complaints regarding the procurement process carried out by a purchasing public entity, and the supplier/contractor had no alternative than to lodge a complaint with the same entity accused of wrongdoing. There was also a duplicity of tender boards, with each Department having its own tender board, and therefore there was no scope to take advantage of reduction in unit prices for bulk purchases at ministerial rather than departmental level. There was also no appropriate delegation of power and authority from politicians to the tender boards, as the politicians still effectively and operationally controlled the public procurement process⁶

² World Bank CPAR Vol 2 (2002) p 7

³ *ibid*

⁴ *ibid*

⁵ *ibid*

⁶ *Ibid* p 11

With all this as a background, the CPAR therefore recommended the introduction of a public procurement law, and the establishment of a public procurement regulatory body which would be independent of the tender boards with responsibility for the efficiency and effectiveness of the procurement function across the public sector with tasks including policy making, ensuring compliance with procurement laws by public entities, acting as an appeals body to deal with complaints from contractors/suppliers⁷. It also recommended that the Department Tender Boards be abolished and thresholds for approval by Permanent Secretary Department Heads revised, and the function be transferred to a Ministerial Tender Board (which would also replace the Federal Tender Board). In addition, the CPAR recommended that the professional procurement cadre within the civil service needed to be strengthened by increasing training resources and introducing a certification system, a specific code of conduct/ethics, and developing a comprehensive procurement manual based on the new law and regulations. Finally, the CPAR recommended that the government explore the potential for electronic procurement by implementing a pilot project to gain experience in the field and test how electronic procurement could be used to support transparency and streamlined procedures⁸. Pending the introduction of the public procurement law, the CPAR recommended some short term measures including the mandatory advertisement of tenders over a certain value, certainty for procurement method to be used in specific tenders, clear definition of bid evaluation criteria, provisions for interest payments to contractors for delayed payments, development of procurement plans to determine requirement of funds for various government agencies at different quarters during the fiscal year, amongst other recommendations⁹.

It is clear therefore that the state of the procurement framework prior to the year 2000 was one in which there was high level corruption, extreme conflict of interest, and a system that did not have proper checks and balances to prevent these issues. With such a state of affairs it is no wonder that the public duty of ensuring

⁷ ibid p 6

⁸ ibid p 23

⁹ Ibid p 10

transparency and accountability could not possibly be able to survive, let alone thrive.

Following the extensive review done by the CPAR and based on some of the recommendations, the Federal Government of Nigeria (FGN) issued three circulars¹⁰. These Circulars were the first concerted steps by the FGN to introduce a procurement process at the Federal level in order to plug the loopholes which the CPAR had identified. Apart from the issuing of the Circulars, the FGN set up the Budget Monitoring and Price Intelligence Unit (BMPIU), as an operationally independent body headed by a Senior Special Assistant to the President. The BMPIU was charged with the responsibility of overseeing the process for award of government contracts and procurements of goods and services, and in effect it acted as a sort of clearinghouse.¹¹ The BMPIU performed regulatory, monitoring, training and certification functions. These included setting standards on harmonised bidding and tender documents, undertaking procurement research and survey with a view to determining information needs and project costing, enforcing professional ethics and sanction of erring officers and professionals. Its certification functions included the certification of all federal-wide procurements. The BMPIU also created guidelines and procedures for the procurement of capital projects as well as associated goods and services, and it operated under a clear mandate, clear goals, and objectives. It was charged with harmonising existing government policies and practices on public procurement and updating them where necessary. This was to move from the duplicity of rules and functions that existed under the previous FR process. The BMPIU was also charged with establishing and updating pricing standards and benchmarks for all supplies to government across different departments and parastatals. The goal was that this would lead to uniformity in pricing on purchasing and reduce opportunities for fraudulent practices.

¹⁰ New Policy Guidelines for Procurement and award of contracts in Government Ministries/Parastatals (Circular F.15775 of 27th June 2001); Due Process Certification of Contracts (Circular TRY/A5&B5/2001 of October 2001); Guidelines for Implementation of Due Process Certification of Contracts (Circular TRY/A4/B4/2002/OAGF/TS/026/168 of 5th July 2002).

¹¹ The BMPIU was headed by Dr Obiageli Ezekwesili. It was in this position that she earned the nickname "Madam Due Process" for the work she led a team of professionals to do in attempting to sanitise public procurement at the Federal level in Nigeria. She later went on to be Minister of Mines and Steel and then subsequently Minister of Education in Nigeria. She is a former World Bank Vice President, and ardent campaigner for good governance. She was also a co-founder of Transparency International, and one of the pioneer Directors. She was an unsuccessful candidate in the Presidential Elections of the Federal Republic of Nigeria in 2019.

The BMPIU performed procurement audits and undertook the monitoring of capital projects where 50% of the contract sums had been expended. It conducted these audits to ensure that the project sums expended had been used judiciously before authorising the release of further funds. This monitoring function was critical in ensuring that government finances were not being spent on phantom projects and non-performing contract awards. The BMPIU's training and advisory functions included co-ordinating training programmes in order to build up institutional capacity and conducting regular public enlightenment programmes to sensitise various stakeholders involved in the public procurement process. However, the BMPIU was never set up to be a permanent institution or agency, it was always envisaged that it would be a transition agency that would be charged with midwifing a more comprehensive procurement regime, and to this end the BMPIU enforced due process procedures as precursors to the implementation of a new procurement regime.

In 2007, the National Assembly passed the Public Procurement Act, (PPA) 2007, this was Nigeria's first legislation dedicated solely to the procurement process and it revolutionised the procurement process in Nigeria. The law, as with many other procurement laws in developing and emerging countries around the world was modelled on the UNCITRAL Model Law on Procurement of Goods, Construction and Services, 1994. The PPA was created as a result of extensive consultation and research on the procurement regulations needs of Nigeria, initially led by the CPAR and then built upon by the activities of the BMPIU. The PPA amongst other things, established the Bureau of Public Procurement (BPP) as the federal agency in charge of managing the public procurement industry in Nigeria.

Regrettably, it appears that since the passage of the PPA in 2007, and its implementation in the years after, there has not been much improvement - at least in relation to the perception of corruption in the public procurement process in Nigeria. A review of the Transparency International Corruption Perception Index (CPI) over the last 11 years shows that in the years since 2007, Nigeria has not made any major gains in improving the perception of corruption in the system.

Year	Rank	Score
2007	147/179	2.2/10
2008	121/180	2.7/10
2009	130/180	2.5/10
2010	134/178	2.4/10
2011	143/182	2.4/10
2012 ¹²	139/174	27/100
2013	144/175	25/100
2014	136/174	27/100
2015	136/167	26/100
2016	136/176	28/100
2017	148/180	27/100
2018	144/180	27/100

Fig. 2.1 - Source: Transparency International¹³

While the CPI covers several sectors in a country, and not just public procurement, one of the main areas in which corruption manifests is in public procurement, therefore this data is still quite relevant and instructive. Corruption in the public sector is hugely dependent on the manipulation of the procurement framework and public financial management more generally, and the introduction of the PPA does not seem to have solved this issue as it is clear that public procurement in Nigeria continues to be plagued by corruption, fraud and unethical practices¹⁴.

It is therefore suggested that some of the reasons why the application of the PPA seems to have been ineffective lies in the loopholes which exist within the process, and the potential for exploitation by actors within the system. Therefore, the next few sections will analyse some of these loopholes.

¹² From 2012, Transparency International changed the scoring system from a scale of 1-10, to a scale of 0-100.

¹³ Transparency International Corruption Perception Index -< <https://www.transparency.org/research/cpi/overview>> accessed 1 November 2019

¹⁴ Sope Williams-Elegbe, 'Systemic corruption and public procurement in developing countries: are there any solutions?' (2018) *Journal of Public Procurement*. 18 pp. 131-147

2.3 Conflict of Interest Loopholes in the Nigerian Public

Procurement

In Nigeria, public officials are precluded from engaging or participating in any commercial transaction involving the federal government, its ministries, extra-ministerial departments, corporations where his/her capacity as a public officer is likely to confer any unfair advantage - pecuniary or otherwise on him/her¹⁵.

2.3.1 Personal Interest

The oft-cited illustration of a conflict of interest situation in public procurement is when the official has a potential personal financial gain in a procurement transaction. For example, the official has a proprietary interest in a company bidding for a contract, and therefore this is in conflict with the public duty of the official. The personal interest can be a financial or a non-financial benefit which the official stands to gain from the procurement transaction.

In understanding what a private interest might be in a conflict of interest situation, it should be noted that the issues which can lead to a conflict are not limited to pecuniary interests. Sometimes, the public official might have a private interest which benefits him/her in a personal capacity as a member of a class or group of people. For instance, if the public authority is considering separate bids to improve public facilities in separate locations. If the public official lives in one of the locations, it is possible that his/her decision making might be compromised, and so a conflict of interest could be said to exist. Although situations of personal non-financial interest are difficult to prove (and therefore difficult to legislate on), the existence of such interests must be acknowledged in this discussion. For such a personal interest to be classified as one which has the potential to conflict with the public duty however, it must be one which can have a direct influence on the public official. Instances of individuals who have used their private prejudices to guide their role in their official duties though difficult to prove, are not uncommon¹⁶, the motivating

¹⁵ Public Procurement Act (PPA) 2007 s 57(9) (Nigeria)

¹⁶ For instance, in the UK in the case of *Ladele v London Borough of Islington* [2009] EWCA Civ 1357 - Ms Ladele, who was a registrar for marriages, births, and deaths for the London Borough of Islington objected to being required to officiate at civil partnership ceremonies due to her Christian beliefs. This case illustrates how the private interests and public duties of public officials may sometimes come into conflict with one another. The courts held that her refusal to officiate the ceremonies was in breach of the Equality Act (Sexual Orientation) Regulations 2007, and the Borough's decision to compel her to officiate the ceremonies or face disciplinary action was valid.

factor does not necessarily have to be a personal financial interest, it can be driven by other motivations.

2.3.2 Network of Influence

Apart from personal interests, there are other interests which though not directly emanating from the public official could none the less be classed as a private interest. These types of interests are one step removed from personal interests, it is those instances in public procurement transactions where a family member, friend or acquaintance of the public official is involved either as a bidder/contractor or as someone who stands to benefit from the award of the contract. The interest here could be that a family member or friend might be involved with one of the companies bidding for a contract. Apart from in the obvious case of the immediate family members of the public official, there does not seem to be a hard and fast rule for deciding what kind of relationships will fall into this category and therefore be a private interest. For instance, would it be fair to classify extended family as falling under private interests? – uncles, aunts, nephews, nieces, family members by marriage etc. what about childhood friends who have no blood relationship but have such a close relationship as to effectively wield the same influence¹⁷? The answer is not clear, and that is probably why in the legislation there is no clear-cut guidance on it, but it is expected that it will be reviewed on a case by case basis. Unlike personal interests which is straightforward to legislate against, legislating against family and friends' interest is a bit more complicated, as most of the laws do not explain which types of relationships are covered. For example, the PPA provides that a conflict of interest would be one where a person has a '*direct or indirect... relationship with a bidder, supplier, contractor or service provider that is inherently unethical or that may be implied or constructed to be, or make possible personal gain due to the person's ability to influence dealings*'¹⁸. The Act however does not go into more detail about what a direct or indirect relationship may be, and this idea of a direct or indirect relationship is not expanded upon either in the Public Procurement Regulations¹⁹ or the Public Procurement Manual²⁰.

¹⁷ An interesting point to view this problem is from the theory of 'Three Degrees of Influence' - Christakis, Nicholas A.; Fowler, James H. (2009). *Connected: The Surprising Power of Our Social Networks and How They Shape Our Lives*. Little, Brown and Co.

¹⁸ PPA 2007 s 57(12) (b)

¹⁹ Public Procurement (Goods and Works) Regulations (PPR) 2007 (Nigeria)

²⁰ Procurement Procedures Manual for Public Procurement in Nigeria (PPM) 2011 (Nigeria)

It is relatively easy to proscribe commercial interests within the immediate family, an example of how this has been done is the law in New Jersey, in the USA which prevents public officials from knowingly transacting any business with himself, a member of his immediate family, or a business organization in which the public servant or an immediate family member has an interest while performing his official functions on behalf of a governmental entity²¹. The approach taken by the law here has been to specify which family relations are proscribed, rather than leave it ambiguous. However, legislating with a certain degree of certainty around what relationships outside of the immediate family should be proscribed is more difficult and the solution that has been adopted in most cases is to give a broad prohibition, and leave the details up to ethics and integrity codes, this is a more pragmatic and welcome approach.

2.3.3 Political Conflict of Interest

Another important type of conflict of interest which we need to discuss is *-political conflict of interest*. This is conflict of interest which arises after an elected candidate has accepted finance and funding from private individuals with the implied (or in some rare occasions express) understanding that preferential treatment would be afforded to the donor/contributor. It is arguably one of the most pervasive types of conflict of interest in democratic societies, and this is because awarding of contracts is the most effective currency which politicians can use to reward those who backed them financially during the election process²². This sort of conflict of interest has its ideological roots in the patron-client relationships which began in traditional feudal societies²³.

²¹ SNew Jersey Criminal Code s 2(c)

²² An example of this was witnessed recently in Nigeria in 2017 where a gubernatorial aspirant a political party in the forthcoming election in Anambra State, Hon. Tony Nwoye and his billionaire sponsor, Prince Arthur Eze, allegedly reached an agreement on how to share positions after the election. According to the purported agreement, the candidate allegedly agreed to allow Prince Eze have 10 commissioners, as well as 30 percent of the state's internally generated revenue, (IGR), if he won the election. Both parties allegedly signed a contract to this effect (drafted by a lawyer) - Yemi Itodo, 'Anambra guber: Alleged secret agreement between Tony Nwoye, Arthur Eze exposed' (*The Daily Post*, 25 August 2017) <<http://dailypost.ng/2017/08/25/anambra-guber-alleged-secret-agreement-tony-nwoye-arthur-eze-exposed/>> accessed 26 March 2018

²³ Shmuel Noah Eisenstadt Louis Roniger L, *Patrons, Clients and Friends: Interpersonal Relations and the Structure of Trust in Society* (Cambridge University Press 1984) - These relationships historically involved 'the *patron* providing *clients* with access to the land and basic means of subsistence and the clients reciprocating with a combination of economic services and social acts of deference and loyalty. The patron-client relationship has as its core characteristics - a combination of inequality and asymmetry in power with seeming mutual solidarity expressed in terms of personal identity and interpersonal sentiments and obligations; a combination of potential coercion and exploitation with voluntary relations and mutual obligations; and a

The political conflict of interest, which is a result of election funding, is broadly under the term 'political finance', which has a wider meaning to include finance to be used by political parties for their routine expenses, political education and policy research, costs of litigation etc. However, for the purposes of our discussion we will limit ourselves to the category which Pinto-Duschinsky²⁴ refers to as an *acceptance of money in return for an unauthorized favour or the promise of a favour in event of election to an office*. In his research he was able to learn of significant cases from twenty-eight (28) countries²⁵ where these allegations were made ranging from developed to developing countries²⁶. Fazekas and Cingolani in explaining what this manifestation of conflict of interest is, state that '*donating to election campaigns in return for public procurement contracts is a corrupt exchange which is widely considered as one of the most frequently used mechanisms (for corruption), and has in turn, received the highest scrutiny*'²⁷. Research has been carried out which has shown instances where election campaigns and public procurement contracts awards have intertwined, have been uncovered in diverse countries such as Czech Republic, Brazil, Italy, the USA, Romania, and Russia, however evidence in many of the cases are only suggestive²⁸. Research was carried out in 2011 and found that firms (in the USA) who made campaign contributions were on average awarded more additional contracts²⁹, the researcher was however quick to point out that the contractor-politician relationship is not generally a *quid pro quo*, but what campaign contributors get is access and a range of other intangible benefits. In Brazil, companies' campaign contributions translated into additional contracts won worth fourteen times more than the contributions³⁰, in Russia, companies with at least 5% revenue from procurement contracts increased their illicit political party financing

combination of emphasis on such mutual obligations and solidarity or reciprocity between patrons and clients with the somewhat illegal or semi-legal aspect of these relations

²⁴ Michael Pinto-Duschinsky, 'Financing Politics: A Global View', (2002) 13 Journal of Democracy', 4, pp. 69-86

²⁵ Antigua and Barbuda, Bahamas, Belgium, Brazil, Cameroon, Colombia, Croatia, Czech Republic, Ecuador, Germany, India, Italy, Japan, Mexico, Pakistan, Papua New Guinea, Peru, South Korea, Spain, Suriname, United Kingdom, United States of America, and Venezuela.

²⁶ The point needs to be made however that these were cases of allegations and not necessarily with proven convictions. Political campaign is an area rife with true and false allegations.

²⁷ Mihály Fazekas and Luciana Cingolani, *Breaking the cycle?: How (not) to use political finance regulations to counter public procurement corruption*, (2016) Working Paper series: GTI-WP/2016:01 < http://www.govtransparency.eu/wp-content/uploads/2016/06/GTI-WP2016_1_Fazekas-Cingolani_PolfinPP-corr_draft_160222.pdf> accessed on 1 November 2019

²⁸ n 24

²⁹ Christopher Witko, 'Campaign Contributions, Access, and Government', (2011) 3 Contracting, J Public Adm Res Theory

³⁰ Taylor Boas et al, 'The Spoils of Victory: Campaign Donations and Government Contracts in Brazil', (2014) Journal of Politics, 76(2), 415-429.

transfers by about half, a few weeks around elections and gained substantially more procurement contracts than their non-donating peers afterwards³¹. In Latvia, the effect of political contributions on public procurement contracts was viewed from a loss perspective, where companies whose campaign contributions were given to the ruling party which eventually lost the elections in 2002, lost roughly 30% of their revenues³².

Politics in Nigeria (and in fact round the world) is an expensive undertaking, and because the large majority of individuals may not be able to fund election campaigns themselves - as there is no substantial state funding for elections in Nigeria³³, they have to raise funding from outside sources. These outside sources see election funding as an investment (especially in countries where elections are not fought and won on ideological issues), and therefore the only reason why private citizens/companies would fund an election is to elicit a benefit, the only leverage the election candidates have is to grant favours for contract awards or appointment to positions if they are elected. Situating this therefore in the picture of public procurement, campaign contributors can use their funds as entry fees into the public establishment with the hope that they create relationships which facilitate better business prospects for the organisations. The private actors are therefore able to achieve access and influence over public procurement tenders through their political party or campaign contributions³⁴. To combat this, some jurisdictions have introduced legislation which prevents executives at financial firms that do business with the State from making contributions to politicians or political organizations that operate in the jurisdiction³⁵. The rationale behind this rule is therefore to prevent a situation where the campaign donor could become a corrupting influence on the public agency.

³¹ Maxim Mironov and Ekaterina Zhuravskaya, 'Corruption in Procurement and Shadow Campaign Financing: Evidence from Russia' (ISNIE Annual Conference, 2011)

³² Vyacheslav Dombrovsky, *Do Political Connections Matter? Firm-Level Evidence from Latvia* (No. 3). (Riga 2008).

³³ Okechukwu Eme and Nkechi Anyadike, 'Political Financing in Africa: A Comparative Study of Kenya and Nigeria: Proposal for Reform', (2014) 5 Mediterranean Journal of Social Sciences pp 22-34.

³⁴ OECD, *Financing Democracy. Supporting Better Public Policies and Preventing Policy Capture*, (OECD 2014).

³⁵ In the USA, Federal contractors are completely prohibited from contributing to federal election campaigns – Federal Election Campaign Act 1974. In the UK, political campaign funding is governed by the Representation of the People Act 1983 (RPA) and the Political Parties Elections and Referendums Act 2000 (PPERA). Donations to political parties can only be made by 'permissible donors', there are strict reporting requirements that donations of over £5,000 must be reported to the Electoral Commission.

In the analysis above this thesis has framed the more prevalent private interests that interact with the public duty in the Nigerian context which leads to a conflict of interest, next will be to drill down on a few of the specific legislations which have loopholes that facilitate conflict of interest.

2.4 Conflict of Interest Loopholes in General Legislations

While analysing the legislations on public procurement in Nigeria, the focus will be heavily on the PPA, however, where relevant, provisions of other related legislations will be analysed. Therefore, this section analyses a few provisions of other related legislations which have an impact on the public procurement process and the conflict of interest scenarios which have the potential to arise there.

2.4.1 Mandatory Asset Declaration

Under the provisions of the Nigerian 1999 Constitution, public officials are meant to complete asset declaration forms mandatorily, the asset declaration process involves completing the asset declaration form, swearing a declaration to its authenticity before a High Court Judge, and then submitting it to the Code of Conduct Bureau (CCB). The Fifth Schedule provides a Code of Conduct for public officers. In Section 11(1) it provides as follow:

11. *(1) Subject to the provisions of this Constitution, every public officer shall within three months after the coming into force of this Code of Conduct or immediately after taking office and thereafter -*

(a) at the end of every four years; and

(b) at the end of his term of office, submit to the Code of Conduct Bureau a written declaration of all his properties, assets, and liabilities and those of his unmarried children under the age of eighteen years.

(2) Any statement in such declaration that is found to be false by any authority or person authorised in that behalf to verify it shall be deemed to be a breach of this Code.

The above section from the Constitution seeks to ensure transparency in the Assets declaration of a public official, this is in line with the *United Nations Convention Against Corruption* which calls on State Parties to adopt asset declaration and

financial disclosure regimes for their public officials³⁶. By requiring that those holding office divulge their assets and interests before, during and upon leaving their tenure, any enrichment during that period can be monitored. Based on the provision of the 1999 Constitution, the Code of Conduct Bureau and Tribunal Act (CCBTA)³⁷ was passed in order to implement the Constitutional mandate. From a public procurement perspective, the requirement for assets declaration would be a pointer to a situation where there could be a conflict of interest, this is because it is presumed that the reference to *assets* in the declaration would include shares or other holdings which a public officer would have in a company. Mandatory declarations on the face of it are quite a useful tool, in a system where it is effectively set up, it would require people who want to take advantage of the system to go through elaborate means of hiding their interests, and it could also be used as a key piece of evidence when prosecuting a public official who has made a false declaration. Sadly, declaration alone will not solve the problem, and in fact some public officials might seek to avoid being found out by specifically using proxies. With respect to the provision in the 1999 Constitution above therefore, there are a number of loopholes which could be exploited.

Firstly, there is no requirement that the information be made public once the assets have been declared. Research suggests that while it is true that there is a positive correlation between public disclosures and government quality (which by definition includes lower levels of corruption), this only holds true when these disclosures are made accessible to the public and when the scope of the disclosures is comprehensive³⁸. In Section 3 of the CCBTA the functions of the Code of Conduct Bureau are listed as including receiving, retaining and examining assets declarations of public officials, and receiving complaints about non-compliance. There is no requirement that this information be made public. Public availability of asset information both deters officials from intentionally filing false declarations and encourages corrections for unintentional mistakes, moreover, it strengthens and facilitates citizens' involvement in reviewing the declarations for accuracy and

³⁶ United Nations Convention Against Corruption 2003, Article 8, paragraph 5; Article 52, paragraph 5

³⁷ Cap. C 15 LFN, 2004

³⁸ Simeon Djankov, Rafael La Porta, Florencio Lopez-de-Silanes, and Andrei Shleifer, 'Disclosure by Politicians', (2010) 2 American Economic Journal: Applied Economics 179–209

completeness. One study concluded that in some countries up to eighty percent of all declaration forms contain critical errors³⁹.

Secondly, in the CCBTA⁴⁰, the form for submitting the asset declaration is discussed, and crucially it does not include providing information about income, it only covers properties, assets and liabilities of public officials and their spouses and unmarried children under the age of twenty-one years. It should be pointed out that this section is largely a reproduction of Section 11(1) of the Fifth Schedule to the 1999 Constitution, however it introduces some discrepancy, in that the age for asset declaration for children of a public official is set at eighteen years old in the Constitution and is set at twenty-one years old in the CCBTA. It is this sort of uncertainty and lack of coherence that creates room for conflict of interest to exist. Further, the Constitution has not mandated the disclosure of *sources of income*. Therefore, theoretically a family member of a public official could be earning an income from a company, in some kind of capacity, where the company is connected to the public official's employer contractually and therefore a conflict of interest situation would arise. The fact that the Constitution only mandates disclosure of assets and does not include *income* is a loophole which unscrupulous public officials may look to exploit. The inclusion of income declaration into the requirement of declaration by public officials in the 1999 Constitution would be a big step in the right direction for compulsory disclosure. The fact that income is not specifically covered in the asset disclosure form is a red flag for any proactive disclosure process.

Under the Code of Conduct for Public Officers⁴¹ the word "assets" is defined as including any property, movable and immovable and incomes owned by a person, using that definition it would suggest that income should be declared, however a reading of the Asset Declaration Form would show that this is not the case. The Asset Declaration Form for public officers is contained in the First Schedule of the Code of Conduct Bureau and Tribunal Act, it asks public officers to complete the following 'details of assets' – *cash in hand, cash in bank (in and outside Nigeria), landed property*

³⁹ *ibid*

⁴⁰ CCBTA s 15

⁴¹ Fifth Schedule 1999 Constitution.

(in and outside Nigeria and how acquired), movable property or assets and how acquired, government securities and private securities (within and outside Nigeria), and finally details of assets/property of wife(ves) and children. It is clear therefore that the current Asset Declaration Form does not capture income of the public officers, and therefore theoretically a public officer could be drawing an income from a source which could create a conflict of interest in his/her daily role, but not been obliged to declare this income, as it is not covered in the Asset Declaration Form.

In conclusion, the 1999 Constitution and the CCBTA made pursuant to the Fifth Schedule of the Constitution lays a good foundation for enshrining transparency by creating the rule on mandatory asset declaration, however there are existing issues and loopholes which can be easily exploited, and these need to be addressed.

It should be noted that Nigeria is currently a member of the Open Government Partnership (OGP)⁴² and under its current Action Plan⁴³, it has committed to establish a *Public Central Register of Beneficial Owners of companies*⁴⁴. If this is achieved, this would go a long way to addressing the loopholes identified in this section.

2.4.2 Limited Access to Companies' Register

The Nigerian Companies and Allied Matters Act (CAMA) ⁴⁵ is the law that governs the registration of business, companies, and organisations in Nigeria. Under the Companies Regulations 2012 made pursuant to the CAMA, individuals are allowed to undertake a search on the file of the records kept with the Corporate Affairs Commission (CAC), to obtain the following information among others – the names of shareholders and the number of shares held by each shareholder, names of Directors, details of any secured creditors. This information is available but has an application process, and frequently there are instances of where the CAC might be

⁴² The Open Government Partnership is a multilateral initiative founded in 2011 that aims to secure concrete commitments from national and subnational governments to promote open government, empower citizens, fight corruption, and harness new technologies to strengthen governance. It currently has 79 members

⁴³ Nigeria Action Plan 2019-2021 <<https://www.opengovpartnership.org/documents/nigeria-action-plan-2019-2021/>>

⁴⁴ Commitment 6 Nigeria Action Plan 2019-2021.

⁴⁵ Cap. C20, Laws of the Federation of Nigeria, 2004

‘unable to find the file’ being searched. Currently online public searches can be conducted on companies, however the only information which is provided is the date of registration, and registered business address.

Therefore, the loophole that exist here is that in cases where there is need to confirm the identity of the owners of a company, and to determine whether or not a public procurement official (or any related person) is connected to the company, the confirmation process comes at a cost, and has a delay of up to a week. Therefore, this creates a barrier for confirming the individuals behind a company and creates a loophole for conflict of interest as it could deter members of the public who want to investigate awards to certain companies, the cost attached to the searches and the turnaround time for completion creates a barrier to accessing this information, and it is submitted that this barrier is a loophole.

2.4.3 Opacity in Election Campaign Financing

In Nigeria, under the provisions of the Constitution, political parties are mandated to file detailed annual statement and analysis of its sources of funds and other assets together with a similar statement of its expenditure with the Independent National Electoral Commission (INEC) who in turn are to submit to the National Assembly a report on the accounts and balance sheet of every political party every year⁴⁶. Subsequent to these provisions, the INEC released the Political Party Financial Reporting Manual⁴⁷ which is applicable to all registered political parties, and which they are bound to follow.

However this is not being followed in practice, in fact the most recent Political Party Audit Report is from the year 2011, and in that year, of the twenty-three registered political parties, only two had properly filed their annual reports⁴⁸, and there is no information about whether annual reports have ever been filed with the National Assembly. Also, under the Electoral Act 2010, the INEC is given the power to place

⁴⁶ 1999 Constitution s 225-226

⁴⁷ Independent National Electoral Commission: Political Party Financial Reporting Manual 2011 - <https://www.inecnigeria.org/wp-content/uploads/2018/10/Political_Party_Finance_Handbook.pdf> accessed 1 November 2019

⁴⁸ Independent National Electoral Commission: Political Party Audit Report - <<https://www.inecnigeria.org/wp-content/uploads/2018/10/EXECUTIVE-SUMMARY-REPORTS-FOR-ALL-POLITICAL-PARTIES-ACCOUNT-FOR-THE-YEAR-2011.pdf>> accessed 1 November 2019

limitations on the amount which can be contributed towards an election campaign⁴⁹, this has been set at N1,000,000 (One Million naira⁵⁰). The Electoral Act further provides⁵¹ that election expenses of a political party shall be submitted to the INEC in a separate audited return within 6 months after an election and such return shall be signed by the political party's auditors and counter-signed by the Chairman of the party and be supported by a sworn affidavit by the signatories as to the correctness of its contents. As with a lot of regulatory requirements, the willingness of the subjects of the regulation to comply is a factor of many things, primarily the ease of reporting, the sanctions for non-reporting, and finally the willpower of the regulator to enforce the rules and regulations.

The loophole here therefore is that the political parties are using the lack of any penalties for non-reporting as an avenue to avoid filing any reports to the INEC. In fact, in the case of political party and election campaign financing in Nigeria, arguably the most important is the sanctions for non-filing of annual reports, crucially the relevant section of the Electoral Act⁵² does not specify any penalty for non-compliance and therefore there is no incentive for the political parties to comply with the regulations. Further, it would appear that there has been a failure of the regulator – INEC, to ensure compliance by the political parties to their responsibility of filing proper returns. It is this lack of proper penalties for breach, and the tepidness of the enforcement, that creates the loopholes within the political financing regulations, as without reports there is opacity as to who is funding the political parties privately, if that information was made available there would be a way to identify if those funding the political parties have any interests in government contracts which are awarded by the political party in government.

2.5 Conflict of Interest Loopholes in the Public Procurement Act 2007

Under the provisions of the PPA, the procurement process is to be conducted by open competitive bidding and is to be done in a manner which is transparent, timely,

⁴⁹ Section 90 Electoral Act 2010 (Nigeria)

⁵⁰ S.91 (9) This is the equivalent of circa £2,000 (Two thousand pounds)

⁵¹ Section 92

⁵² Section 89

and equitable for ensuring accountability; with the aim of achieving value for money and fitness for purpose in a manner which promotes competition, economy and efficiency. Contracts must be awarded to the lowest evaluated substantially responsive bid⁵³.

Open competitive bidding is 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 needed⁵⁴. Bidding for procurement in Nigeria is carried out either by way of National Competitive bidding or International Competitive Bidding⁵⁵. The PPA also allows for other types of tendering in specific circumstances, these include *two stage tendering* where it is not feasible for the procuring entity to formulate detailed specifications for the goods/works/services to be procured, where the character of the goods or works to be procured are subject to rapid technological advances , or where the procuring entity seeks to enter into a contract for research, experiment, study or development⁵⁶; *restricted tendering* where the goods/works/services to be procured 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 what is to be procured⁵⁷; *request for quotations from suppliers/contractors* where the subject of procurement does not exceed a sum that is set out in the Procurement regulations⁵⁸.

The PPA was passed in 2007 to address a number of failings that existed in the public procurement process in Nigeria, and while theoretically the passage of the law would have seemed to have achieved that, the reality is that there are a number of loopholes which exist within the laws that have the potential to be exploited and are indeed being exploited by bad actors within the public procurement sector. We will now move to a discussion of some of the loopholes that exist within the Nigerian PPA.

⁵³ PPA 2007 s 16(17)

⁵⁴ PPA 2007 s 24(2)

⁵⁵ PPA 2007 s 25

⁵⁶ PPA 2007 s 39

⁵⁷ PPA 2007 s 40

⁵⁸ PPA 2007 s 41

2.5.1 Insufficient Oversight of Single Source Procurement

Under the current framework of procurement methods in Nigeria, single, direct and emergency procurement is permitted. Jointly, these procurement methods are referred to as *single source procurement*. In the PPA, single source procurements are sometimes referred to as "direct" procurement and "emergency" procurement⁵⁹. It can be defined as any procurement contract entered into without a competitive process. The PPA allows procuring entities under certain circumstances to engage in direct and emergency procurement⁶⁰, and while the availability of these procurement methods is not in and of itself a loophole, the loophole manifests itself when these procurement methods exist within a system without the proper oversight and safeguards. This creates a transparency and accountability risk, and a loophole that may be exploited by unscrupulous actors. The use of single source procurement is a potential area where there is the possibility of subverting a transparent procurement process. Direct and emergency procurement operate under a process that allows the procuring agency to unilaterally decide procurement awards to suppliers, within limited thresholds for direct procurement and with subsequent ratification for emergency procurement.

These provisions have been abused by actors within the procurement sector in Nigeria, and has led to the practice of *contract splitting* in direct procurement – whereby in order to circumvent the thresholds for prior review and approval, some procuring authorities split contracts into several lots, to avoid the regulatory review mechanism and in order to manipulate the processes for the award of those contracts, therefore making it difficult for the regulatory agency to track those contracts. Instances of illegal or unethical conduct would then only come to light where there is a complaint by a bidder in the procurement process, or during procurement audit of the procuring authority in question by its supervising Ministry that it reports to, or the BPP. This provides procuring authorities with a lot of latitude to manipulate processes for below threshold contracts⁶¹. An example of this

⁵⁹ Sope Williams-Elegbe, 'The Reform and Regulation of Public Procurement in Nigeria', (2012) 41 Public Contract Law Journal, 2 pp. 339–366

⁶⁰ PPA 2007 s 41-43

⁶¹ Sope Williams-Elegbe, 'Systemic Corruption and Public Procurement in Developing Countries: Are There Any Solutions?' (2018) 18 Journal of Public Procurement, pp. 131-147.

is when the Office of the Auditor-General of the Federal Republic of Nigeria, in its 2015 Audit Report accused the Ministry of Petroleum Resources of contract-splitting⁶², specifically the report stated that the Ministry, in the award of contract for the supply of office supplies, split the contract into smaller packages and awarded to four different companies in order to circumvent the Permanent Secretary's approval threshold.

With respect to emergency procurement, in March 2016, the Federal Government of Nigeria decided to take steps to cut down weeds around the village of Wachakal (in an area thick in the insurgent battle between the Nigerian Government and Boko Haram⁶³ terrorists) in order to stop flooding. This was done under a government agency established to help coordinate and lead efforts at rebuilding infrastructure and rehabilitate millions of victims of the *Boko Haram* insurgency that was devastating many communities in Nigeria's North East. A Senate Report indicted the Secretary to the Federal Government for awarding the contract to a company which he was a Director in, and had incorporated, but ceased to be a Director just a few weeks before the contract was awarded. He was suspended by the Federal Government after the Senate Report indicted him, and thereafter arrested by the special procurement fraud unit of the Economic and Financial Crimes Commission. He has been charged and the trial is ongoing⁶⁴.

To understand the scale of this problem of single source procurement, for the purposes of this thesis an analysis was conducted to determine the number of times direct and emergency procurement was being used in Nigerian Federal Procurement, this analysis was done using published data of Certificates of No Objection issued by the BPP in the years 2016 and 2017⁶⁵. In 2016, about

⁶² Michael Eboh, 'AuGF accuses Petroleum Ministry of Contract Splitting, Procurement Violation (Vanguard 19 September 2019) <<https://www.vanguardngr.com/2017/09/au-gf-accuses-petroleum-ministry-contract-splitting-procurement-violation/>> accessed 1 November 2019

⁶³ In the local Hausa dialect, *Boko Haram* means "Western education is forbidden." The Boko Haram militants mainly inhabit areas in the northern states of Nigeria, specifically Yobe, Kano, Bauchi, Borno and Kaduna and have been waging an insurgency marked by kidnappings, terrorist bombings, and invasion of village and towns since 2003.

⁶⁴ Guardian NG Editorial, 'Babachir Lawal: A Matter Of Honour' (The Guardian 4 January 2017) <<https://guardian.ng/opinion/babachir-lawal-a-matter-of-honour/>> accessed 1 November 2019; Alexis Akwagyiram, and Paul Carsten, 'In the weeds: How top official got tangled in Nigerian aid scandal' (Reuters 14 September 2017) <<https://www.reuters.com/article/us-nigeria-corruption-aid-insight/in-the-weeds-how-top-official-got-tangled-in-nigerian-aid-scandal-idUSKCN1BP1GA>> accessed 1 November 2019

⁶⁵ Bureau of Public Procurement – Certificates of No Objection, <<http://www.bpp.gov.ng/all-downloads/>> accessed on 1 November 2019

£700million of procurement funds was spent through direct or emergency procurement, this represents 25% of all procurement funds spent in that budget year. In 2017, the figure was just over £500 million which represented 11% of all procurement funds spent in that budget year. Those figures of single source procurement only represent the number for procurement awards where post award ratification is necessary by the BPP, one can only imagine the actual numbers when the figures for awards below threshold are taken into consideration, however there are currently no authorised sources where an accurate figure for this can be obtained. As can be seen from the statistics of the frequency with which single source procurement is being used, there is a real possibility that procurement processes like direct or emergency procurement which give seemingly unfettered fiat for the decision on which companies are awarded contracts creates loopholes for conflict of interest to operate unabated because of the lack of transparency and accountability.

The PPA already has a provision that prohibits contract splitting, specifically it provides that the splitting of tenders to enable the evasion of monetary thresholds set shall be an offence under the Act⁶⁶, and the PPA provides that when emergency procurement is used, this needs to be ratified by the BPP (where above the threshold)⁶⁷. The problem therefore is not one of legislation, but one of monitoring and enforcement. There are limited resources and agencies that can monitor the affairs of all government agencies, and it is only when information around public contracts is made easily accessible, that there can be better monitoring of issues like this.

Primarily this burden for monitoring procurement units is based on a hierarchical structure, first with the supervising Ministry in charge of the procuring authority, and concurrently on the Bureau of Public Procurement⁶⁸ and the Office of the Auditor General of the Federation⁶⁹ who are legally empowered to review the

⁶⁶ PPA 2007 s 58(4)(d)

⁶⁷ PPA 2007 s 43(4)

⁶⁸ Section 5(p) of the PPA 2007 provides that the BPP shall have the function of performing procurement audits and submit such report to the National Assembly bi-annually

⁶⁹ Section 85(2) of the Constitution of the Federation Republic of Nigeria 1999, provides that the Public Accounts of the Federation and of all Offices and Courts of the Federation shall be audited and reported on by the Auditor-General who shall

procurement and spending activities of the procuring agency, however, with the large number of agencies that are under the monitoring jurisdiction of those agencies, it makes it difficult for the monitoring to be as effective as possible. This is the critical drawback of a vertical accountability structure, when monitoring and enforcement is based on a strict hierarchical line of reporting, and there are too many agencies that report to the agency(ies) monitoring, then it becomes almost impossible for thorough monitoring, and leads to the use of monitoring techniques like random audits⁷⁰ to ensure probity.

2.5.2 Exclusion of Defence Procurement

The relationship between defence procurement, national security and attendant confidentiality concerns has resulted in a dearth of information on issues connected with defence. Information on defence procurement policy in Nigeria is unavailable, owing to the culture of secrecy that surrounded the military regimes that governed Nigeria until 1999. In addition, Nigeria's defence procurement policy is neither fully developed nor formalised⁷¹. Defence procurement in Nigeria comprises all the purchasing activities of the Ministry of Defence and includes the purchase of military hardware such as armoured fighting vehicles, artillery guns, arms and ammunition, combat aircraft, ships, missiles and software such as communication equipment, spare parts, general stores and military apparel. It also involves construction contracts to build artillery fields and accommodation for servicemen, as well as military training contracts.⁷² Therefore, defence procurement in Nigeria operates outside of the government civil procurement rules and is the joint responsibility of the Ministry of Defence and the armed services. Specifically, the PPA⁷³ provides that procurement of special goods; works and services involving national defence or national security are specifically excluded from the operation of its provisions, unless the President's express approval has been first sought and obtained.

submit his report to the National Assembly; and for that purpose, the Auditor-General or any person authorized by him in that regard shall have access to all the books, records, returns and other documents relating to those accounts.

⁷⁰ The BPP employs random audits for its monitoring role.

⁷¹ S. Williams, "The Development of Defence Procurement Policy in Nigeria and the Case for Reform" (2005) 14 Public Procurement Law Review, 153.

⁷² Ibid

⁷³ PPA 2007 s 15(2)

In public procurement systems the world over, the defence sector is generally treated as a special entity within government, often appearing exempt from the usual rules of scrutiny and oversight, this is often justified with reference to national security concerns⁷⁴. However, there still exist rules on how public procurement should be conducted, some countries have their defence procurement sit within the same regulations for general public procurement⁷⁵ or they have specific legislation passed for defence procurement⁷⁶. Therefore, even though the defence sector is viewed as a special sector by most countries, there still exists some sort of framework for the procurement process. The issue therefore is not the fact that the defence procurement process sits outside of the regular public procurement process – as stated by reference to other countries, this is very common, and is done for very cogent reasons – the issue is the fact that the process is plagued with a lack of transparency.

As stated above, defence procurement in Nigeria operates outside of the government civil procurement rules and is the joint responsibility of the Ministry of Defence and the armed services. Williams-Elegbe illustrates⁷⁷ the non-standardised nature of defence procurement in Nigeria, stating that defence procurement as conducted by the Ministry of Defence and the individual services differ in practice in several respects. Within the Ministry of Defence, requests for procurement are sent by the Defence Equipment Evaluation Committee of a particular service to the Procurement Standing Committee in the Ministry of Defence, which co-ordinates defence procurement and reviews the proposal before award procedures are undertaken and the contract is awarded. In addition, if the acquisition exceeds a certain limit, the Procurement Standing Committee will submit the request to the Minister of Defence, who may bring it before the Federal Executive Council for approval.

However, where acquisitions are to be conducted solely within the remit of one of the armed services, a different procurement structure is utilised – each armed

⁷⁴ Mark Pyman, Regina Wilson and Dominic Scott, 'The Extent Of Single Sourcing In Defence Procurement And Its Relevance As A Corruption Risk: A First Look', (2009) 20 Defence and Peace Economics, 3, pp. 215-232

⁷⁵ This is the case for Australia, Italy, and Norway

⁷⁶ This is the case for the following countries – India, the United Kingdom, South Korea, Sweden, and the USA.

⁷⁷ Ibid p. 5

service having their own unique structure. For instance, in the Nigerian army, the procurement requests are usually initiated by the user unit through a formal request to the Army Headquarters. These procurement requests are received by the army's Defence Equipment Evaluation Committee, which tries to ensure the standardisation of proposed procurements with existing systems and based on the nature of the procurement, determines where the request is forwarded to. Procurement of hardware is the responsibility of the Department of Army Policy and Plans (DAPP) and therefore requests that fall under this category are passed to the Chief of Policy, while the procurement of in-service support items is the responsibility of the Department of Army Logistics (DOAL) and therefore requests here are passed to the Chief of Logistics. Once the necessity for the proposed equipment is established, the Army Procurement Planning Committee takes over responsibility by making a call for tenders and issuing guidelines on which the contract will eventually be based. Once the committee has completed its functions, the ultimate decision on whether or not to enter into a contract with the chosen supplier rests with the Chief of Army Staff.

There is no binding legislation or regulations that cover defence procurement in Nigeria, and the procedures discussed above are largely ad-hoc with conflicting policy documents and unpublished and frequently classified non-binding administrative guidelines. Therefore, defence procurement is largely conducted by means of procedures known only to Ministry of Defence officials. It is this secrecy and lack of transparency in the defence procurement process that has created a loophole which can, and has been, exploited by bad actors in the public procurement process in Nigeria. A report in 2017 by Transparency International⁷⁸ showed that as extra-budgetary spending on counterterrorism in Nigeria has increased in the last several years due to the insurgency war against Boko Haram, this has led to an increase in the scale and scope of corrupt opportunities in the defence sector resulting in a corrupt war economy that incentivises high ranking officials and security personnel to perpetuate conflict for personal gain. In 2015, the Presidency set up two temporary audit committees: one investigating spending by the Office of

⁷⁸ Weaponising Transparency: Defence Procurement Reform as a Counterterrorism Strategy in Nigeria. Transparency International (2017)

the National Security Adviser and another one investigating defence arms and equipment procurement. The reports by the Committees led the Vice President to declare that \$15 billion had been stolen in arms procurement fraud⁷⁹ between 2007 and 2015, the individuals who have been implicated and are currently on trial for the allegations of fraud include the former National Security Advisor, the former Minister of State for Finance, and the former Chief of Defence Staff⁸⁰ who was killed in an unrelated incident before the completion of the trial against him⁸¹.

This area is therefore an area which needs to be strengthened within the procurement process in Nigeria, and the loophole needs to be closed. As can be seen from how the instances of procurement fraud were discovered within the Nigerian defence sector, it is clear that there were no sufficient institutional safeguards for the sector. The most practical step to try to plug this loophole would be for regulations around defence procurement be created to set standards for the sector. However, the underpinning problem is the lack of transparency which has been entrenched in the sector, and the conditional accountability mechanisms. These are the core issues which need to be addressed, and it is these sorts of issues which horizontal accountability, would be able to address. From the example of fraud that was discovered in the defence procurement process in Nigeria, it is instructive that it was only discovered after an *ad-hoc* committee was set up, a clear indication of a failing within the vertical accountability mechanism. A horizontal accountability mechanism if properly put in place could have been able to identify the fraud in the system earlier and been more effective in bringing it to light.

2.5.3 Unclear Debrief Procedure

The PPA provides the mandatory obligation on the procuring entity to debrief losing bidders who request a debrief⁸², in other words a losing bidder may request to be

⁷⁹ Felix Onuah, Alexis Akwagyiram and Richard Balmforth, 'Nigeria's Vice President says \$15 billion stolen in arms procurement fraud', (Reuters 2 May 2016) < <https://in.reuters.com/article/nigeria-corruption/nigerias-vice-president-says-15-billion-stolen-in-arms-procurement-fraud-idINKCN0XT1UK> > accessed on 1 November 2019

⁸⁰ Ade Adesomoju, 'N3.97bn fraud: Badeh's company pleads guilty to charges, forfeits \$1m, Abuja houses to FG', (The Punch 4 March 2019) <<https://punchng.com/alex-badeh-loses-six-properties-1m-as-court-terminates-charges/>> accessed 1 November 2019

⁸¹ Fidelis Mbah, 'Nigeria's former defence chief killed amid growing insecurity', (Aljazeera 19 December 2018) <<https://www.aljazeera.com/news/2018/12/nigeria-defence-chief-killed-growing-insecurity-181219070104869.html>> accessed 1 November 2019

⁸² PPA 2007 s 19(e)

informed about the reason for the decision that was reached, and the procuring entity is obliged to provide this debrief. While this is a very welcome provision, a loophole however exists, in that the Act does not specify the manner in which the debrief should be carried out. The Act does not specify whether debriefs should be done in writing or orally, it also does not state the extent of the information which should be included in the debrief. The importance of a debrief is critical especially in bids where there may have been irregularities, the information provided in the debrief could provide evidence of the irregularity, and thereby give the losing bidder the evidence necessary to request for a review of the bid process.

The effect of this lack of clarity around the right to request a debrief is very apparent in the procurement process when one analyses the petitions which have been put before the BPP - the organisation which has the role of receiving complaints about the procurement process. In the most recent information shared by the BPP concerning petitions which were filed in 2017⁸³, a total of five hundred and seventeen (517) petitions were filed and of this number, one hundred and twenty five (125) of these petitions were made by contract bidders who had referred their complaints to the BPP for various reasons around improper debriefing, ranging from non-responsiveness of procuring entities when a debrief request was made⁸⁴, to instances where debriefs were only provided verbally by the procuring entity⁸⁵. Clearly some clarity and guidance is needed on this issue of debriefs if almost 25% of the petitions being filed are for complaints around debriefs. This lack of clarity on debriefs goes to the heart of the transparency and accountability issue - ideally the PPA (or the regulations made pursuant to it) should have gone into some detail about what information would be provided and how this would be done, it should at a minimum inform the losing bidder about the selection criteria, the score of the losing bidder being debriefed, the reasons for the losing bidder's score, the score of the selected bidder, and the name of the selected bidder.

⁸³ Bureau of Public Procurement Petition Reports : <<http://www.bpp.gov.ng/petition-reports/>> accessed 26 February 2019

⁸⁴ *Petition by MII Justice Advocate on behalf of Rhazeta filed against Federal Government college Vandeikya* (No. 110 BPP Petition Reports 2017)

⁸⁵ *Petition by Samdam Global Construction & Resources Limited and Netview Enviro Com Limited filed against National Commission for Refugees Migrants and Internally Displaced Persons* (Nos. 133 and 134 BPP Petition Reports 2017)

Williams-Elegbe⁸⁶ makes this point about the need for transparency in the debrief process when she discusses the need for the introduction of international best practice in Nigerian public procurement, stating that one of the hallmarks of this is transparency, and one of the requirements for transparency is for there to be opportunities for verification within the procurement decision making process, and this includes the opportunity for contractors to be given reasons why they were or were not selected for a contract award. She argues that the current approach under the PPA does not fully meet the requirements of international best practice in two ways – firstly the giving of reasons to a losing bidder is of crucial importance in the maintenance of a robust procurement dispute resolution system, and in a system where bidders are not aware of the reasons why they were unsuccessful, they will also be unaware of any irregularities in the procurement process that may constitute grounds for review. Secondly, she states that where unsuccessful bidders are only notified of the outcome of the procurement process after the successful bidder has been notified and possibly after the conclusion of the contract, this denies them the possibility of instituting a challenge that could lead to a review of the contract award decision.

This loophole where unsuccessful bidders do not have a clearly defined right to a debrief goes to the heart of the problems around transparency and accountability, and is one of the issues which this thesis will address in the next chapters, specifically by advocating for a robust *horizontal accountability* mechanism which should empower the bidders and other stakeholders to hold a procuring authority to scrutiny when they exercise their decision making powers when contracts are awarded.

2.5.4 Unclear Bid Cancellation Procedure

The PPA 2007⁸⁷ allows the procuring entity to reject all bids, and to also cancel the process at any time in the public interest without incurring any liability to the bidders. Williams-Elegbe suggests that this provision essentially gives public

⁸⁶ Williams-Elegbe S, "A Comparative Analysis of the Nigerian Public Procurement Act Against International Best Practice" (2015) 59 Journal of African Law 85, pp. 92-93

⁸⁷ PPA 2007 s 28

officials carte blanche to cancel the procurement process if the process is not going in a way that favours a personal interest⁸⁸.

Bids can be cancelled because the goods, construction or services are no longer required at all; or where there was an irregularity in the original award procedure and the procuring entity intends to commence a new procedure, e.g. where the procuring entity has received no tenders at all ; or there has been some illegality in the award procedure⁸⁹. It would appear that the PPA subsumes all these instances that could lead to cancellations under the omnibus requirement that it must be in the public interest.

While this right of the procuring entity to both reject the bids, and to also cancel the process is not in issue. This power should not be exercised frivolously, this is because of the effect frivolous cancellations may have on suppliers - since they would have invested time and resources in the process. Repeated and especially frivolous cancellations could serve to undermine the confidence of potential contractors and suppliers in the procurement process and discourage future participation. Therefore, it is important to cancel a procedure only when there are cogent reasons for doing so. Arrowsmith⁹⁰ suggests that regulatory controls over the cancellation process – such as the need for higher approval or a requirement to give reasons for a cancellation – may help to ensure this.

The PPA uses the catch all ‘public interest’ for any justification of what a cogent reason for cancellation could be. The discretion to cancel a procurement may also, like any other discretion, be abused to favour particular suppliers. For example, a procurement could be cancelled, and a new procurement begun because a favoured supplier’s tender is not the best tender. In a recent procurement contract in Nigeria⁹¹, the BPP rejected the plan by the National Pension Commission (PenCom)

⁸⁸ Williams-Elegbe S, “A Comparative Analysis of the Nigerian Public Procurement Act Against International Best Practice” (2015) 59 Journal of African Law 85, p. 92

⁸⁹ Arrowsmith S. (ed.), *Public Procurement Regulation: An Introduction* (EU Asia Inter University Network for Teaching and Research in Public Procurement Regulation 2011) p.103

⁹⁰ Ibid

⁹¹ Tobi Soniyi, ‘BPP Rejects PenCom’s Move to Cancel PAS Project’, (Thisday 14 March 2018)

<<https://www.thisdaylive.com/index.php/2018/03/14/bpp-rejects-pencoms-move-to-cancel-pas-project/>> accessed 1 November 2019

to cancel the procurement process for the building of a Pension Administration System (PAS). PenCom under its previous Director General had awarded the contract to a company, and the BPP had issued a certificate of no objection to the contract award. However, the new acting Director General of PenCom, appeared uncomfortable with the contract and therefore wrote to the BPP seeking to cancel the contract citing *lack of funds* and *national interest*. The BPP rejected the request for cancellation stating that the project was in the national interest and that the funds were available as all that is required by the PPA is for the procuring authority to be able to pay up to 15% contract mobilisation fee⁹². In this instance, the BPP was able to prevent what could have amounted to an abuse of the discretion to cancel a procurement, as no cogent reason could be provided for why the procurement should be cancelled.

The example above highlights a situation where the BPP has acted in a proper manner and been able to forestall an unnecessary cancellation, however more certainty is required around the definition of *public interest*, in order to enable the BPP to be able to validly reject future ill-conceived cancellation requests, or cancellation decisions which have been carried out in opaque circumstances to obfuscate accountability. Clarification on what constitutes as *public interest* will provide a standard with which stakeholders can get involved in the accountability process by providing *horizontal accountability*, an explanation of the term would facilitate adequate monitoring in order to determine if the standard set has been met, and where it has not been met, would serve as a foundation of a request for a review.

Another important loophole to discuss with respect to the issue of cancellation of bids is whether the bidders in a bid that has been cancelled should be given the optional right to debrief as they would have if the procurement process was completed and they were losing bidders (even though there was no winner). It could be argued that the bidder who has spent substantial time, effort and costs in the bid process should at least be given the right to know why all the bids were rejected, or

⁹² It has been suggested in some quarters that the real reason behind the request for cancellation of the award was in order to conduct a re-tender process, and to potentially slot in a preferred alternate bidder.

why it was cancelled. The provision on debrief⁹³ of losing bids does not make a clear distinction between a losing bidder where the award was made, and a losing bidder where all the bids were rejected/the contract was cancelled, and therefore there seems to be no reason why a losing bidder in a contract award which all the bids were rejected/the contract was cancelled should not be entitled to a debrief. This lack of clarity has created a loophole where procuring agencies have decided not to provide a debrief if the procurement process has been cancelled. A debrief of the reason for the bids rejection/ award cancellation would enable the bidder(s) to be able to understand whether there were sufficient grounds to support such an action and if not, then there should be the opportunity to ask for a review of the decision to reject the bids/cancel the contract award.

It would appear however that irrespective of this lack of legislative clarity, in practice the BPP tends to uphold the right of a bidder to request a debrief in cases where the procurement has been cancelled. In the petition filed by *Etudo & Co against the Nigerian Maritime Administration And Safety Agency (NIMASA)*⁹⁴, the procuring agency – NIMASA, cancelled the procurement process for the provision of janitorial services and sundry works at the NIMASA Head office and Annex, the contract bidder expressed dissatisfaction with the cancellation of the procurement process and filed a petition with the BPP. The BPP directed that NIMASA provide the contract bidder with good grounds for the cancellation of the procurement process in line with the provision of Section 28(b) of the PPA, which states that the cancellation of the procurement process after bids have been received can only be done in the *public interest*.

2.5.5 Denial of Liability towards Bidders

Under the provisions of the PPA⁹⁵, a procuring entity does not have any liability to the bidders where all bids are rejected or when the procurement proceedings have been cancelled. With respect to the exclusion of liability for rejected bids/cancelled procurement, the problem with this provision is that it removes the concept of accountability, it does not qualify the exclusion of liability to certain situations.

⁹³ PPA 2007 s 19

⁹⁴ No. 225 BPP Petition Reports 2017

⁹⁵ PPA 2007, s 28

Williams-Elegbe adequately encapsulates this problem stating that the issue is that a procuring authority may do this without it being in the public interest and without giving a reason, noting that the provision essentially gives the procuring authority carte blanche to cancel the procurement process if the process is not going in a way that favours a personal interest⁹⁶. In fact, this actually seems to have been the situation that occurred in the Pencom instance discussed above⁹⁷, so it's not a hypothetical fear. This blanket exclusion from liability when all bids are rejected/procurement award is cancelled is not an ideal one. This is arguably unfavourable to the bidders, when companies put in bids for procurement works/goods, they do this in some cases at extremely great cost and expense, and therefore it can be viewed in some way as an investment. If they are made to lose their investment (through no fault of their own), then there should be some form of compensation envisaged in cases where the reason for the rejection of the bids or cancellation of the award is due to the fault of the procuring entity.

2.5.6 Refusal to grant access to Record of Proceedings

Under the provisions of the PPA, all procuring entities must maintain file and electronic records of all procurement proceedings made within each financial year and these records should be kept for a period of at least ten (10) years from the date of the award of the contract. However, it should be noted that the PPA specifically precludes the possibility of damages being awarded by the procuring entity to suppliers, contractors or service providers for damages owing solely to failure to maintain a record of the procurement proceedings as mandated. Members of the public who request access to the procurement records will be granted said access, but only to all unclassified procurement records. The only cost attached to this would be the cost of copying and certifying the documents plus an administrative charge. The records can only be made available after the procurement contract has been awarded or after it has been terminated without an award. However, a disclosure of the records prior to the award of the contract may be ordered by a competent court.

⁹⁶ Sope Williams-Elegbe 'A Comparative Analysis of the Nigerian Public Procurement Act Against International Best Practice' (2015) 59 Journal of African Law 85 pp. 92

⁹⁷ n 86

Another loophole exists here, in that the PPA provides that a procuring entity may refuse to disclose information when lawfully ordered to do so by a court, if its disclosure would be contrary to law; impede law enforcement; or prejudice legitimate commercial interests of the parties⁹⁸. The PPA in one fell swoop is giving the procuring entity the discretion to disobey a lawful court order where it feels it would fall under the exceptions mentioned above. It would seem logical that the appropriate forum to argue that a disclosure would be contrary to law; impede law enforcement; or prejudice legitimate commercial interests of the parties, is the court of law prior to the order for disclosure, and if those arguments have been made and rejected by the court, then the procuring entity should not be given the authority to still insist on it and refuse the court order. This section of the PPA therefore presents a big challenge to the concept of accountability, and in fact is unconstitutional as it is inconsistent with the provisions of the 1999 Constitution of the Federal Republic of Nigeria which gives the judiciary the power to adjudicate over matters, and makes decisions of the courts binding⁹⁹. Therefore, this loophole is one which erodes the creditability of the courts - one of the government institutions which is integral in the horizontal accountability system, and this is something which will need to be addressed in order to ensure effective horizontal accountability.

2.5.7 Gaps in the Bid Review Process

Under the provisions of the PPA¹⁰⁰, a bidder may seek administrative review for any omission or breach by a procuring or disposing entity under the provisions of the PPA, or any regulations or guidelines made under the PPA or the provisions of bidding documents. The only element that a complainant needs to prove to claim internal remedy is that the procuring or disposing entity has caused or allowed an omission or breach, contrary to the provisions of the PPA, subsidiary legislation made pursuant to the PPA, or bidding documents. The PPA does not require complainants to prove that they suffered or may suffer loss or injury because of the alleged breach or omission. Therefore, such breaches are actionable per se¹⁰¹.

⁹⁸ PPA 2007 s 38(3)

⁹⁹ 1999 Constitution s 287(3) - "The decisions of the Federal High Court, a High Court and of all other courts established by this Constitution shall be enforced in any part of the Federation by all authorities and persons, and by other courts of law with subordinate jurisdiction to that of the Federal High Court, a High Court and those other courts, respectively."

¹⁰⁰ PPA 2007 s 54

¹⁰¹ K Udeh, A Comparative Study of the Effectiveness of Bidder Remedies in South Africa and Nigeria, PhD Dissertation (2018) < <https://scholar.sun.ac.za/handle/10019.1/103274> >

A bidder who seeks a review of a procurement decision must make a request for administrative review to the procuring entity within fifteen working days from the date the bidder first became aware of the circumstances giving rise to the complaint or should have become aware of the circumstances, whichever is earlier. On receipt of the complaint, the accounting officer has fifteen (15) working days to review it and make a decision in writing.

Where a decision is not taken within that time frame or the bidder is not satisfied with the decision of the accounting officer, the bidder may within ten (10) days of the decision or lack thereof, make a further complaint to the BPP. Upon receipt of the complaint, the BPP must inform the procuring entity and suspend any further action by the procuring entity until the BPP has settled the matter. The BPP has the power to nullify in whole or part any unlawful act or decision made by the procuring entity, revise any improper decision by the procuring entity and substitute its own decision for such a decision, or dismiss the complaint. The BPP has twenty-one (21) days after receiving the complaint to make a decision and must state the reason for its decisions and remedies granted if any. Finally, if the BPP fails to deliver a decision within the stipulated time, or the bidder is dissatisfied with the decision of the BPP, the bidder may appeal to the Federal High Court within thirty (30) days of the receipt of the decision of the BPP or the expiration of the time stipulated for the BPP to deliver a decision. This process for bid review has been affirmed in the courts. In *AC Egbe Nig Ltd v. Director-General of Bureau of Public Procurement*¹⁰² the Federal High Court held that the court will not entertain any suit challenging a procurement decision of an entity unless a complaint has first been made to the accounting officer concerned and to the BPP as per the procedure contained in the PPA. This decision of the court is representative of the manner in which the BPP deals with requests for administrative review. For instance, in the Petition filed by *Sino Standard Global Ltd against the Ministry of Foreign Affairs*¹⁰³, the BPP advised the complainant to follow the complaint procedure by complaining to the procuring entity first before requesting an administrative review, as this was in line with the provisions of the

¹⁰² Suit No. FHC/B/CS/116/2010, Federal High Court, Federal Republic of Nigeria

¹⁰³ No. 215 BPP Petition Reports 2017

PPA. The grounds for review which a bidder can bring to challenge a procurement award include where it is alleged that there has been any omission or breach by a procuring or disposing entity under the provisions of the Act, or any regulations or guidelines made under the Act or the provisions of the bidding documents.

Now that an overview has been provided of the bid review process, the next sections will turn to the specific loopholes that exist within the bid review process.

2.5.7.1 Pre-award exclusion

One of the loopholes which exists in the bid review process is that it excludes a key part of the procurement process - the pre-award stage. There is no provision that deals with how complaints can be made with respect to the period before bids have been put in/or a selection has been made - Gordon¹⁰⁴ defines these sorts of complaints as 'protests'. This is important because the PPA¹⁰⁵ provides - *a bidder may seek administrative review for any omission or breach by a procuring or disposing entity under the provisions of this Act, or any regulations or guidelines made under this Act or the provisions of bidding documents*. What this provision seems to suggest is that only a *bidder* has the right to request administrative review or make a complaint, therefore if there are contractors who are unable to bid for a project e.g. in a case where selective tendering has been allegedly unfairly used, they would not be able to make a complaint as they are not '*bidders*' in the process. Udeh¹⁰⁶ opines that since the PPA does not exempt choice of procurement methods from review, it is arguable that the legislative intention is for contractors excluded by a wrongful use of procurement method to challenge it.

This uncertainty about who can bring an action for administrative review needs to be addressed. There is therefore the need to unequivocally broaden the base of who can request an administrative review, and to include those who may not necessarily have put in a bid. Allowing individuals who may not have put in bids to challenge decisions, is a way of improving horizontal accountability. A system that essentially

¹⁰⁴ Daniel Gordon, 'Constructing a Bid Protest Process: The Choices that every Procurement Challenge System must make' (2006) 35 Public Contract Law Journal, 3, pp. 427-445.

¹⁰⁵ PPA 2007 s 54(1)

¹⁰⁶ Ibid

creates limitations on who can bring an action or can seek redress for a procurement decision is one which limits the participation of stakeholders in the sector and hampers horizontal accountability within the procurement process.

An inclusion of contractors, who were unfairly excluded from a selective bidding process, giving them the ability to challenge an award and request for administrative review would be in line with the recommendations of the UNCITRAL Model Law 2011¹⁰⁷, wherein it states in the commentary to the implementation of Article 64 on the *right to challenge and appeal*¹⁰⁸, that this right should be based on a supplier's or contractor's claim that it has sustained loss or injury from non-compliance with the procurement law, and that the right be given only to suppliers and contractors (the term including potential suppliers or contractors, such as those excluded through prequalification or pre-selection). The Commentary to the UNCITRAL Model Procurement Law, however, suggests that only general members of the public, and subcontractors should be omitted from the ambit of the right to challenge.

2.5.7.2 Judicial Review

Under the PPA, in order for legal proceedings to be initiated against the BPP, there are certain requirements which must be met¹⁰⁹. No suit can be commenced against the BPP before the expiration of thirty days after written notice of an intention to commence the suit shall have been served upon the BPP by the intending plaintiff or his agent. The notice of intention to sue should clearly state - the cause of action; the particulars of the claim; the name and address of legal practitioner of the intending plaintiff; and the relief being sought. This requirement is quite common for lawsuits against government agencies in Nigeria, and it is known as a **pre-action notice**. Under Nigerian Law, where a pre-action notice is required before institution of a case, it is a condition precedent and if this is not met the jurisdiction of the court to entertain the matter cannot be validly invoked. The validity of such pre-action

¹⁰⁷ The United Nations Commission on International Trade Law Model Law on Public Procurement 2011. It contains procedures and principles aimed at achieving value for money and avoiding abuses in the procurement process. The text promotes objectivity, fairness, participation and competition and integrity towards these goals.

¹⁰⁸ *Guide to Enactment of the UNCITRAL Model Law on Public Procurement*, (United Nations, 2014)

¹⁰⁹ PPA 2007 s 14

notices has been upheld in various Supreme Court decisions in Nigeria¹¹⁰. It should be noted here however that there might be some uncertainty with respect to the exact time frame for when an action for review at the courts can be commenced. This is because the PPA states the review of the BPP's decision must be within thirty days of the decision of the BPP, or lack thereof. However, as was discussed above¹¹¹, the PPA mandates that a pre-action notice must be issued to the BPP before any challenge, and it is only after the expiration of thirty days that a case can be filed.

This approach presents a potential obstacle to remedies, and a loophole in the procurement process. The issue is whether a claimant can be disenfranchised by serving a pre-action notice to the BPP, and then upon the expiration of the notice, when the case is filed in court, the BPP then brings a motion for dismissal as the suit is out of time? An illustration of this goes thus – BPP issues a decision against Contractor A on Day 0, contractor decides to appeal to the courts and serves the BPP with a pre-action notice on Day 7, and due to the law on pre-action notice, Contractor A has to wait for thirty days to expire before he can bring a suit. On Day 38 he files a suit against the BPP at the courts, the BPP then raises a preliminary motion for dismissal claiming the suit is out of time. The lack of legislative clarity of both *Sections 14(1) and 54(7) of the PPA* has created a loophole which could be exploited by bad actors. This is because the ability to bring an action in court against the BPP is the ultimate exercise of the power to hold the procuring authority accountable and is a process which would emphasise the importance of horizontal accountability. A process wherein the path to accountability in court is confusing has a discernible impact on transparency and accountability.

Another loophole which exists in the Nigerian procurement process is as regards the fact that there is no provision in the PPA that a request for review by the court would grant an automatic stop on the execution of the contract by the winning bidder. The PPA¹¹² states that when a request for review is put forward by a bidder to the BPP, the BPP is to suspend any further action by the procuring entity until it

¹¹⁰ *Captain Amadi v. NNPC* [2000] 10 NWLR (Pt. 674) 76; *Nigercare Development Co. Ltd. v. Adamawa Water Board & Others* [2008] 5 M.J.S.C. 118

¹¹¹ n 100

¹¹² PPA 2007 s 54(4)(a)

has settled the matter, by doing this the PPA ensures that any decision reached by the BPP is not frustrated by the contract already having been executed. It preserves the rights of the complaining bidder. The BPP has the power to dismiss the complaint; nullify in whole or in part an unlawful act or decision made by the procuring entity; revise an improper decision by the procuring or disposing entity or substitute its own decision for such a decision¹¹³. When a bidder makes a request for administrative review and it is established that there was indeed a breach of the process, then the procurement process could be nullified, or the contract awarded to the bidder¹¹⁴.

The powers of the BPP to essentially provide interlocutory reliefs is quite clearly stated, but with respect to when reviews are made to the court there is no such specificity. It is suggested that the lack of a mandatory stay on the execution of the contract would mean that in a situation where an interlocutory injunction is not granted, if the court was to rule that there were defects in the procurement process, and the contract has already been executed (if it involves a simple purchase of goods), or is being executed (if it involves the award of construction works); the system would then be faced with the following choice of options: ordering a re-opening of the tender or awarding the contract in favour of the other party – which could cause substantial disruption to the procurement; alternatively of offering no relief, only a declaratory relief – this is based on the principle that the courts will not act in vain¹¹⁵; or finally of offering only monetary compensation for bid preparation costs and loss of earnings/lost profits. In order to avoid this situation, the appellant would have to specifically request that the court grant an interlocutory injunction pending the completion of the case. This interlocutory injunction would restrain the respondents from further action in the challenged procurement for a definite time or pending the final determination of the trial. The process for applying for this relief in the Federal High Court is contained in the Federal High Court rules¹¹⁶, and it is only granted where evidence shows that any delay in hearing it would entail

¹¹³ PPA 2007 s 54(4)(b)

¹¹⁴ PPA 2007 s 54

¹¹⁵ The legal principle is that the courts will not make an order which it knows cannot be enforced or will have no effect.

¹¹⁶ FHC Rules o34 r3(6)(b)

irreparable damage or serious mischief to the applicant. In addition, the applicant must furnish the court with a satisfactory undertaking as to damages¹¹⁷.

The loophole that exists here therefore is that because there is no specific mandatory stay of execution, the appellant would have to apply for one, and as this is a discretionary remedy – it could be rejected by the court, and if this happens then it could lead to a situation where a contract award could be manifestly unfair, but the bidder who takes the matter all the way to court could win the case, but still lose out because a stay of execution of the contract was not granted and the contract award has been executed by the time the case is concluded. Horizontal accountability implies that the system is able to hold the public officials to account, and also ensure that there is fairness to the parties involved, and this loophole could create a situation where a bidder could be robbed of the most appropriate relief for an illegal award by the procuring entity.

A mandatory stay of execution of a contract award pending a judicial review/appeal, is in line with international best practice, as evidenced by Article 65 of the UNCITRAL Model Procurement Law 2011, which contains the model provision dealing with the *effect of a challenge*. The article provides:

“1. The procuring entity shall not take any step that would bring into force a procurement contract or framework agreement in the procurement proceedings concerned...

(c) Where it receives notice of an application or of an appeal from the [name of the court or courts]

2. The prohibition referred to in paragraph 1 shall lapse ... working days [the enacting State specifies the period] after the decision of the procuring entity, the [name of the independent body] or the [name of the court or courts] has been communicated to the applicant or appellant, as the case may be, to the procuring entity, where applicable, and to all other participants in the challenge proceedings.

¹¹⁷ FHC Rules Order 26 r 7(2); *Kotoye v CBN* (1989) 1 NWLR (Pt 98) 419 422-423 SC; *Obeya Memorial Hospital v AG Federation* (1987) 3 NWLR (Pt 60) 325 SC; *Olowu v Building Stock Limited* [2004] 4 NWLR [Pt 864] 445.

3. (a) The procuring entity may at any time request the [name of the independent body] or the [name of the court or courts] to authorize it to enter into the procurement contract or framework agreement on the ground that urgent public interest considerations so justify;"

The Guidelines to the UNCITRAL Model Law¹¹⁸, explains that this is to prevent the entry into force of a procurement contract or framework agreement while a challenge or an appeal remains pending. Thus ensuring that the challenge or appeal cannot be nullified by making an award a *fait accompli*, and that the procuring entity should be prohibited from taking any step to bring a procurement contract (or framework agreement) into force where it receives an application for reconsideration or is notified of a challenge or an appeal by the independent body or courts. This is not the case with the legislation in Nigeria, as there is no express stay on execution of the contract when an appeal is made to the courts, and therefore this is a loophole within the procurement system.

2.5.8 The Many Shortcomings of the NCPP

The PPA 2007 established¹¹⁹ the National Council on Public Procurement (NCPP) made up of twelve members¹²⁰, and it gives the President the power to appoint members of the Council¹²¹. Essentially the NCPP is a permanent overarching body at the Federal level charged with the overall oversight function of the procurement process in the country. It is therefore arguably the most important oversight body in the procurement process to which everyone is accountable. In this section we will discuss some of the many issues which exist around this Council, and how loopholes have thrived in the wake of its introduction into the PPA.

¹¹⁸ n 99

¹¹⁹ PPA 2007 s 1

¹²⁰ Six full time members - the Minister of Finance, the Attorney-General and Minister of Justice of the Federation, the Secretary to the Government of the Federation, the Head of Service of the Federation, the Economic Adviser to the President, and the Director General of the Bureau of Public Procurement (BPP) – who is the Secretary to the Council; and six part-time members who represent various interests including the Nigeria Institute of Purchasing and Supply Management; the Nigeria Bar Association; the Nigeria Association of Chambers of Commerce, Industry, Mines and Agriculture; The Nigeria Society of Engineers; Civil Society; and the Media.

¹²¹ PPA 2007 s 1(4)

2.5.8.1 Delay in Constituting the NCPP

The first and most important issue that needs to be addressed is the fact that since the PPA was enacted in 2007, the NCPP is yet to have been constituted. The duty for constituting the NCPP rests with the President of the Federal Republic of Nigeria, and in the period since the PPA was passed in 2007 no President has exercised this duty¹²².

It would appear that the Presidency has exploited another loophole within the PPA - the PPA provides that the Chairman and other members of the Council shall be appointed by the President, however the PPA unfortunately does not specify a time frame within which the President must appoint the members of the NCPP. From the composition of the members it is also clear that the NCPP is an important body for introducing some level of horizontal accountability into the procurement process, by mandating that citizens (the 6 part-time members) should be members of the body, thereby giving them some powers over the process.

In fact, this level of involvement is similar to what Lodge and Stirton¹²³ refer to in their characterisation of the worldview – *citizen empowerment*. This worldview places importance of accountability through forum devices and suggests that accountability and transparency are about reducing social distance and relying strongly on group-based processes, advocating maximising input-oriented participation and the placing of maximum scrutiny of anyone with discretionary power. Involving the citizens in the NCPP can be regarded as the ultimate level of citizen empowerment within the procurement process in Nigeria by essentially including them in the vertical accountability system which the NCPP sits in, therefore, on the face of it, the creation of an overarching body set up to monitor the procurement process and create policy would appear to be a laudable step towards managing issues in the procurement process like conflict of interest.

¹²² There have been 3 different Presidents since 2007 - 2019

¹²³ Martin Lodge and Lindsay Stirton, 'Accountability in the Regulatory State' in Robert Baldwin, Martin Cave, and Martin Lodge (eds.), *The Oxford Handbook of Regulation* (Oxford University Press 2010)

There have been repeated calls¹²⁴ for the NCPP to be constituted, and in fact, a recent document¹²⁵ authored by the Bureau of Public Service Reforms¹²⁶ urged the Federal Government to expedite the work to constitute the NCPP in line with the PPA, but these calls have gone unheeded. Udeh¹²⁷ makes the point that the fact that the NCPP has not been constituted, does not mean it does not legally exist. He argues that by virtue of the fact that the PPA establishes the NCPP, it has a legal existence even though it has not been constituted. He points to the opinion of the court in *Cupero Nigeria Limited v Federal Ministry of Water Resources*¹²⁸ which stated that although the NCPP is yet to be constituted, it is a misconception to opine that it is non-existent or not established.

Since the NCPP has not been constituted as mandated by the PPA, the functions of the NCPP are currently being carried out by the Federal Executive Council (FEC)¹²⁹. The question then is what can be done to get the NCPP constituted, and the most straightforward and obvious solution would be for the President to constitute it, however it is apparent that the President does not have an urgent inclination to constitute it¹³⁰, therefore there needs to be more pressure for this power to be exercised. Apart from putting *soft* pressure on the Presidency to exercise this function, another option is to seek legal means to mandate that this is exercised. The pertinent question to ask at this juncture therefore is whether the President can legally refuse or delay the constitution of the NCPP.

¹²⁴ Jacob Olatunji, 'BPP operating illegally -Reps Give Jonathan 21 days ultimatum' (*Procurement Monitor*, 30 November 2011) <<http://www.procurementmonitor.org/blog/page/2/>> accessed 2 June 2017; Victor Emejuiwe, 'Set up Public Procurement Council, now' (*The Nation Newspaper*, 16 November 2015) <<http://thenationonline.net/set-up-public-procurement-council-now/>> accessed 2 June 2017; Martins Olojo, 'Where is Nigeria's Public Procurement Council?' (*The Guardian Nigeria Newspaper*, 17 September 2016) <<https://guardian.ng/opinion/where-is-nigerias-public-procurement-council/>> accessed 2 June 2017; Sani Tukur, 'Buhari joins Jonathan, Yar'Adua to violate Nigerian law on public procurement' (*Premium Times Newspaper*, 27 December 2016) <<http://www.premiumtimesng.com/news/headlines/219033-buhari-joins-jonathan-yaradua-violate-nigerian-law-public-procurement.html>> accessed 2 June 2017; Editorial, 'Constitute the Procurement Council now' (*Vanguard Newspaper*, 4 January 2017) <<http://www.vanguardngr.com/2017/01/constitute-the-procurement-council-now/>> accessed 2 June 2017

¹²⁵ Joe Abah, 'Nigeria: What is Working and What is Not?' (*Bureau of Public Service Reforms*, 7 February 2017) <<http://bpsr.gov.ng/index.php/publications/bpsr-resources/evaluations?download=90:what-is-working-and-not-working-in-nigeria>> accessed 2 June 2017

¹²⁶ The Bureau of Public Service Reforms is a body established by the Federal Government to initiate, coordinate and ensure full implementation of public service reforms in Nigeria.

¹²⁷ Kingsley Tochi Udeh, *Nigerian National Council On Public Procurement: Addressing The Unresolved Legal Issues* (2015) 2 APPLJ 1

¹²⁸ FHC/ABJ/CS/867/11.

¹²⁹ This is the Cabinet of Ministers of the Federal Republic of Nigeria and are political appointees of the President who report to the President directly.

¹³⁰ There has been no official communication from the Presidency as to the reason for the refusal to constitute the NCPP

The answer to that question will depend on the interpretation of the wording of the relevant section of the PPA¹³¹ which states that the members of the Council *shall* be appointed by the President. In the case of *Ugwu v Ararume*¹³², the Nigerian Supreme Court held that the word "shall", in its ordinary meaning is a word of command which is normally given a compulsory meaning because it is intended to denote obligation. Therefore, if that decision is to be applied, then there is an obligation created on the President to constitute the NCPP. The challenge therefore exists in determining the best course of action to compel the President to so act. A Nigerian non-governmental organisation – the Centre for Social Justice stated that it sued the President in order to compel the constitution of the NCPP, however the suit was struck out by the courts¹³³

This issue of the non-constitution of the NCPP is a wilful action of the Presidency not to act, and by so doing prevent proper monitoring and accountability by the NCPP as envisaged by the PPA. If horizontal accountability is enhanced in the system, and the duty placed on the President is enforced through the proper channels, it would not only strengthen the vertical accountability system – as the NCPP as a body, sits at the top of that system, but it would also enhance horizontal accountability at a certain level, by including the part-time members within the accountability framework.

2.5.8.2 Clarification of NCPP *Part-Time Members*

Flowing from the point discussed above on the need for the NCPP to be constituted, another distinct loophole that exists in the provisions concerning the NCPP, is the fact that there is no qualification on how the part-time members of the NCPP can be appointed (once the NCPP is finally constituted). The President seems to have the power to appoint whomever he/she decides, and the only qualification here is that they be a member of the relevant organisation. There is no requirement that they be public procurement experts or have any specific relevant experience.

¹³¹ PPA 2007 s 1

¹³² (2007) LPELR-3329(SC)

¹³³ Centre for Social Justice Blog, < <https://csj-ng.org/programmes/public-finance/public-procurement/>> accessed on 17 February 2020

It is submitted that one of the goals of the NCPP and the reason why there are diverse officers who are to be appointed to the NCPP is to ensure probity and diversity of opinions, in fact it is this inclusion of individuals who are outside of government which engenders horizontal accountability and provides for *citizen empowerment* as envisaged by Lodge and Stirton¹³⁴. Therefore, in order for there to be unbiased citizen involvement and representation in the NCPP, it is suggested that the definition of certain members, the qualification for appointment, and the nomination process needs to be reviewed with the goal of enhancing horizontal accountability. Below are some thoughts on how the part time members to be appointed into the NCPP can be chosen by the President, in a transparent manner, and in a manner, which enhances their independence and therefore leads to more effective vertical accountability, and more improved horizontal accountability.

- **Regulated Members**

Under the provisions of the PPA, one part-time member is to be chosen to represent each of the following organisations – the Nigeria Institute of Purchasing and Supply Management, the Nigeria Bar Association; Nigeria Association of Chambers of Commerce, Industry, Mines and Agriculture; and the Nigeria Society of Engineers¹³⁵. As all these organisations are regulated, a possible solution is that the members be nominated by the heads of those bodies. For example, the member representing the Nigerian Bar Association (NBA) would be someone who has either been elected internally by the NBA to hold that position or been selected by the NBA President (in conjunction with the Executive of the NBA) to sit on the Council and represent the NBA's voice.

- **Civil Society**

The PPA states that one of the members of the NCPP will be a representative from *civil society*¹³⁶, it should be pointed out that this term is quite vague. The PPA does not define what *civil society* means, however if we were to use the definition of civil society as put forward by the United Nations, as comprising civil society

¹³⁴ n 112

¹³⁵ PPA 2007 s 1 (2)(f)(i-iv)

¹³⁶ PPA 2007 s 1 (2)(f)(v)

organizations and non-governmental organizations¹³⁷, then this would fall under the definition of organisations which have been validly incorporated under Nigerian law as Incorporated Trustees¹³⁸ established with social goals and missions. Unfortunately, as opposed to the other part time members of the Council, civil society is not organised within a regulatory framework specified under the Law, therefore if there is no synergy between the civil society groups, anyone who runs a civil society group could potentially be appointed by the President as a representative of the Council.

An effective way to approach this issue would be for it to be a process of nomination by civil society organisations which have already been shortlisted by the BPP. The BPP in one of its functions, periodically carries out a process of accreditation of Civil Society Organisations, the BPP accreditation process requests for information including evidence of the organisation's registration with the Corporate Affairs Commission (CAC), and details of the organization's work in public procurement, good governance, transparency and accountability. The accredited civil society organisations could then amongst themselves elect or nominate an individual to represent its interests on the NCPP.

- **Media**

As regards the membership of the *Media* on the NCPP as provided for in the PPA¹³⁹, same as with *civil society*, this term is not defined. Historically this would have referred to mainstream media like newspapers, radio and television stations. However, in this digital age it is arguable that new forms of media can and should be included, especially electronic media which would encompass online newspapers, blogs, etc. The fact that this area of the *media* is evolving so rapidly and has done so over the last couple of decades or so, necessitates a need for clarity on what the term *media* in the PPA would encompass. There are 2 separate media agencies in Nigeria which could arguably lay claim to the right of membership of the NCPP, there is the Broadcasting Organisation of Nigeria (BON) which is the organisation for TV and

¹³⁷United Nations, <<http://www.un.org/en/sections/resources-different-audiences/civil-society/>> accessed 19 February 2018

¹³⁸ Part C Companies and Allied Matters Act 2004

¹³⁹ PPA 2007 s 1(2)(f)(vi)

radio stations, and there is the Newspapers Agency of Nigeria (NAN) which is the organisation for newspapers and print media. There is therefore a need for this to be clarified.

2.5.8.3 Proceedings of the NCPP

A final point to make as regards the NCPP is that if/when the NCPP is finally constituted, there will be a matter of importance which would need to be addressed, either by amending the provisions of the PPA, or by creating internal regulations for the conduct of the NCPP as the PPA is silent on exactly what the voting process/regulations of the meetings of the Council will be. It does not state whether voting is by simple majority or whether a certain percentage of votes is necessary for decisions to be passed. Also missing is key information about how many members are needed for a quorum to be formed. This information is not only important but actually critical as it explains how valid decisions can be made by the Council, although it may be argued that since the composition of the board is twelve members (six full time and six part time), that a quorum may be achieved when there are seven members of the Council present, as it would be the number needed if decisions were to be made by simple majority, the fact that the PPA is silent on the numbers needed for a decision to be made makes the absence of any direct guidance on the number required for a quorum more glaring. It is suggested that this omission needs to be addressed quickly. Udeh¹⁴⁰ makes a valid argument when he points out that based on the provisions of the Interpretation Act¹⁴¹, in Section 27(1)(a) which states that *“where a body established by an enactment comprises three or more persons, then any act which the body is authorised or required to do may be done in the name of the body by a majority of those persons or of a quorum of them”*. Therefore as the PPA is silent on the proceedings for meetings, the provision of the Interpretation Act will come into play and therefore decisions by the NCPP must be taken by simple majority.

In other similar Nigerian legislations that were reviewed for this thesis, where a governing board or council was instituted, it was quite common that within the

¹⁴⁰ Kingsley Tochi Udeh, *Nigerian National Council On Public Procurement: Addressing The Unresolved Legal Issues* (2015) 2 APPLJ 1

¹⁴¹ CAP I23 LFN 2004.

legislation a schedule is annexed to it that sets out the manner in which proceedings need to be conducted. For instance, the *Infrastructure Concession Regulatory Commission (Establishment, Etc.) Act 2005*¹⁴² sets out in its schedule the proceedings of the Governing board, and amongst other things specifies how meetings should be held, the notices to be given, the keeping of minutes of its proceedings, the quorum of meetings, etc. Similarly, the *National Health Insurance Scheme (NHIS) Act 1999*¹⁴³ establishes a governing council, and sets out in the schedule to the Act, supplementary provisions relating to the council including issues like quorum, number of meetings per year, manner in which meetings are to be conducted, etc.

Therefore, it is clear that the creation of supplementary rules for governing boards or councils within the legislation that has established such councils or boards in Nigeria is not a strange occurrence, in fact it would appear that not having supplementary rules governing procedure for meetings is the rare occurrence. From a review of twenty laws¹⁴⁴ which have established governing boards or councils in Nigeria, all twenty of them had schedules within the legislation which had supplementary rules for the governing boards or councils.

It is important that the modalities for voting and for obtaining quorum in meetings of the NCPP be spelt out explicitly, as it is necessary for adequate monitoring by the citizens in a horizontal accountability system. Without clarity on the rules it is difficult for citizens to monitor whether or not the rules are being followed, and therefore is a limitation to effective participation in a horizontal accountability system. The lack of supplementary rules for the proceedings of the NCPP is therefore

¹⁴² The Infrastructure Concession Regulatory Commission (ICRC) was established in 2008 under the Infrastructure Concession Regulatory Commission (Establishment, etc) Act, 2005. The ICRC was established to regulate Public Private Partnership endeavours of the Federal government aimed at addressing Nigeria's physical infrastructure deficit which hampers economic development. The pioneer Governing Body of ICRC was inaugurated on 27 November 2008

¹⁴³ This Act established the NHIS which provides social health insurance in Nigeria where health care services of contributors are paid from the common pool of funds contributed by the participants of the Scheme.

¹⁴⁴ The laws reviewed were - *Infrastructure Concession Regulatory Commission (Establishment, Etc.) Act 2005*; *National Health Insurance Scheme Act 1999*; *National Oil Spill Detection and Response Agency (Establishment, Etc.) Act 2006*; *National Film and Video Censors Board Act 1993*; *National Hospital For Women And Children, Abuja (Establishment, Etc.) Act 1999*; *National Human Rights Act 1995, as amended in 2010*; *National Identity Management Commission Act 2007*; *National Information Technology Development Agency Act 2007*; *National Institute for Cultural Orientation Act 1993*; *Insurance Act 2006*; *National Lottery Act 2005*; *National Office for Technology Acquisition and Promotion Act 1992*; *National Orientation Agency Act 1993*; *National Steel Council Act 1979*; *Nigeria Export Processing Zones Act 1992*; *Nigerian Accounting Standards Board Act of 2003*; *Nigerian Export Promotion Council Act 1976*; *Nigerian Investment Promotion Commission Act 1995*; *Nigerian Minerals and Mining Act 2007*; *Nigerian Shippers' Council Act 1978*.

a loophole which has a potential to be exploited if/when the NCPP is finally constituted.

2.6 Conclusion

Through the course of this chapter, it was determined the advent of the PPA has not brought with it the promise of reduction in corruption levels that existed pre-PPA and pre-CPAR, the corruption levels have largely remained the same, as borne out by the data from the Transparency International Corruption Perception Index.

This chapter analysed the effect and effectiveness of the PPA vis-à-vis managing conflict of interest in the system and identified specific sections of the legislation which have created loopholes in the system and have been or could be exploited by bad actors in the system. It highlighted instances where these loopholes have been exploited and presented hypothetical scenarios where others could be exploited. The Chapter consistently pointed out areas where the adoption of horizontal accountability would be essential towards properly managing conflict of interest. Specifically, this chapter identified issues like the growing reliance of single source procurement methods, the opacity of defence procurement, the inherent unfairness of the bid redress mechanisms available in the procurement process, absolute immunity of procurement officers, and the issues surrounding the NCPP. The net effect of all these limiting sections and provisions in the PPA is that the system as set up does not adequately support the entrenchment of horizontal accountability as a tool to supplement vertical accountability.

This next chapter will identify exactly how horizontal accountability would be able to help in managing these loopholes and will narrow in on the specific structures which have to be in place for horizontal accountability to be implemented effectively.

Chapter 3 - A Theoretical Framework for Managing Conflict of Interest using Horizontal Accountability

3.1 Introduction

This Chapter will put forward the position that the current regulatory approach of public procurement in Nigeria is one which limits the efficacy of its stated policy goals of ensuring transparency and accountability in the procurement system. It identifies the current transparency and accountability framework within the procurement process, as one with a dual accountability framework - vertical accountability and horizontal accountability, with vertical accountability being the dominant system. It posits that in order to achieve the optimal level of transparency and accountability and for the procurement system to meet its lofty policy ambitions of ensuring transparency and accountability within the procurement process, it must change the approach to its regulatory framework. The solution advanced is that there is the need for the enhancement of horizontal accountability in the process, and this can only be achieved by improving access to information and strengthening the legal rights of the actors in the horizontal accountability system. Finally, it suggests a framework for assessing the effectiveness of horizontal activity within a procurement system.

3.2 Understanding Conflict of Interest in Nigerian Public Procurement

Public procurement is when the government enters contracts for goods/services. The public procurement official in that role, exists in order to facilitate these transactions which the government enters, therefore in exercising that function the public official is meant to keep the public duty as the paramount interest. In the introductory chapter to this thesis, the concept of conflict of interest was explained as having three elements - a *public duty* must be in existence; a *private interest* must be in existence; and finally, the private interest must have the *capacity to improperly influence the public duty*. To understand the concept of conflict of interest within Nigerian procurement, there needs to be a more nuanced understanding of both

concepts of public duty and private interest within the Nigerian context, and this is what the next few sections will provide.

3.2.1 The Public Duty in Public Procurement in Nigeria

Historically, in many societies in the past it was assumed that elected or non-elected public officials would take advantage of public office to promote their own personal interests, however, as democracy grew, and governments became accountable to the people, citizens began to demand that public officials discharge their duties in the public interest and with fairness and impartiality¹. Weber theorized that officials in a bureaucracy should receive a fixed salary, be graded by rank, and that their job be their sole occupation, with the understanding that the role is not to be exploited for emoluments or rents², further signalling a departure from earlier periods. In modern day governance, public officials have a duty – a public duty, to which they must adhere to in performing their functions. In exercising this public duty, they are to do so without influence from any private interests. It is where there is an interference with this public duty by a private interest, that a conflict of interest is said to arise.

To understand the public duty, we must first start with the lowest denominator – *why does the public procurement official exist? What is his/her job?* This is the starting point, and to identify this, one must first identify what the policy objectives of the procurement system is, in other words, what is the public procurement policy. Trepte³ identifies economic efficiency, promotion of social and political objectives and trade objective as objectives of a public procurement system⁴. Arrowsmith⁵ identifies eight objectives of the public procurement system as value for money; integrity; accountability; equal opportunities and equal treatment for providers; fair treatment of providers; efficient implementation of industrial, social and environment objectives; opening public markets to international trade; and efficiency in the procurement process. In putting forward this list of objectives of

¹ Alexander Seger, 'Corruption and Democracy: What are the Issues', *Corruption and Democracy*, (Council of Europe 2008)

² Max Weber, *Economy and Society* (first published in 1921, University of California Press 2013) Foreword by Guenther Roth

³ Peter Trepte, *Regulating Procurement: Understanding the ends and means of Public Procurement Regulation* (OUP 2004)

⁴ Trepte explains that these objectives are abstractions, and no system is based on only one of these abstractions. They are not mutually exclusive, and any one procurement system is likely to exhibit elements of all three.

⁵ Arrowsmith S. (ed.), *Public Procurement Regulation: An Introduction* (EU Asia Inter University Network for Teaching and Research in Public Procurement Regulation 2011) p.4

public procurement systems, she makes the very important point that ‘within different public procurement systems the existence of different objectives and the weight attached to the various objectives differ quite markedly’⁶. For instance, some procurement systems might attach more importance to the use of procurement to promote social objectives and therefore the government may be willing to pay higher for goods and services in order to implement those values.

While noting the validity of the objectives of a public procurement system as put forward by the public procurement scholars above, it is suggested that the lists of objectives put forward by them, and other scholars, can never be exhaustive, and can only always be illustrative of the ways governments may decide to implement the public procurement policies of their countries.

In Nigeria, the Public Procurement Act 2007 (PPA) states that its policy goal is to *conduct procurement in a manner which is transparent, timely, equitable for ensuring accountability with the aim of achieving value for money and fitness for purpose in a manner which promotes competition, economy and efficiency*⁷. These principles squarely underline what the procurement policy in Nigeria is ultimately trying to achieve. The approach adopted under the PPA seeks to ensure transparency and equality, but also puts emphasis on timeliness, achieving value for money and fitness for purpose. Therefore, from the provisions of the PPA, one can state the policy objectives thus: *ensuring timeliness; ensuring transparency and accountability; ensuring value for money; ensuring fitness for purpose*. Identifying the stated policy objectives of Nigeria’s public procurement system is one thing, however evaluating whether the policy and legislation meets up with these objectives is another task altogether, and in order to determine this, we will identify whether the Nigerian procurement system meets its own stated policy objectives, so we can identify what the public duty of a procurement officer in Nigeria should be.

In the Nigerian public procurement system, there is a strong theme of protectionism for national industrial development, which seems to underpin the entire system.

⁶ Ibid p.5

⁷ PPA 2007 s 16

While, this is not expressly mentioned as one of the objectives of the procurement system in the PPA, the provisions and policies by the government makes this goal apparent. The goal to use procurement as a tool to drive national industrial development broadly falls under the classification of *horizontal policy objectives*⁸, and as highlighted in a recent UNIDO report⁹, innovation is generally considered an essential component of economic growth and development, and it is the foundation of long-term economic growth. Therefore, governments seek to develop policies they believe will promote innovation. Some of these include the use of tender preferences¹⁰, providing explicit minimum local content thresholds in contract requirements, and for procurement contracts lower than specified thresholds.

Generally in public procurement it is usual for contractors/suppliers from certain sectors to be nationals¹¹, however in the case of the Nigerian public procurement system, more steps have been taken down this line, for instance, when comparing bids from foreign contractors or suppliers with national bidders, procuring entities are empowered to grant a margin of preference to domestic contractors, and suppliers for goods manufactured in Nigeria, and bid documents may provide a domestic preference of 15% of the delivered price for goods and 7.5 % for works¹². This is similar to the *bumiputeras*¹³ system in Malaysia, where Malaysian bumiputera companies received a margin of preference over a reference price, and all supplies contracts between a stated value, and works contracts up to a stated value were reserved for bumiputera suppliers, amongst other incentives to the bumiputeras.¹⁴ In South Africa, procurement is of particular significance in the public sector and has been used as a policy tool to correct past discriminatory and unfair practices which occurred during the apartheid era. Due to South Africa's

⁸ This is when a procuring authority uses the procurement process to promote social, environmental or other societal objectives which are not uniquely associated with any particular contract or do not even necessarily arise from the function of the procuring public authority - Client Earth Legal Briefing, Briefing No.2 : Horizontal Objectives in Public Procurement, 2011

⁹ Kamala Dawar and Seung Chul Oh, 'The Role of Public Procurement Policy in Driving Industrial Development' (2017), UNIDO Working Paper 8/2017. < https://www.unido.org/sites/default/files/2017-07/WP_8_FINAL_0.pdf > accessed 31 October 2019

¹⁰ which may include requirements in the tender specifications for innovative solutions to the contract requirements, designating goods and services that satisfy certain pre-set quality criteria and provide preferences for them in public procurement

¹¹ These are sectors of national importance like Defence contracts including the purchase or sale of firearms etc.

¹² PPA 2007 s 34

¹³ This literally translates to 'sons of the soil'

¹⁴ Christopher McCrudden, 'Using public procurement to achieve Social Outcomes', (2004) 28 Natural Resources Forum 257-267

history of discrimination, unfair practices and marginalisation of people, various groups in society were denied the privilege of being economically active within the government procurement system. The Preferential Procurement Policy Framework Act 2000 gives effect to the South African Government's priority of empowering historically disadvantaged persons by giving them preferential treatment in procurement activities. It entrenches the obligation of government to award preferential procurement points to enterprises owned by historically disadvantaged persons and for certain government priorities. The Act also provides for exemptions to preferential procurement in certain sectors and industries. In addition to that there is the Broad-Based Black Economic Empowerment Act which empowers the Minister of Trade and Industry to issue codes of good practice on black economic empowerment that may include, inter alia, '*qualification criteria for preferential purposes for procurement and other economic activities*'. The B-BBEE Act requires every organ of state and public entity, as defined therein, to apply any relevant code of good practice issued in terms of the B-BBEE Act in developing and implementing a preferential procurement policy. It is these codes that determine the B-BBEE status of any procuring entity and, hence, that determine the preference points allocated to any bidder in terms of the preferential procurement framework.

When bidders submit their tender proposals they need to submit a certificate that has been calculated in accordance with a scorecard prescribed under the Codes of Good Practice (which are issued under the BBEE Act). The certificate indicates what level BEE contributor the tenderer is, and, depending on their level, they score a certain number of points out of 10 or 20 (depending on the value of the contract) in terms of the regulations. These points are then added to the points scored for price for purposes of calculating an overall score.

Governments around the world have explored the possibility of using its purchases to not only promote redistribution among different segments of the population, but also to develop an industrial strategy, to introduce innovation technologies or foster environmental protection through products or services that have a reduced environmental impact, therefore, using procurement as a legitimate tool to stimulate domestic production and consumption. An example can be seen in the use

of public procurement strategies and policies which have been used to support industrial development by targeting Small and Medium Enterprises (SME) involvement in the procurement system. Some ways this has been done is the promotion of set-asides¹⁵, mandatory subcontracting to SMEs, bid price preferences¹⁶, higher advance payments¹⁷.

The Nigerian Government seeks to use Public Procurement as one of the tools to drive domestic growth of industries, and this is quite evident in the fact that the PPA sets domestic preferences for indigenous companies¹⁸, it grants a margin of preference when comparing tenders from domestic bidders¹⁹ and foreign bidders and when comparing tenders from domestic suppliers offering goods manufactured locally with those offering goods manufactured abroad. However, these margins of preference only apply under international competitive bidding. This is quite instructive as it can be viewed as a way that the government uses procurement to restrict international participation and competition in Nigerian bids. In fact since the PPA was passed there have been two Executive Orders – *Presidential Executive Order on support for Local Content in Public Procurement*²⁰, and the *Presidential*

¹⁵ A quota as a percentage of designated government procurement contracts or total spending is reserved or 'set aside' for a targeted category of bidders that meet the preferential qualification criteria such as SME status.

¹⁶ Bids from eligible SMEs are a given margin of preference and if the lowest evaluated bidder is a SME, it is awarded the contract.

¹⁷ This is when the Government approves the release of a larger percentage of procurement funds upon awarding of contracts to contractors who would otherwise not be able to fund the execution of the contract or would not have access to finance facilities which would enable them to execute the contracts.

¹⁸ PPA 2007 s 34

¹⁹ It should be noted that a critical oversight in the PPA's domestic privilege regime is the fact that it does not define 'domestic bidders' nor explain what it means by 'goods manufactured locally'. This is not addressed in the PPA or the Procurement Procedures Manual for Public Procurement in Nigeria.

²⁰ The Order mandates that all Ministries, Departments and Agencies (MDAs) of the Federal Government of Nigeria (FGN) must grant preference to local manufacturers of goods and service providers in their procurement of goods and services, and that any document issued by any MDA of the FGN for the solicitation of offers, bids, proposals or quotations for the supply or provision of goods and services shall expressly indicate the preference to be granted to domestic manufacturers, contractors and service providers and the information required to establish the eligibility of a bid for such preference. The solicitation documents require bidders or potential manufacturers, suppliers, contractors and consultants to provide a verifiable statement on the local content of the goods or services to be provided. Furthermore, Made-in-Nigeria products shall be given preference in the procurement of certain listed items²⁰ and at least 40% of the procurement expenditure on these items in all MDAs of the FGN shall be locally manufactured goods or local service providers. The Executive Order further mandated that within 90 days of the date the Order was issued, heads of all MDAs of the FGN are to assess the monitoring, enforcement, implementation, and compliance with the Executive Order and local content stipulations in the Public Procurement Act or any other relevant Act within their agencies, and propose policies to ensure that the Federal Government's procurement of goods and services maximises the use of goods manufactured in Nigeria and services provided by Nigerian citizens doing business as sole proprietors, firms, or companies held wholly by them or in the majority; and submit such findings to the Honourable Minister of Industry, Trade & Investment. Finally, the Executive Order mandates that within 180 days of the date of the order, the Minister of Industry, Trade & Investment in consultation with the Director-General of the BPP must submit to the President, a report on the Made-in-Nigeria initiative that includes findings from the policies submitted by the MDAs. This report was to include specific recommendations to strengthen the implementation of Local Content Laws and local content procurement preference policies and programme²⁰. The Executive Order defines "local content" to mean the amount of Nigerian or locally produced human and material resources utilised in the manufacture of goods or rendering of services. <<https://medium.com/@TheAsoVilla/acting-president-osinbajo-signs-executive-order-on-support-for-local-content-in-public-procurement-c4e7591178a4>> accessed 20 February 2018

*Executive Order (PEO) for Planning and Execution of Projects, Promotion of Nigerian Content in Contracts and Science, Engineering and Technology*²¹, which specifically give preferences to Nigerian businesses.

It should be noted however that the use of domestic preferences which could be classed as protectionist to improve industrial development in a country has its fair share of criticisms. One of the biggest criticisms being the fact that there is the risk of corruption and super-imposition of vested interests²² in addition to that is the fact that preferential regimes may have associated costs like higher consumer prices, inefficiency etc.²³. However, an analysis of the efficacy or otherwise of these protectionist methods to stimulate industrial development is outside of the scope of this thesis.

Ultimately this analysis of the objectives of the procurement system in Nigeria is to distil the duty of the public procurement official, therefore based on the analysis the policy objectives of the Nigerian public procurement system above, the policy in Nigeria extends beyond the stated policy of ensuring a transparent, timely, equitable for ensuring accountability with the aim of achieving value for money and fitness for purpose in a manner which promotes competition, economy and efficiency. Taking into consideration certain sections in the PPA, the stated policy objective has been extended to include promotion of domestic and national participation and encouragement of industrial development and innovation.

Therefore, the Nigerian procurement policy essentially operates on two planes, the first in relation to purely domestic bids seeks to enshrine the following values: ensuring equality; ensuring transparency and accountability; ensuring value for money; and ensuring fitness for purpose. However, once there is an international

²¹ The PEO recognised that entrenching Science, Technology and Innovation in everyday life is key to achieving the nation's development goals across all sectors of the economy and the government desires to harness this to drive national competitiveness, productivity and economic activity. The PEO gives wide ranging preferences for Nigerian companies, for this purpose. For example, the PEO states that government agencies shall adopt local technology to replace foreign ones, where they meet set standards. The PEO's approach is to tackle this problem on multiple fronts including the use of preferences, local capacity development, limiting (and in some cases a total prohibition) on the use of foreign experts, the use of tax incentives etc.

²² Lea Kaspar and Andrew Puddephatt, *Benefits of Transparency in Public Procurement for SMEs: General Lessons For Egypt*. (Global Partners and Associates 2012)

²³ Travis K. Taylor, 'Countertrade Offsets in International Procurement: Theory and Evidence' in Murat A. Yulek and Travis K. Taylor (eds.), *Designing Public Procurement Policy in Developing Countries* (Springer, 2012).

element to the procurement, the second plane is activated and the values of - ensuring equality, ensuring value for money, and to a certain extent ensuring fitness for purposes give way to the values of promoting domestic participation in procurement, and encouraging industrial development and innovation.

Those are the goals of the procurement system, and it is the duty of the public procurement official to align their tasks towards those goals. We can see therefore that transparency and accountability are a critical aspect of achieving those goals.

3.2.2 The Private Interest in Public Procurement in Nigeria

The second part of the conflict of interest equation is the private interest. In trying to identify the root cause of why certain public officials in Nigeria engage in malfeasance, a number of interesting theories have been developed, and we will now attempt to analyse these theories. The first of these theories which we will analyse is the *theory of the two publics* as laid out by Ekeh²⁴, who argues that civil servants are faced with two publics – the *primordial public* and the *civic public*. The primordial public is associated with kinship, tribe/ethnic group, while the civic public relates to the society either in the public sector or in the private sector where individuals work. The thrust of the theory is that the individual in the civic public views his duties as moral obligations to benefit and sustain a primordial public of which he is a member. There is therefore a conflict of interest between both publics and the primordial is the superior interest. Ekeh explains that ‘...*a good citizen of the primordial public gives out and asks for nothing in return...he will only continue to be a good man if he channels part of the largesse from the civic public to the primordial public...it is legitimate to rob the civic public in order to strengthen the primordial public*’²⁵. This characterization by Ekeh was with regards to many first-generation Africans in post-colonial societies. This theory has also been cited with approval by a few other Nigerian scholars²⁶. However, others have criticised this theory

²⁴ Peter Ekeh, ‘Colonialism and the Two Publics in Africa: A Theoretical Statement’ (1975) 17 *Comparative Studies in Society and History* 91

²⁵ Ibid

²⁶ Ilufoye Ogundiya, ‘Political corruption in Nigeria: Theoretical perspectives and some explanations’, (2009) 11 *Anthropologist*, 281-292.; Ogbewere Ijewereme, *Anatomy of Corruption in the Nigerian Public Sector: Theoretical Perspectives and Some Empirical Explanations*, (2015) Sage Open Journal <<https://journals.sagepub.com/doi/pdf/10.1177/2158244015581188>> accessed 1 November 2019

contending²⁷ that joining the public service in order to further community interests is never the goal of the individual, the goal is always personal interest, and once this is sated, then the individual may use the communal interest to solidify his/her support base as it were.

With due respect to the critics, the suggestion that the communal interest is a status protecting mechanism, seems to actually support the position of the theory with respect to conflict of interest, which is that the decision making process is driven by something which conflicts with the *civic public* of the public official. The theory of the two publics explains the approach public officials take when they are faced with decisions, and since the decision making is guided by the advancement of the *primordial public* it explains the conflict of interest in the public official. Ekeh's position is that in a society with an extremely strong primordial public, the civic public will always be in constant threat of being relegated where there is a clash between both interests.

As mentioned earlier, the theory of the two publics was one put forward to explain the behaviour of civil servants in a Nigerian society that was transitioning from colonialism, however it is suggested that this theory has even acquired more relevance in modern day public institutions in Nigeria. This is due to the threat of rising ethnic tensions and violence²⁸, the importance of cementing one's ethnic base has become a key requirement of survival within the public space. The increased need for security felt by individuals, and the haven which the *primordial public* provides for those who eventually must exit from public service accentuates this. These ethnic conflicts have therefore played a role in strengthening *tribalism* and sustaining the importance of the primordial public²⁹.

²⁷ Eghosa Osaghae, 'Colonialism and Civil Society in Africa: The Perspective of Ekeh's Two Publics', (2006) 17 *Voluntas: International Journal of Voluntary and Nonprofit Organizations*, 3, pp. 233-245

²⁸ Haldun Çancı and Opeyemi Odukoya, 'Ethnic and religious crises in Nigeria: A specific analysis upon identities (1999-2013)', (2016) *AJCR* available at < <http://www.accord.org.za/ajcr-issues/ethnic-religious-crises-nigeria/>> accessed on January 14 2017

²⁹ n 27 p.241

Another theory which seeks to explain the peculiar nature of how private interests manifest in the public service in Nigeria, was suggested by Joseph³⁰, he referred to Nigeria having a unique system called '*prebendalism*' where public officers feel they have a right to a share of government revenues, and use them to benefit their supporters and people who share the same religion, and members of their ethnic group. In this system, public offices are regarded as *prebends*³¹ used by public officers to generate material benefits for themselves and their constituents and kin groups. The prebendalism theory is a theory which gives a theoretical angle to a colloquial and well-worn concept which is familiar to Nigerians, the concept of *sharing the national cake*³², the concept essentially is that the wealth of the country belongs to everyone and no one, and therefore anyone in a position of power has a right to take his/her share of the wealth of the country. In the context of public procurement therefore this is normally extended to the right to award contracts to oneself or those with close relations. Both the theory of the two publics and prebendalism share certain similar parallels with the concept of *guanxi*³³ in China, and the *wantok* system in Papua New Guinea³⁴. The affinity for kinship over public duty is one which seemingly exists across other cultures.

It should be noted that the theory of two publics and the prebendalism theory are somewhat similar, a similarity that was discussed and acknowledged by Ogundiya³⁵. However they are separate in the core driver of the motives of the public official - in the theory of two publics, what drives the action of the public official to act against the civic public is to maintain his/her status and provide protection from a fractured ethnic society, while what drives the actions of a public official in prebendalism is

³⁰ Richard Joseph, *Democracy and Prebendal Politics in Nigeria: The Rise and Fall of the Second Republic*, (Cambridge University Press, 1987)

³¹ This is a historical term which refers to a portion of the revenues of a cathedral or collegiate church granted to a canon or member of the chapter as his stipend – Oxford Dictionary

³² George Nche, 'The concept of national cake in Nigerian political system: Implications for national development', (2011) *Bassey Andah Journal of Cultural Studies*. 4. 79-94.

³³ The overall concept of *guanxi* involves building a relationship and trust between business partners. *Guanxi* involves long-term personal relationships with some element of interpersonal commitment and affect, the term basically expresses a relationship where one party has an obligation to another which has been built over time by reciprocal exchange of favours. The core idea of *guanxi* is the relationship between or among individuals that creates obligations for a continual exchange of favours. In a more simplistic way it means one party does something for another party now, with the expectation that in future when he/she has a need and the other party is in a position to assist in that need, then the other party will reciprocate. It is a system based not only on the expectation of one party, but on the correspondent obligation of the other party

³⁴ In Tok Pisin, *wantok* means "one talk" – meaning the language of the tribe or clan that a person belongs to and *wantokism* is the traditional welfare system that evolved around that tribe. The system is often associated with nepotism and the use of one's personal connections to secure public service jobs

³⁵ Ilufeye Ogundiya, 'Political corruption in Nigeria: Theoretical perspectives and some explanations', (2009) *Anthropologist*, 11, 281-292.

an innate belief that the *prebend* is one which should be accessed as of right, and therefore there is no moral wrongdoing. The similarity however is that both seem to suggest a strong moral justification for the actions of the public official, even though they would clearly be classed as illegal. Studies³⁶ have provided evidence of a culture in the Nigerian public service which promotes nepotism and patronage - a key manifestation of the theory of the two publics and *prebendalism*.

It is important to state that the above analysis is not meant to suggest that all actors in the public space are driven by their primordial public or prebendal motivations. The fact is that there also exists, those who are not likely to succumb to any private interests and will in fact follow the regulatory process without the need for a system in place to watch their actions. In fact, Lankester suggests that there will always be 'altruists' in any system who dedicate themselves unreservedly to the interests of the public, and are incapable of having competing interests, let alone acting on those interests which compete with the public good; but that there will always be those 'self-interested' who need countervailing mechanisms in place in order to ensure that competing interests do not interfere with their public duties. James Madison³⁷ once famously said '*...If men were angels, no government would be necessary...*'³⁸.

Therefore, it is important to ensure that a framework of countervailing mechanisms exists. It cannot be left solely to the discretion of the public official to ensure that they will follow the rules. While there are people who do not need these countervailing mechanisms in order to abide by the rules, there will always be people within the system who seek to subvert the rules. Whether their desire is borne out of an affinity to the primordial public or a *prebendalist* leaning, is immaterial. Those who would seek to subvert the rules must be kept in check, and this thesis argues that this countervailing mechanisms which are currently heavily focused on vertical accountability measures, would be more effective if horizontal accountability was enhanced.

³⁶ Dele Owulu, 'The Nature of Bureaucratic Corruption in Nigeria' (1983) *International Review of Administration Science* 49:29; Clay Wescott, 'Guiding Principles on Civil Service Reform in Africa', (1999) 12 *International Journal of Public Sector Management* 2, 145-170; Sola Aina, 'Bureaucratic Corruption in Nigeria: The Continuing Search for Causes and Cures', 48 (1982) *International Review of Administrative Science*, pp.70-76.

³⁷ One of the founding fathers and the fourth President of the United States of America (1809-17)

³⁸ The Federalist No. 51, 1788

3.3 Accountability Framework for Managing Conflict of Interest in Nigerian Public Procurement

The first step to determining the accountability framework within the Nigerian public procurement system lies firstly in identifying the actors that exist in the sector and determining how they interact with each other from an accountability perspective.

- A. ***Procuring entity*** – Under the PPA, the procuring entity means any public body engaged in procurement and this includes a Ministry, Extra-Ministerial office, government agency, parastatal and corporation³⁹, further for the purposes of identifying the actors in the procurement sector, this term is extended to include entities outside the foregoing description which derive at least 35% of the funds appropriated or proposed to be appropriated for any type of procurement described in the PPA from the Federation share of Consolidated Revenue Fund⁴⁰. In the context of this research this means the entity that makes decisions on the award of contracts, and therefore would include the tangential bodies that are involved in that contract decision making process, including – procurement planning committees⁴¹ and tenders boards. They are the protagonists in the procurement equation, their actions affect all other actors, and therefore our understanding of the actor landscape would be from the perspective of the procuring entity in the decision-making process for the award of a contract.

- B. ***Bureau of Public Procurement (BPP)*** – The BPP is an autonomous agency charged with overseeing the public procurement sector in Nigeria. They have oversight over all procuring entities and can review award decisions, and sanction authorities that have breached the provisions of the PPA.

³⁹ PPA 2007 s 60

⁴⁰ PPA 2007 s 15(1)(b)

⁴¹ PPA 2007 s 21(1)

- C. ***National Council on Public Procurement (NCPP)*** - The NCPP is also an oversight body, but its oversight spans the entire procurement sector, it sits above the BPP and apart from oversight functions it is also charged with setting procurement policy within Nigeria. It is charged with recommending the appointment of the Director General of the BPP to the President⁴², approving the appointments of Directors of the BPP⁴³, approving the audited accounts of the BPP⁴⁴, approving general policies and guidelines relating to public procurement as formulated by the BPP⁴⁵, and other oversight functions over the BPP.
- D. ***Contractors*** – In any procurement bid, the contractors or suppliers are the entities who make bids to provide the goods or services in question to the procuring entity, and therefore when they put forward bids to the procuring authority, they are directly affected by the decision of the procuring entity, whether the bid is rejected or the bid is awarded.
- E. ***National Assembly*** – Under the Nigerian legal system, the National Assembly is the federal legislative arm⁴⁶, primarily charged with the function of making laws. However, they also have the power of oversight over the Executive arm of government. By virtue of the PPA⁴⁷, the BPP must perform procurement audits, and submit the reports of the audits bi-annually to the National Assembly.
- F. ***President*** – The President of the Federal Republic of Nigeria has the power to appoint all the members of the NCPP⁴⁸ and the Director General of the BPP on the recommendation of the NCPP⁴⁹

⁴² PPA 2007 s 7(1)

⁴³ PPA 2007 s 2(c)

⁴⁴ PPA 2007 s 2(d)

⁴⁵ PPA 2007 s 5(a)

⁴⁶ Chapter V of the 1999 Constitution

⁴⁷ PPA 2007 s 5(b)

⁴⁸ PPA 2007 s 1(4)

⁴⁹ PPA 2007 s 7(1)

G. **Observers** – The PPA mandates⁵⁰ that a procuring entity shall, in implementing its procurement plans invite two credible persons as observers in every procurement process one person each representing a recognized; private sector professional organization whose expertise is relevant to the particular goods or service being procured, and a non-governmental organisation working in transparency, accountability and anti-corruption areas. Observers have the right to submit their observation report to any relevant agency or body including their own organizations or associations;

H. **Courts** – The Federal High Court has the power to order the disclosure of procurement records⁵¹, and to entertain appeals from the BPP regarding procurement decisions⁵². The Federal High Court is also the court that deals with appeals for Freedom of Information request denials from federal agencies. The Courts are also charged with trying offences which are in breach of the PPA⁵³

As can be seen from above, there are essentially eight key actors within the procurement process which are specifically referenced in the PPA. A final actor is the '*society/the citizenry*' as the entire procurement system is created for the benefit of society, however for the purposes of this thesis, society/citizenry will be represented by the *observers* as their goal is to ensure probity within the procurement process for the benefit of the society at large. A lot of the interactions within the actors stems from the actions of the procuring entity when the award of the contract is made, and therefore it is from that perspective that we will analyse the system.

It should be stated that even though the *courts* are recognised as an actor in the procurement process, for the purposes of determining an accountability model, they will not be classified as actors but as *enablers*. This is because, of all the actors within

⁵⁰ PPA 2007 s 19(b)

⁵¹ PPA 2007 s 38(3)

⁵² PPA 2007 s 54(7)

⁵³ PPA 2007 s 58

the procurement sector, they are the only ones who cannot take any action on their own volition, their involvement needs to be triggered by another actor in the system. For instance, the courts cannot of their own volition review a procurement decision, a case must have firstly been filed by a contractor. Therefore, in developing an accountability model, these *enablers* are important cogs in the accountability wheel, however for the reasons given above, they cannot be classed as actors *stricto sensu*.

3.3.1 Developing an Accountability Model: Vertical and Horizontal Accountability

Bovens, Schillemans and Goodin⁵⁴ suggest that accountability is a relational concept, linking those who owe an account and those to whom it is owed, they state that the minimal conceptual consensus of accountability entails, first of all, that accountability is about providing answers; is about answerability towards others with a legitimate claim to demand an account.

Schillemans⁵⁵ states that accountability requires an actor with a duty to render an account to a second actor with the authorisation to judge the actions of the first actor and usually impose sanctions. Therefore, accountability in this sense, refers to answerability to someone for appropriate conduct and expected performance. This interaction between the accountor and accountee therefore presupposes a formal relationship, and it is this relationship that distinguishes accountability from the many other communicative relations of public agents with other parties. He suggests that from an analytical perspective, processes of accountability normally involve three phases – the *information phase* where the accountor renders an account on his conduct and performance to the accountee, the *debate phase* where the accountor and accountee engage in a debate on the account that has been given, and the *sanction phase* where the accountee comes to a concluding judgment and decides whether and how to make use of available sanctions. This understanding of the accountability process is in line with the approach for this thesis and shall therefore be adopted.

⁵⁴ Mark Bovens, Robert E. Goodin, and Thomas Schillemans, 'Public Accountability' in Mark Bovens, Robert E. Goodin, and Thomas Schillemans (eds), *The Oxford Handbook of Public Accountability* (Oxford University Press 2014)

⁵⁵ Thomas Schillemans, 'Accountability in the Shadow of Hierarchy: The Horizontal Accountability of Agencies', (2008) *Public Organ Rev* 8: 175

In the introduction to this thesis, we briefly discussed the concepts of vertical and horizontal accountability, as representing the two types of accountability mechanisms which are present within the Nigerian public procurement process. The concepts of vertical and horizontal accountability stem from the research of O'Donnell in his discussion on delegative democracy. He argues that in institutionalized democracies, accountability runs both vertically and horizontally. He explains *vertical accountability* as a system which makes elected officials answerable to the ballot box, and horizontal accountability making elected officials answerable to a network of relatively autonomous powers/institutions which have the ability to question and eventually punish elected officials who have improperly discharged their responsibilities. He argues that horizontal accountability is relatively weak and, in some cases, non-existent in delegative democracies, and the institutions which carry out this horizontal accountability are viewed by elected officials as unnecessary encumbrances that hamper their mission and they therefore make efforts to hamper the development of those institutions⁵⁶. O'Donnell's conceptualisation of vertical accountability is of accountability within a political/democratic framework. He argues that elections, social demands that usually can be articulated without suffering state coercion, and regular coverage by the media of at least the more visible of these demands and of apparently wrongful acts of the public authorities are all dimensions of vertical accountability. All these actions are performed individually or by means of some kind of organised/collective action with reference to those who occupy positions in state institutions⁵⁷. Further, he conceptualises *horizontal accountability* as the existence of state agencies that are legally enabled and empowered, and factually willing and able, to take actions that span from routine oversight to criminal sanctions or impeachment in relation to actions or omissions by other agents or agencies of the state that may be qualified as unlawful. He asserts that horizontal accountability applies to non-hierarchical accountability, and he focuses on whether the legislature and courts, as accountees, are in a position to hold the executive, the accountant, to account.

⁵⁶ Guillermo O'Donnell, 'Delegative Democracy', (1994) 5 Journal of Democracy, 1, pp. 55-69

⁵⁷ Guillermo O'Donnell, 'Horizontal Accountability in New Democracies' in Marc F. Plattner, Larry Diamond, and Andreas Schedler (eds), *The Self-Restraining State: Power and Accountability in New Democracies* (Lynne Rienner Publishers, 1999)

Therefore in his conceptualisation of vertical accountability, it is a hierarchical network characterised by the ultimate power of electoral accountability, and horizontal accountability is a relationship between equals within the democratic operation – the executive, legislature, and judiciary, all constraining and holding each other accountable within the framework of separation of powers and *checks and balances*.

This conceptualisation by O'Donnell would have very limited application to the context of this thesis, which focuses on accountability, not within the broad democratic or electoral mandate of public officials, but of the decisions of unelected officials with regards to contract awards. In fact, there has been some debate about O'Donnell's definition of the concepts and the application thereof, some scholars have questioned his limitation of agents of horizontal accountability to state agents like the courts, and some argue that this definition should be broadened to include other non-state actors such as civil society organizations⁵⁸. Schillemans⁵⁹ adopts O'Donnell's core argument of horizontal accountability applying to non-hierarchical systems, but adapts it to address peers, equals, stakeholders or concerns outside of the hierarchal relationship between central government and executive agency. In explaining horizontal accountability, he states that the adjective, *horizontal*, indicates an important distinction from traditional forms of accountability, where a subordinate usually reports to a superior (hence these can be coined vertical forms of accountability). Horizontal accountability arrangements address peers, equals, stakeholders or concerns outside of the hierarchal relationship between central government and executive agency. Schilleman's approach broadens the agents of horizontal accountability from the limitations placed by O'Donnell, and this broadening of the agents of accountability is critical to the understanding and approach of this thesis as it comes to the issue of horizontal accountability. By viewing the accountability model of the public procurement system in Nigeria from the perspective of vertical accountability and horizontal accountability, it is clear that both accountability mechanisms exist within the system, however while the

⁵⁸ Philippe C. Schmitter, 'The Limits of Horizontal Accountability', in Andreas Schedler, Larry Diamond, and Marc F. Plattner, (eds.), *The Self-Restraining State: Power and Accountability in New Democracies* (Lynne Rienner, 1999), 59–63.; Richard L. Sklar, 'Democracy and Constitutionalism', in Andreas Schedler, Larry Diamond, and Marc F. Plattner, (eds.), *The Self-Restraining State: Power and Accountability in New Democracies* (Lynne Rienner, 1999)

⁵⁹ n 54

hierarchical structure that supports the vertical accountability mechanism seems to be well set up, the horizontal accountability opportunities are dependent on other institutions, and when one takes into consideration the fact that many of the loopholes which were discussed in the previous chapter, directly affect the ability of these actors to exercise the horizontal accountability then it is clear that there needs to be a strengthening of horizontal accountability in order to address the loopholes that exist.

3.3.1.1 Vertical Accountability

The diagram below will illustrate the relationship between all the actors in a vertical accountability relationship, with the action of the procuring entity being the starting point. It is a diagrammatic representation of the provisions of the PPA.

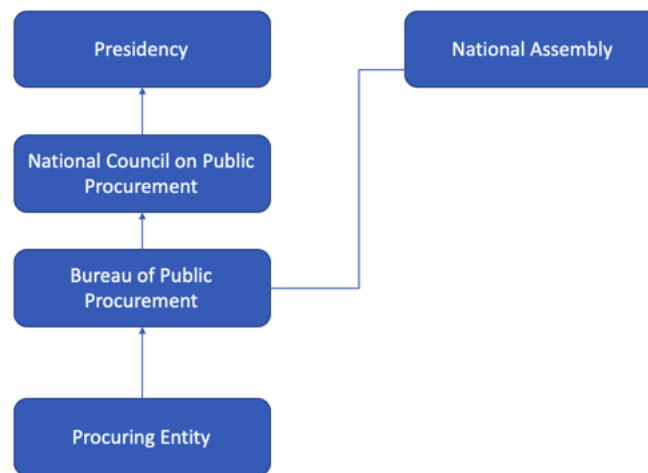


Figure 3.1 Vertical Accountability in Nigerian Public Procurement

From the above diagram, it is quite clear that the procuring entity is accountable to other actors higher up on the hierarchical chain, the procuring entity sends records of proceedings to the BPP, the BPP reports to the NCPP on annual basis and also sends bi-annual reports to the National Assembly. The NCPP is in charge of creating policy for the entire procurement system and is in charge of appointing the principal officers of the BPP and approving its budget, therefore it sits above the BPP in the

hierarchy. The members of the NCPP are appointed by the President, and so they therefore sit below the below the Presidency in the hierarchy.

In order to properly develop this vertical accountability system within the Nigerian public procurement context, it is important to situate this within a theoretical model which can help explain it better - the principal/agent theory or the *agency theory*.

The *agency theory* has its roots in law⁶⁰ and economics⁶¹. However, it is the economic theory of agency that has been applied theoretically in research and academic discourse. The economic theory of agency is the study of the agency relationship and the issues that arise from it, particularly the dilemma that the principal and agent, while nominally working toward the same goal, may not always share the same interests. Mitnick⁶² formulated an institutional or regulatory principal agent model, he examined the relationship between agents in the regulatory bureaucracy and their political principals noting that agents could be motivated by the public interest or by their own narrow self-interest. Agency theory in institutional or regulatory bureaucracy therefore posits a process whereby, bureaucrats (agents) are assumed to have distinct informational and expertise advantages over politicians (principals). The agents better understand the policy and the organizational procedures that are required to implement it, and therefore have the opportunity to act for their own gain⁶³.

This theory seems ideal for our research with respect to creating a model for vertical accountability, in fact, certain scholars advocate for an approach of using the principal-agent model in researching public procurement⁶⁴. Within the principal-agent paradigm the public official is classed as the agent, and the goal is to control the actions of the agent by surmounting the issues of *information asymmetry, adequate monitoring, and effective control*. If these issues are adequately addressed,

⁶⁰ Samuel J. Stoljar, *The Law of Agency: Its History and Present Principles*, (Sweet & Maxwell 1961)

⁶¹ Stephen Ross, 'The Economic Theory of Agency: The Principal's Problem', (1973) 63 *American Economic Review*, 2, pp. 134-39

⁶² Barry Mitnick, 'Fiduciary Rationality and Public Policy: The Theory agency and some consequences' (Annual meeting of the Political Science Association, New Orleans 1973)

⁶³ Richard Waterman and Kenneth Meier, 'Principal-Agent Models: An Expansion?', (1998) 8 *Journal of Public Administration Research and Theory*, 2 pp. 173-202

⁶⁴ Christopher Yukins, 'A Versatile Prism: Assessing Procurement Law Through the Principal-Agent model', (2010) 40 *Public Contract Law Journal*, 1, pp. 63-86

there is less opportunity for the public duty to be improperly influenced. The essence therefore of the principal agent model is to make the agent *accountable* to the principal.

The principal-agent relationship is ideal for understanding the relationship that exists between the relevant actors in the Nigerian procurement process as indicated in the diagram above. However, there are certain actors within the procurement process who do not fall under this vertical accountability mechanism, but who otherwise play an important role in holding the procuring entity accountable – the *observers*, the *contractors* and the *courts*. They cannot be classed as either agents or principals of any other actors within the accountability framework, and therefore in order to understand the role they play and the relationship they have with the other actors within the system, we will look to the concept of horizontal accountability for enlightenment.

3.3.1.2 *Horizontal Accountability*

The diagram below illustrates the relationship between all the actors in a horizontal accountability relationship, with the action of the procuring entity being the centre. It is a diagrammatic representation of the provisions of the PPA.

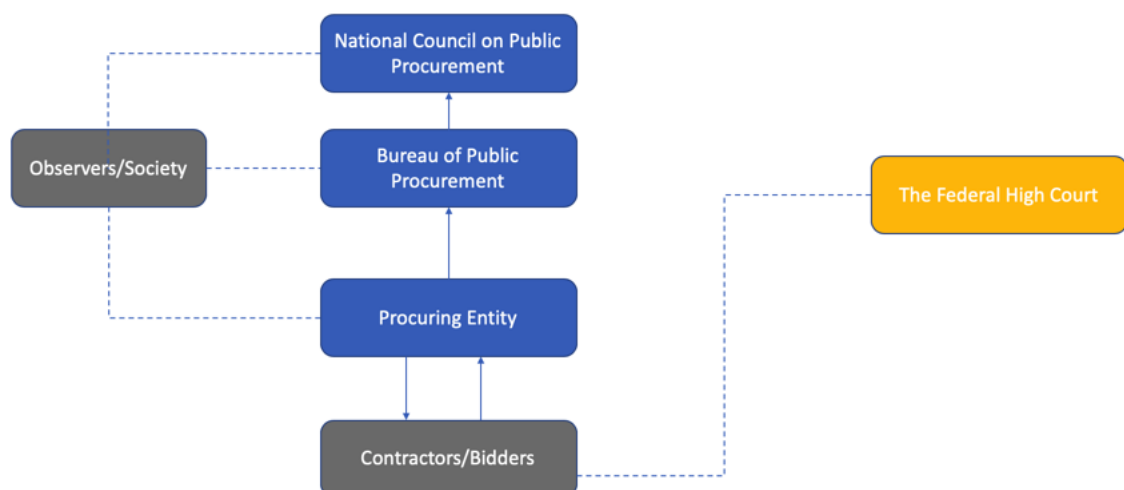


Figure 3.2 Horizontal Accountability in Nigerian Public Procurement

From the above diagram, we can determine the following interactions between the actors in the process. The contractors/bidders make bids for contract awards to the procuring entity. The procuring entity sends records of proceedings to the BPP and must also allow the *observers* the right to observe bid processes. The *observers* are then able to send their own observation report to the BPP. Where the NCPP is properly set up, certain members of the observers can be appointed as part time members of the NCPP. If the contractors/bidders are unhappy with the outcome of a procurement award, they may request for an administrative review from the procuring entity, if the outcome of the review by the procuring entity is unsatisfactory, the contractors/bidders can make an appeal to the BPP, and if they are dissatisfied with the decision of the BPP, they can appeal to the courts. The Federal High Court sits outside the structure somewhat, because based on the provisions of the PPA, they can only be involved when approached by the *contractors/bidders*.

It is clear from the discussion on the interaction between the actors here that some measure of accountability exists, in that some of the actors have the right to hold the procuring entity to account for its conduct, however the right to hold to account in this context is not one borne out of a hierarchical relationship with the entity. In actual fact it is one created out of the fact that these actors have an active stake in the integrity of the decision-making process of the procuring entity. The contractors/bidders need to ensure that the process is fair as that affects their ability to be awarded contracts, the observers are civic organisations or non-governmental organisations with stated aims of improving procurement and ensuring best practice in the grant of contract awards, and so they desire a system which has integrity, and when the process has been incorrectly followed, they have a duty to ensure probity. Finally, the courts have a stake in the process, because as custodians of the law, they are constitutionally mandated to ensure that the laws of the land are being followed. In this accountability mechanism, no actor on its own is able to exercise all three accountability constituent elements i.e. *obligation to report* to that actor, *the capacity to interrogate*, and, *the ability to sanction or make a binding decision*, and so in order to exercise accountability, the actor would need the involvement of one or more other agents into the accountability transaction. For

instance, while the procuring entity might have an obligation to report to the contractor (via record of proceedings/debrief), and the contractor/bidder has the capacity to interrogate the report provided (via an appeal), it cannot sanction or make a binding decision – this element is in the hands of the BPP or the courts, as the case may be.

Therefore, it is clear that there is some accountability system that exists, the task therefore is to identify a theoretical foundation for the right of these actors to hold the procuring entity accountable, outside of the principal agent theory, and for this the stakeholder theory will be adopted. The *stakeholder theory*⁶⁵ is a theory of organisational management and ethics which addresses morals and values explicitly as a central feature of managing organisations⁶⁶. The stakeholder theory was developed by Freeman⁶⁷ as a way to '*revitalise the concept of managerial capitalism by replacing the notion that managers have a duty to stockholders with the concept that managers bear a fiduciary relationship to stakeholders*'⁶⁸. The theory argues that corporations have *stakeholders*, the term meaning '*groups and individuals who benefit from or are harmed by, and whose rights are violated or respected by corporate actions*'⁶⁹, and these stakeholders have a right to make claims.

Applying *stakeholder theory* to public organisations (such as public procurement agencies/authorities) is not universally accepted. In fact, certain scholars⁷⁰ doubt the value and appropriateness of such an undertaking, the position taken by them is that the theory is a private sector one governed by fundamentally different principles from public sector organisations. Another group of scholars⁷¹ are on the other side of the divide and argue that the insights from the application of *stakeholder theory* to the private sector can be applied in part to the public-sector setting. Mostly arguing that the application of the theory is appropriate because

⁶⁵ R. Edward Freeman, *Strategic Management: A Stakeholder Approach* (Pitman, 1984).

⁶⁶ Robert Phillips, R. Edward Freeman and Andrew C. Wicks, What Stakeholder Theory Is Not, (2003) 13 Business Ethics Quarterly, 4, pp. 479-502

⁶⁷ R. Edward Freeman, 'A Stakeholder Theory of the Modern Corporation', in T. L. Beauchamp, and N. E. Bowie (eds.), *Ethical Theory and Business* (Prentice Hall, 2001), pp. 56-65.

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ Thomas Donaldson and Lee E. Preston, 'The Stakeholder Theory of the Corporation - Concepts, Evidence, and Implications,' (1995) 20 Academy of Management Review, 1, pp. 65-91.

⁷¹ Hans J. Scholl, 'Applying Stakeholder Theory to e-Government: Benefits and Limits', (Proceedings of the 1st IFIP Conference on E-Commerce, E-Business, and E-Government Zurich, 2001)

government can be conceptualised as the management of relationships and interests of societal stakeholders, and all democratic political models involve balancing legitimate competing interests in society⁷². The stakeholder theory posits that there exists more than one individual who benefits or is harmed by the actions of the individual/organisation carrying out certain actions.

The arguments made in support of the use of the *stakeholder theory* in research on public sector organisations has a lot of merits. If the assertion in this context that the primary function of the procuring entity is to ***ensure transparency and accountability in the procurement process*** is accepted, then this lends itself to the conclusion that the procuring entity should exercise this towards the groups and individuals who benefit or are harmed by its actions, and as explained above these individuals/groups would be the actors within the horizontal accountability system. The stakeholder theory is therefore a useful tool in understanding the accountability mechanism within a horizontal accountability system.

As can be seen from the discussion so far, it is clear that Nigeria's public procurement process operates both a vertical accountability and horizontal accountability model, with the former being the more dominant model. It is suggested therefore that a system that allows for dual accountability mechanisms, as the Nigerian public procurement process does, has the right foundation for accountability, however in order for it to be effective, both accountability mechanisms will need to be strengthened, and in the Nigerian context from our analysis so far, it is clear that the accountability mechanism which needs to be strengthened more is the horizontal accountability system as the loopholes which have been identified to exist, exist in the context of the actors in the horizontal accountability system exercising their rights.

Now that the different accountability systems that exist within the public procurement process in Nigeria have been identified, next will be an analysis of the available tools that exist for the actual exercise of accountability.

⁷² Leif Skiftenes Flak and Jeremy Rose, 'Stakeholder Governance: Adapting Stakeholder Theory to E-Government' (2005) 16 Communications of the Association for Information Systems, 31.

3.3.2 Current Tools for Accountability in Nigerian Public Procurement

There are different tools of accountability which are applied in different public sectors in different countries. This thesis will analyse some of these tools to determine whether they exist in the Nigerian public procurement sector, if they do – how they are being used, and their suitability or lack thereof for the Nigerian public procurement sector; if they do not – then whether or not they should be introduced. There have been a number of approaches on identifying the tools/instruments of accountability, and as will be shown, some approaches advanced by the scholars below will have similarities and overlaps, and to varying degrees will have potential application to a discussion on the Nigerian procurement process, however this thesis posits that a more appropriate toolbox is needed to approach the issue of conflict of interest in Nigeria, and a merger of some of the tools and ideas will be necessary to achieve this.

Hood⁷³ suggests the following tools for accountability – *hierarchy*, *mutuality*, *competition*, and *contrived randomness*. He defines *hierarchy* as the dominant mechanism for addressing issues of accountability, and the approach of this tool is based on the assumption that civil servants within the public organisation are accountable to their superiors within the organisation. Hierarchy is the most commonly known and long-standing mechanism of accountability, here those at the top of the hierarchical chain of command delegate authority to those subordinate to them while at the same time holding these subordinate actors accountable for their decisions, behaviour and performance in exercising this delegated authority⁷⁴. *Mutuality* depends on civil servants and public organisations watching each other; while *competition* is more market based with organisations competing against each other (and the private sector) to be the best. Finally, *contrived randomness* is random assessment and intervention by some external actor.

⁷³ Christopher Hood, Oliver James, B. Guy Peters, and Colin Scott, *Controlling Modern Government: Variety, Commonality and Change*. (Edward Elgar 2004)

⁷⁴ Mark D. Jarvis, 'Hierarchy' in Mark Bovens, Robert E. Goodin, and Thomas Schillemans (eds), *The Oxford Handbook of Public Accountability* (Oxford University Press 2014)

Taking into consideration the actors within the public procurement sector in Nigeria and the accountability interaction with the procuring entities, *hierarchy* as a tool is the dominant tool, with the procuring entity hierarchically accountable to the BPP, NCPP, National Assembly, and the Presidency when you apply the hierarchical chain. *Mutuality* as a tool in the pure sense as suggested by Hood does not seem to feature prominently in the public procurement accountability framework in Nigeria, it could be argued that it is present within the procurement entity, when procurement decisions need to be made, and the procurement planning committee or tenders board, as the case may be, has the job of ensuring the relevant agents within the entity are acting within the set guidelines. However, as we are classifying the entire procuring entity as one actor, then it stands to reason that the PPA does not make any provisions for this tool to be present.

Competition as a tool is also not one which is used within the Nigerian public procurement process, as the service provided when procuring is not one which organisations can compete with each other to provide the services to the public, therefore it is unsuited for this discussion on public procurement. *Contrived randomness* is a potent tool frequently adopted within the Nigerian procurement process, with the BPP essentially conducting spot checks on the procuring decisions of certain agencies, however because it is done by the BPP and it is expected that an audit could be done, this sits more within the hierarchical tool. Also relevant here is the power to request for procurement proceedings, this could be characterised as a use of this tool, however the potency of this tool is hampered, as one of the loopholes which we identified in the procurement process in Nigeria in the previous chapter is the fact that the procuring entity can decide not to provide the information on the proceedings, and cannot be compelled to do so by the courts.

Therefore from an analysis of the tools suggested by Hood, there are two tools which are relevant to the Nigerian public procurement process – *hierarchy* which is quite dominant already and therefore arguably doesn't need any expansion, and *contrived randomness* which exists within the Nigerian public procurement process framework but which is quite limited in its applicability and could benefit from an expansion of its application.

Lodge and Stirton⁷⁵ put forward four worldviews on accountability in the regulatory state that underline any understanding of what needs to be held to account, by how much, and what sorts of motivations are said to underline actors' behaviours: *fiduciary trusteeship*, *consumer sovereignty*, *citizen empowerment*, and *surprise and distrust*. *Fiduciary Trusteeship* is stated as a 'technocratic' doctrine where emphasis is placed on legal and political forms of accountability that make public officials responsible for their actions, either through legal means or electoral punishment. Here, oversight and review are to be conducted by authoritative and responsible experts with a mandate to provide for accountability. In *consumer sovereignty* the citizens are regarded as the best judges of their own needs, who should be allowed to take their own decisions. Individuals are regarded as capable of taking informed decisions and therefore the significance of choice or competition is emphasised, with regulation playing a role as facilitator of choice or competition. The *citizen empowerment approach* emphasises the reduction of social distance and relies strongly on group-based processes, advocating maximising input-oriented participation and the placing of maximum scrutiny of anyone with discretionary power. *Surprise and Distrust* posits that those in positions of authority need to be treated with distrust and subjected to constant surprise. The underlying rationale is that good behaviour will ensue as those who are supposed to be accountable do not know when they are being watched, or *when the lights will go on*.

Viewing these tools from the perspective of the public procurement process in Nigeria and the actors in the process, we can see *the fiduciary trusteeship* seems to have a number of similarities with Hood's *hierarchy* tool. The focus on legal and political forms of accountability belies a leaning towards the hierarchical or vertical form of accountability. Therefore, as with Hood's *hierarchy*, it can be stated that this is the tool, which a number of the other actors in the procurement process use to ensure the accountability of the procuring entity. In fact, the fiduciary trusteeship tool seems more relevant within the Nigerian procurement system than Hood's *hierarchy* as it permits the inclusion of the contractor as an actor who can use legal

⁷⁵ Martin Lodge and Lindsay Stirton, 'Accountability in the Regulatory State', in Robert Baldwin, Martin Cave, and Martin Lodge (eds.), *The Oxford Handbook of Regulation* (Oxford University Press 2010)

means to enforce accountability. Therefore, this tool can be said to be even more representative of the accountability process in Nigerian public procurement.

Consumer sovereignty as a tool while being an applicable tool for analysing the public procurement sector, is limited in its efficacy as the crux of the tool is the fact that the ultimate end users are able to make choices to prove their acceptance and displeasure. The ability to make a choice is dependent on there being a sufficient alternative, however in public works it is more often than not the case that there is only one choice, for instance only one public bridge leading to a particular community. While the end users might be dissatisfied with the public goods purchased, the ability to exercise consumer sovereignty in its true form is limited as they cannot make a choice to swap with another provider. On the other hand, the *citizen empowerment* tool is one which makes an appearance within the context of the Nigerian public procurement process. The emphasis of this tool is on 'voice' in the sense of direct input by the citizens, 'information' in the sense of being closely involved in each of the five dimensions of a regulatory regime⁷⁶, and also representation in the sense that it emphasises close control over delegated authority. It could be argued that the introduction of observers as actors in Nigerian public procurement can be viewed as a manifestation of this tool in that context, however its effectiveness as a tool is severely hampered in that the observers in the process are victims of a number of the loopholes which have been highlighted as existing in the procurement process, a key loophole which would mitigate against the efficacy of this tool is the fact that the emphasis on direct input is limited where the observers can only share observation reports about what they have witnessed in a bidding process. This is a form of horizontal accountability which is limited within the Nigerian public procurement process and needs to be enhanced to make it effective.

Finally, *Surprise and distrust* bears a lot of similarity with *contrived randomness* as discussed by Hood, and as was mentioned in the analysis of *contrived randomness*,

⁷⁶ They identify five crucial dimensions in any discussion of accountability: the decision-making process that leads to the creation of a regulatory standard in the first place; the existence of a regulatory standard for affected participants within the regulated policy domain; the process through which information about the regulated activities is being gathered and how this information is 'fed back' into standard setting and behaviour modification; the process through which regulatory standards are being enforced; and the activities of the regulated parties themselves

it would appear that the beginnings of using this tool exist in the Nigerian public procurement process for instance, the process of allowing members of the public request the record of procurement proceedings, however this is hampered by the loophole which allows the procuring entity to refuse to release the information, and the PPA states that they cannot be compelled by the courts.

From the above analysis of Hood and Lodge/Stirton's accountability tools, it is clear that the current procurement process in Nigeria has certain tools which support different accountability regimes, for instance *hierarchy/fiduciary duty* help to solidify a vertical accountability structure, and *contrived randomness*, *citizen empowerment*, and *surprise and distrust* seem to bring horizontal accountability more to the fore. The effectiveness of these different tools is limited, especially with the backdrop of the loopholes which exist within the Nigerian public procurement process. Therefore, in order to make the process of enforcing the public duty more robust using some of these tools, there is a need to improve the understanding of the framework within which these tools work in order to achieve that goal.

3.3.3 The Transparency and Accountability Matrix (TAM)

This section introduces a framework for determining how effective the accountability mechanism in a public procurement system is, and then applies this to the vertical and horizontal accountability mechanisms within the Nigerian public procurement system. This framework will give us clarity for determining the presence of accountability, as opposed to systems that merely appear to be accountable. This thesis has identified from the analysis in the previous section, that the tools of *contrived randomness*, *citizen empowerment*, and *surprise and distrust* are tools which can be used to effect horizontal accountability. However, in order to make these tools available, there are certain critical elements that have to exist.

As discussed previously, the constituent elements of accountability within a procurement process are – *the (actor's) obligation to report*, *the (forum's) capacity to interrogate*, and, *the forum's sanction/control power*. Within this framework, these elements will be viewed from the point of view of the accountee i.e. the actor in the procurement process who exercises the accountability power vis-à-vis the actions

of the procuring entity. Therefore, the procuring entity's obligation to report will be replaced by the overarching concept of ***access to information***, essentially whenever the procuring entity has an obligation to report to the actor, the actor essentially has *access to information* to be provided by the accountant. The second element is the actor's ability to interrogate the information which has been provided, this element is therefore not a mere right to make comments or observations about the information reported, it is a right to demand that the procuring entity explains any decisions it has made, or any discrepancies in the information it has provided. Inexorably linked to the ability to demand explanation/capacity to interrogate is the ability to sanction the entity and the requisite legal structure for those sanctions to be exercised, if there are no sanctions attached to a demand for explanation/interrogation, then the interrogation is not really one in the real sense of the word, as it can be ignored, therefore both elements are intrinsically linked and therefore both will be represented by the term ***legal empowerment***.

Access to Information and *Legal empowerment* are therefore the two most critical elements of any accountability structure within a public procurement process. With regards to access to information, in the vertical accountability model with its hierarchical approach, the accountant is legally bound to provide information to the accountee, and therefore the flow of information is constant and stable, and upon the receipt of that information, the accountee can interrogate it, and if there are discrepancies or instances of malfeasance, the accountee can sanction the accountant. For instance, in the Nigerian procurement structure, the procuring entity must submit record of proceedings to the BPP, and the BPP reviews these records of proceedings, if there are issues with certain contract awards, the BPP can sanction the procuring entity by reversing the contract award decisions.

Access to information essentially embodies the principles of transparency as discussed in the introductory chapter, and the system can either be transparent by default or transparent by request. *Transparency by default* means that in order for the accountee to have access to information, there is nothing it needs to do, there is a legal imposition on the accountant to always make the information available at certain prescribed times. On the other hand, *transparency by request* means that in

order for the accountee to have access to information, there needs to be a request for that information, and in certain instances, this request for the information can be declined by the accountor. Therefore, *transparency by default* is an accountability system wherein the access to information can be exercised by the accountee as of right and without the need to justify the need for the information. Whereas *transparency by request* is an accountability system within which the accountee needs to request for the information, and in some cases justify the reason for the request, and the accountor possesses some measure of discretion on whether or not to grant the request. If we apply those concepts to the Nigerian public procurement process, we are able to determine that the vertical accountability system is one which has *transparency by default*, while the horizontal accountability system is one which operates *transparency by request*, because the actors who sit outside of the hierarchical structure can only get access to information by requesting it.

With regard to *legal empowerment* which is the second critical foundation of the accountability system, it is important that there is a legal basis upon which the accountee can challenge/review the actions of the accountee, and critically that there is the ability to sanction or take some kind of enforceable action when there has been malfeasance. Within the Nigerian procurement process this legal right to review accountee's actions and where appropriate make some sort of sanction without recourse to a third party only exists in the actors within the vertical accountability system - the BPP, the NCPP, the National Assembly etc can all review the actions of the accountor and in some cases unilaterally reverse their decisions or impose sanctions. Therefore, these actors have *high legal empowerment*. It is high legal empowerment because the hierarchical framework essentially means that the accountor unconditionally answers to the accountee.

However, for actors who sit within the horizontal accountability system, they can only exercise this legal empowerment right by engaging another actor within the system- the courts, and the nature of the sanctions which can be meted out varies. The degree of legal empowerment within such a relationship therefore is based on the availability of the right to request for sanctions, the enabling environment for the sanctions to be accessed, and the nature of the remedy which can be obtained.

Therefore, in a system that has access to information, and high legal empowerment, the accountability framework for both vertical and horizontal accountability is enhanced. However, we have seen in the Nigerian procurement process, while highlighting the loopholes that exist within the system, that issues like unclear debrief procedure, unclear bid cancellation procedure and gaps in bid review process, all mean that there are roadblocks created by the procurement process which affect the effectiveness of this legal empowerment and as a result lead to a reduction in the efficacy of horizontal accountability particularly.

This thesis therefore argues that in order to unleash the powers of an effective dual accountability system, both vertical accountability and horizontal accountability systems need to be strong, and the model for strengthening these systems is what the Transparency and Accountability Matrix (TAM) seeks to achieve. The TAM when applied to the Nigerian public procurement process will identify which interactions need strengthening and this thesis will then make suggestions on how those interactions can be strengthened. In developing a framework for identifying the relative strength or weakness of an accountability system, this thesis argues that there are three differing outcomes that the system may result in – *declaratory accountability*, *conditional accountability*, and *full accountability*. This can be represented with the below diagram, which we will refer to as the *Transparency and Accountability Matrix (TAM)*.

	Low Legal empowerment	High Legal empowerment
Transparency by Default	Conditional Accountability	Full Accountability
Transparency by request	Declaratory Accountability	Conditional Accountability

Figure 3.3

Essentially what the *TAM* is proposing is that the goal of every accountability system should be to achieve **full accountability**. The term *full accountability* is a system where the accountee has unfettered ability to hold the accountor to account for their actions. The accountee has unfettered access to information, and full authority to interrogate and sanction the accountor. Full accountability exists by default in a well-structured vertical accountability system, which has no loopholes, and also exists within a horizontal accountability system that has transparency by default and high legal empowerment without any loopholes or impediments.

Conditional accountability presupposes a horizontal accountability system where there are either impediments to the ability to access information, for instance where there is a system of transparency by request - the accountees are able to request for access to information about the activities of the accountor, however the accountor may refuse the request for information if the request falls within one of the stated exceptions which allows it to be able to refuse access to the requested information; or a system where there is unfettered access's to information, but the accountee attempting to hold the accountor accountable is one which has *low legal empowerment* because the enforcement framework is non-existent or limited.

Declaratory accountability is a system wherein the accountees believe they have some measure of oversight over the actions of the public officer, whereas in reality they have nothing enforceable, they can make demands for information but only have the power to protest, because the requisite legal structure for the enforcement of the rights is so weak as to in effect make it non-existent. In theory, it can be said that this type of accountability system does not exist within the Nigerian public procurement process as there exists a legal framework for the enforcement of rights and the actors within the accountability framework all have a right to access this legal framework.

Full, limited, and declaratory accountability can all be achieved by an interplay of four different inputs – *transparency by request (TReq)*, *transparency by default (TDef)*, *Low Legal empowerment (LLE)*, and *High Legal empowerment (HLE)*. The twin concepts of transparency by default and transparency by request have been

discussed above, however in addition to the above, it is important to note that *transparency by default* is synonymous with a system that has open government data laws wherein the information is legally mandated to be shared proactively and at specified times in a specified format, and with *transparency by request* it should also be further noted that this is synonymous with a system where the basis of access to information is freedom of information laws. One of the key arguments of this thesis is that in order to improve horizontal accountability in the procurement process, there needs to be a shift from transparency by request to transparency by default and embracing open government data is the route to achieving that. Transparency by request makes it difficult for individuals and organisations, who sit outside of the vertical accountability system, to identify or notice conflicts of interest and other indications of corruption; as these instances only come to light when individuals or groups already have suspicions around specific transactions or where there has been a whistle-blower involved. Open government data therefore represents a graduation up the transparency scale, as a move from transparency by request, to transparency by default. Below is an illustration of the outcomes that are possible when the various elements come into contact within the Nigerian public procurement process.

Transparency by Request + Low Legal empowerment = Declaratory accountability.

Transparency by Request + High Legal empowerment = Conditional accountability.

Transparency by Default + Low Legal empowerment = Conditional accountability.

Transparency by Default + High Legal empowerment = Full Accountability.

The TAM needs the following information to work – an assessment of the level of transparency that exists in the system; and an assessment of the level of legal empowerment in the system. This information is readily available in most systems as it can be determined by analysing the legal framework in those systems, as has been done regarding the Nigerian system. The goal of any system that wants to achieve true accountability therefore is to result in *full accountability*. After an analysis of the procurement process in Nigeria, it is clear that only the vertical accountability process currently supports a full accountability process i.e. *transparency by default + high legal empowerment*, and the best outcome for

horizontal accountability within the current framework in Nigerian public procurement as it is set up is *conditional accountability*, which is achieved by the interplay of transparency by request + high legal empowerment or transparency by default + low legal empowerment. However, as a result of the many loopholes that exist within the public procurement process in Nigeria, more often than not the reality is in fact *declaratory accountability* within the horizontal accountability process.

As a first step therefore, in order to improve the horizontal accountability process from a declaratory one, to one with conditional accountability, the current loopholes in the process which water down the transparency by request tools, and reduce the level of legal empowerment, must be addressed and those loopholes, closed. In order to move to a state of full accountability, the system must move from transparency by request to transparency by default, and the legal empowerment tools must be increased to ensure high legal empowerment.

3.4 Conclusion

This Chapter put forward the position that the current dual accountability approach of vertical accountability and horizontal accountability in the Nigerian public procurement system needs to be improved. Specifically, this Chapter argued that horizontal accountability mechanisms that exist within the system need to be adequately strengthened. It explained the concept of the private interest in conflict of interest within the Nigerian context, and the theories of the two publics and prebendalism, which have helped to shed some light of why public officials might act in a manner which is in conflict with their public duty.

It introduced the concepts of vertical and horizontal accountability and discussed the importance of a dual accountability system in managing the issues of conflict of interest that arise in public procurement in Nigeria. Finally, the Chapter concluded by introducing the Transparency and Accountability Matrix and arguing that unleashing the potential for full accountability within the accountability process can be achieved in systems that have transparency by default, and where citizens have high legal empowerment within a structured system, and that in order to ensure

that the current system, which is set up as having conditional accountability, holds public officials accountable, then the loopholes which exist in the system need to be addressed, or else the system will be one of declaratory accountability.

The next chapter of this thesis will analyse some ways in which a system can achieve *full accountability* or *conditional accountability* – primarily by instituting open government data, thus creating a system of transparency by default, and by equipping citizens with higher legal empowerment. These and other tangential issues will be discussed in the following chapter.

Chapter 4 - Improving Access to Information

4.1 Introduction

The preceding chapter put forward the position that the accountability structure within Nigerian public procurement is currently a dual structure wherein there are both vertical accountability and horizontal accountability systems in place, and argued that while the vertical accountability system has a well-structured and understood hierarchical system in place which facilitates full accountability to the actors within the hierarchical structure, the horizontal accountability system needs to be improved upon. Specifically, that in order to achieve the state of *full accountability* in horizontal accountability, there needs to be an improvement of the access to information for the actors within the horizontal accountability system, the current method of *transparency by request* in most accountability interactions, needs to move to one of *transparency by default*. The Chapter also argued that access to information is just one side of the equation, the other dependence, is that the actors within the horizontal accountability system must be able to use the information to achieve a meaningful legal solution, therefore they must be adequately legally empowered.

This chapter argues that in situations with transparency by request, the system structure must be improved to protect the right of the horizontal accountability actors in the system to get access to that information, and ensure that in most request instances, the requests are granted, and only in the rare justifiable cases should exceptions be allowed to deny a request. Ultimately however, the goal should be to move to a system of transparency by default, as the best outcome of transparency by request in the context of the Transparency and Accountability Matrix (TAM) is *conditional accountability*, whereas the best outcome with transparency by default is *full accountability*.

References will be made to some of the loopholes identified in chapter two that existed within the public procurement process in Nigeria, and where appropriate, the loopholes which enhanced access to information can solve from the perspective

of the *Transparency and Accountability Matrix (TAM)* will be discussed. The TAM will be applied to the loopholes identified in the public procurement process in Nigeria, in order to determine the current level of accountability and actual steps which can be taken to improve the accountability surrounding the specific loophole being discussed.

Finally, the Chapter analyses the implications of improved access to information, specifically as it concerns privacy rights and confidentiality and further analyses the potentially negative impact which implementing full horizontal accountability through improved access to information may lead to.

4.2 Improving Transparency by Request

Although certain sector specific legislation like the Public Procurement Act 2007 (PPA) provide the conduit through which actors within the horizontal accountability framework can obtain access to information, the bedrock of any access to information regime has to be freedom of information legislation, as it is a catch-all that allows access to information which is in the custody of all government actors, and therefore this would include procuring entities.

The Freedom of Information Act (FoIA) in Nigeria was passed in 2011 after a long and challenging process. Obe¹ gives a vivid account of the creation of Nigeria's FoIA dating back from 1992 till it was passed in 2011. Ironically the movement for the passage of the FoIA started, not as a pure good governance initiative, but as a way to scale government secrecy with respect to human rights violations of prisoners. In the early 1990s in Nigeria, there was a curtain of secrecy concerning the numbers of prisoners who were in prisons and detention, and who were allegedly being starved and killed indiscriminately. The Civil Society organisations at the time – championed by the Civil Liberties Organisation², felt that mandatory access to government records would give them accurate data to fight these human rights injustices, hence their desire for the FoIA. The shift from using the request for the FoIA as a human rights tool to an anti-corruption mechanism happened in 1998/99

¹ Ayo Obe, 'The Challenging Case of Nigeria' in Ann Florini (ed), *The Right to Know: Transparency for an Open World* (Columbia University Press 2007)

² Civil Liberties Organization (CLO) is a non-governmental organisation involved in the promotion of human rights in Nigeria.

during the midwifing of the new democratic government and in the immediate years of the new democracy³. The FoIA had its first reading in the House of Representatives⁴ on February 22, 2000: it was the first civil society bill to be presented to the National Assembly, and even though it had a number of setbacks, it was finally passed into law and signed by the President in 2011, almost 20 years later after the initial agitation for its creation in 1992. The FoIA is arguably one of the biggest tools for enthroneing transparency in the Nigerian public governance space. It was passed to *'make public records and information more freely available, provide for public access to public records and information, protect public records and information to the extent consistent with the public interest and the protection of personal privacy, protect serving public officers from adverse consequences of disclosing certain kinds of official information without authorization and establish procedures for the achievement of those purposes and; for related matters.'*

4.2.1 Requests for Information

Section 1 of the FoIA it crystallises the right of any person 'to access or request information, whether or not contained in any written form, which is in the custody or possession of any public official, agency or institution howsoever described'. In the next section, it mandates public institutions to ensure the proper organisation and maintenance of all information in its custody in a manner that facilitates public access to such information⁵. The FoIA goes further by providing that persons who have a right of access under it shall have the right to institute proceedings in court to compel any public institution to comply with the provisions of the FoIA. The Act further details the process for application, timelines, potential outcomes and penalties for non-compliance of the public official or agency⁶.

While the FoIA is a laudable step in the transparency system in Nigeria public governance as a form of transparency by request, it should be noted that the FoIA provides that in certain instances, requests for information may be denied if they

³ Prior to 1999, Nigeria had witnessed only 10 years of civilian government in its almost 40 years existence since independence from the British in 1960. The remaining 30 odd years, Nigeria had been governed by Military rule.

⁴ Nigeria has a bicameral legislature with a Federal Senate and Federal House of Representatives. For a Bill to be passed into law the Bill must be passed in both Houses of the National Assembly.

⁵ Freedom of Information Act (FOIA) 2011 s 2(2).

⁶ FOIA 2011 s 4-8

fall within the listed exceptions. The global standard for freedom of information laws has been championed by Article 19⁷, in its Principles on Right to Information Legislations⁸, the Principles were originally developed in 1999 and updated in 2015. They have been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression, in his report to the 2000 Session of the United Nations Commission on Human Rights⁹, and referred to by the Commission in its 2000 Resolution on freedom of expression, as well as by his successor in 2013 in his report to the UN General Assembly in 2013¹⁰. The Principles proposed that all individual requests for information from public bodies should be met unless the public body can show that the information falls within the scope of a limited regime of exceptions, and that a refusal to disclose information is not justified unless the public authority can show that the information meets a strict three-part test. The three-part test being that the information *must relate to a legitimate aim as provided for in international law; disclosure must threaten to cause substantial harm to that aim; and the harm to the aim must be greater than the public interest in having the information.*

With respect to the first part of the test, the Principles state that a complete list of the legitimate aims which may justify non-disclosure should be provided in the law, and this list should include only interests which constitute legitimate grounds for refusing to disclose documents and should be limited to matters recognized under international law such as law enforcement, privacy, national security, commercial and other confidentiality, public or individual safety, and the effectiveness and integrity of government decision-making processes. The second part of the test states that the public body must show that the disclosure of the information would cause substantial harm to that legitimate aim. It is not sufficient to justify an exception simply on the grounds that the information requested falls within the scope of the legitimate aim listed. The final part of the test states that even if substantial harm to the legitimate aim can be shown, the information should still be disclosed if the benefits of the disclosure outweigh the harm, in other words if there

⁷ Article 19 is a British human rights organization with a specific mandate and focus on the defense and promotion of freedom of expression and freedom of information worldwide founded in 1987. The organization takes its name from Article 19 of the Universal Declaration of Human Rights

⁸ The Public's Right to Know: Principles of Right to Information

<https://www.article19.org/data/files/RTI_Principles_Updated_EN.pdf> accessed 4 November 2019

⁹ E/CN.4/2000/63

¹⁰ A/68/362, 4 September 2013

is a public interest to the information being disclosed, this overrides the substantial harm to the legitimate aim.

Contrasting the international best practice as advocated by the Principles¹¹, the Nigerian FoIA has a number of exceptions which may be used as grounds for refusal of a freedom of information request. These exceptions include international affairs and national defence¹², administrative enforcement proceedings of law enforcement or correctional agencies¹³, personal information¹⁴, commercial confidentiality¹⁵, privileged information¹⁶, research and academic information¹⁷. In most of the sections dealing with exceptions, the test that is used in determining whether or not a disclosure would fall under an exception is the public interest test. The provisions state that an application for information shall not be denied where

¹¹ n 7

¹² FoIA 2011 s 11- *A public institution may deny an application for any information the disclosure of which may be injurious to the conduct of international Affairs and the defence of the Federal Republic of Nigeria*

¹³ FoIA 2011 s 12 - *A public institution may deny an application for any information which contains-*

(a) Records compiled by any public institution for administrative enforcement proceedings and by any law enforcement or correctional agency for law enforcement purposes or for internal matters of a public institution, but only to the extent that disclosure would-

(i) interfere with pending or actual and reasonably contemplated law enforcement proceedings conducted by any law enforcement or correctional agency, (ii) interfere with pending administrative enforcement proceedings conducted by any public institution, (iii) deprive a person of a fair trial or an impartial hearing, (iv) unavoidably disclose the identity of a confidential source, (v) constitute an invasion of personal privacy under Section 15 of this Act, except, where the interest of the public would be better served by having such record being made available, this exemption to disclosure shall not apply, and (vi) obstruct an ongoing criminal investigation; (b) information the disclosure of which could reasonably be expected to be injurious to the security of penal institutions.

¹⁴ FoIA 2011 s 14 - *a public institution must deny an application for information that contains personal information and information exempted under this subsection includes – (a) files and personal information maintained with respect to clients, patients, residents, students, or other individuals receiving social, medical, educational, vocation, financial, supervisory or custodial care or services directly or indirectly from public institutions; (b) personnel files and personal information maintained with respect to employees, appointees or elected officials of any public institution or applicants for such positions; (c) files and personal information maintained with respect to any applicant, registrant or licensee by any government or public institution cooperating with or engaged in professional or occupational registration, licensure or discipline; (d) information required of any tax payer in connection with the assessment or collection of any tax unless disclosure is otherwise requested by the statute; and (e) information revealing the identity of persons who file complaints with or provide information to administrative, investigative, law enforcement or penal agencies on the commission of any crime.*

(2) A public institution shall disclose any information that contains personal information if- (a) the individual to whom it relates consents to the disclosure; or (b) the information is publicly available

¹⁵ FoIA 2011 s 15 - *A public institution shall deny an application for information that contains- (a) trade secrets and commercial or financial information obtained from a person or business where such trade secrets or information are proprietary, privileged or confidential, or where disclosure of such trade secrets or information may cause harm to the interests of the third party provided that nothing contained in this subsection shall be construed as preventing a person or business from consenting to disclosure; (b) information the disclosure of which could reasonably be expected to interfere with the contractual or other negotiations of a third party; and (c) proposal and bids for any contract, grants, or agreement, including information which if it were disclosed would frustrate procurement or give an advantage to any person.*

¹⁶ FoIA 2011 s 16 - *A public institution may deny an application for information that is subject to the following privileges – (a) legal practitioner-client privilege, (b) health workers- client privilege; (c) journalism confidentially privilege; (d) any other professional privileges confidentially by an Act*

¹⁷ FoIA 2011 s 17 - *A public institution may deny an application for information which contains course or research materials prepared by faculty members; FoIA 2011 s 19 - A public institution may deny an application for information that contains information pertaining to – (a) test questions, scoring keys and other examination data used to administer an academic examination or determine the qualifications of an application for a license or employment; (b) architects' and engineers' plans for buildings not constructed in whole or in part with public funds and for buildings constructed with public funds, to the extent that disclosure would compromise security; and (c) library circulation and other records identifying library users with specific materials:*

the public interest in disclosing the information outweighs whatever injury that disclosure would cause. In *Legal Defence & Assistance Project(Gte) Ltd v Clerk of the National Assembly of Nigeria*¹⁸ the court held that the provisions of the FoIA clearly places the public interest above all else including the personal interest of the individuals, and that where the interest of the public is in clash with the individual interest, in deserving cases, the collective interest must be held paramount. In this case the decision of the court was that it was in the public interest for the defendants to release the details of the salary, emolument and the allowances paid to all Honourable Members and Distinguished Senators of the National Assembly.

The only two sections of the FoIA which do not have the public interest test are the sections dealing with disclosure of privileged information by professionals – lawyers, journalists, doctors etc., and disclosure of research information. In *Boniface Okezie v Central Bank of Nigeria*¹⁹ the plaintiff requested (amongst other things) information on the amount of legal fees and other fees paid and to be paid to certain lawyers by the defendant, and one of the grounds which the Defendant used to deny the freedom of information request was the fact that this information would breach legal practitioner and client privilege which was an exception allowed under the FoIA. The court held that the defendant was not obliged to release the information about payments made to the lawyers as the plaintiff had not shown an overriding public interest for that information to be released. Therefore, in the case of disclosure of privileged information the courts still applied the public interest test to the decision even though it was not specifically required to do so.

When comparing the provisions of the FoIA with the principles as espoused by Article 19 with its three-part test, the Nigerian process has a two-part test, the first part is where each section lists the legitimate aim which the exception is seeking to protect, and the second part is the public interest test. The substantial harm element is not included in the Nigerian FoIA legislation, and so there is no requirement that the authority which denies a request need prove that the reason for the denial is

¹⁸ FHC/ABJ/CS/805/2011

¹⁹ FHC/L/CS/494/2012

because there will be substantial harm to the aim protected, all that it needs to do is prove that the information falls under the aim listed in that exception. In *Incorporated Trustees of the Citizens Assistance Centre v Hon Adeyemi Ikuforiji & Lagos State House of Assembly*²⁰, the approach which the court adopted on the issue of the disclosure of personal information was only analysed on the basis of whether or not it was in the public interest. The court did not go into the issue of whether or not *substantial harm* would be visited upon the subjects of the personal information, if the freedom of information request was complied with.

This non-inclusion of the substantial harm element to exception, although not fatal, severely limits the efficacy of the FoIA as it gives authorities a convenient cover for the denial of certain requests. This means that the requester will always need to provide overriding public interest in cases of requests where the information is listed as an exception. Therefore in the broader conversation on horizontal accountability, a system that provides less hurdles for the authority to scale when they want to refuse a request for information, is a system that limits access to information, and by implication weakens the efficacy of horizontal accountability, as access to information is an essential ingredient within the TAM for the exercise of horizontal accountability by the actors within that system.

4.2.2 Appeals

Apart from the issues of obtaining access to the information and the legislation which governs how this access is managed. It is also important that there is a structure in place to address denials of access. The *Article 19* principles state that there should be a process for deciding upon requests for information, and this should be spread across three different levels: within the public body; appeals to an independent administrative body; and appeals to the courts. With respect to the first stage of the appeal process, there should be provision for an internal appeal to a designated higher authority within the public authority who can review the original decision. With respect to the independent administrative body, the principles suggest that this may be either an existing body, such as an Ombudsman or a

²⁰ ID/211/2009

specialised administrative body established for this purpose, and that in either case, the independence of the body should be guaranteed, and that best practice should be to create an independent *Information Commission*. The procedure by which the administrative body processes appeals over requests for information which have been refused should be designed to operate rapidly and cost as little as is reasonably possible. In order to ensure that all members of the public can access this procedure and that excessive delays do not undermine the whole purpose of requesting information in the first place.

The administrative body should be granted full powers to investigate any appeal, including the ability to compel witnesses and, importantly, to require the public body to provide it with any information or record for its consideration, in camera where necessary and justified. Upon the conclusion of an investigation, the administrative body should have the power to dismiss the appeal, to require the public body to disclose the information, to sanction public bodies for obstructive behaviour where warranted and/or to impose costs on public bodies in relation to the appeal²¹. Finally, the person requesting the information should be able to appeal to the courts against decisions of the body. The court should have the full power to review the case on its merits and not be limited to the question of whether the body has acted reasonably. This will ensure that due attention is given to resolving difficult questions and that a consistent approach to right to information issues is promoted. A process for deciding upon requests for information should be specified at three different levels: *within the public body; appeals to an independent administrative body; and appeals to the courts*.

In contrast, the relevant provisions of the PPA on access to record of proceedings, and the provisions of the FoIA on access to information do not provide for a three-stage appeal process. Both laws only provide for a **one stage appeal process**, which is that when requests for information are denied, the only option is to take the appeal to the courts. This one stage appeal process therefore is an impediment to effective transparency by request, which reduces the efficacy of horizontal

²¹ Principle 5, Article 19: The Public's Right to Know: Principles of Right to Information <https://www.article19.org/data/files/RTI_Principles_Updated_EN.pdf> accessed 4 November 2019

accountability. A recent survey carried out by the Hague Institute for Innovation in Law²² showed that only 8% of Nigerians who have serious legal issues ever approach the courts, therefore there is a high mistrust/lack of faith in the judicial institutions in Nigeria, if citizens are not going to court when they have a serious personal legal issue, it stands to reason that it is unlikely they will then decide to go to court over an access to information issue. In a country with such a pronounced lack of faith in the judicial system, it is very likely that a large number of individuals will give up their quest for judicial review of an access to information request denial.

Apart from the issue of systemic mistrust of the judicial system in Nigeria, there is also the issue of the cost of legal fees as a barrier to access. Specifically, the costs, time and effort which is required to file an action at the Federal High Court²³ are extremely prohibitive for individuals who want to enforce the provisions of the FoIA. If a requester were to be successful in court for an appeal to a denied request, there is no specified redress process which states that the person be reimbursed the cost of bringing the litigation, the only redress is provided in the FoIA²⁴ which is that in the case of wrongful denial of access, the defaulting officer or institution is liable on conviction to a fine. The relevant provisions of the PPA on access to record of proceedings has no such provision either, therefore the requester is faced with having to bear the costs of the appeal with no possibility of reimbursement. With such a cumbersome process, this could deter individuals without adequate funding from appealing decisions where access to information has been denied by the relevant authority.

For the Nigerian FoIA (and indeed, other sector-specific laws that deal with access to information) to serve the primary purpose of transparency, the system must have very few barriers to access, it should be as frictionless as possible. A frictionless system is one where the individual can make the request relatively cheaply and quickly. This is evident in the provision of Section 8 of the FoIA which provides that *fees shall be limited to standard charges for document duplication and transcription*

²² Hiil Justice Needs and Satisfaction Survey - Nigeria 2018 <<https://www.hiil.org/projects/justice-needs-and-satisfaction-in-nigeria/>>

²³ The Federal High Court of Nigeria has jurisdiction over FOIA refusal appeals.

²⁴ FoIA 2011 s 7(5)

where necessary, this is indicative of the fact that the FoIA intentionally does not set out a burden of high cost that could potentially prevent people from requesting information. There are no access fees, and the only fees available are justifiable and linked to document duplication costs and transcription costs. The introduction of the timeline for responding to applications²⁵ is a further indication of the fact that the FoIA seeks to prioritise promptness and predictability in the response process. Therefore, it is clear that cheap and quick access to information are principles embedded in the FoIA, it is however disconcerting that the application of the FoIA does not fit within that reality, and in fact there are a number of impediments to its efficacy which has a follow on effect on the efficacy of horizontal accountability by the actors involved in the system.

The three stage appeal principle as suggested by *Article 19* would greatly address the issues associated with a one stage appeal process as discussed above, however while the first stage and the third stage of the process can be implemented relatively seamlessly (if the relevant changes to the laws are made), there is the issue of the second stage in the appeal process – an appeal to an independent authority, as no such authority exists in Nigeria. In the context of the public procurement process and access to record of proceedings, this second stage could theoretically be handled by the Bureau of Public Procurement (BPP), or by the office of the Attorney General of the Federation (OAGF). As the BPP is a sector-specific organisation with a limited scope, it is suggested that the OAGF would be better placed as the second stage of the appeal process for all requests for information across all public authorities, as a more holistic solution. In fact, the FoIA has already given the OAGF certain powers which, if improved upon, can serve as a foundation for exercising this power as a second stage in the appeal process.

Under the Nigerian FOIA²⁶, the Attorney General of the Federation (AGF) is given certain responsibilities to enhance the implementation and efficacy of the FOIA. These responsibilities include receiving yearly reports on or before February 1 of each year from public institutions regarding the following information:

²⁵ FOIA 2011 s 4

²⁶ FOIA 2011 s 29

the number of determinations made by the public institution not to comply with applications for information made to such public institution and the reasons for such determinations;

the number of appeals made by persons under this Act, and the reason for the action upon each appeal that results in a denial of information;

a description of whether the Court has upheld the decision of the public institution to withhold information under such circumstances and a concise description of the scope of any information withheld;

the number of applications for information pending before the public institution as of October 31 of the preceding year and the median number of days that such application had been pending before the public institution as of that date;

the number of applications for information received by the public institution and the number of applications; which the public institution processed;

the median number of days taken by the public institution to process different types of applications for information;

the total amount of fees collected by the public institution to process such applications; and the number of full-time staff of the public institution devoted to processing applications for information, and the total amount expended by the public institution for processing such applications.²⁷

Ostensibly the responsibility given to the OAGF is to ensure that it exercises oversight over all the public authorities with a view to ensuring compliance. The OAGF is to submit to the National Assembly²⁸ an annual report on or before April 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under the FOIA subsequent to a FOI denial, the exemption involved in each case, the disposition of such cases, and the cost, fees, and penalties assessed. The report is also to include a detailed description of the efforts taken by the Ministry of Justice, the Federal Ministry which the AGF heads, to encourage all government or public institutions to comply with the FOIA.

The OAGF is therefore an integral institution in ensuring the proper implementation of the FOIA, and even though the FOIA gives wide powers to the OAGF, this does not go far enough. The powers of the OAGF need to be widened in order to further the

²⁷ FOIA 2011 s 29(1)(a-f)

²⁸ This is both levels of the Nigerian Legislature – Senate and the House of Representatives.

goals of the FOIA. The powers need to be widened specifically in 2 respects – firstly, the OAGF needs to be given the power to conduct administrative reviews of appeals against refusals, and secondly the OAGF needs to be given the powers to either sanction erring public officials/agencies, or to recommend to the appropriate supervising Ministry that sanctions, or reprimands be passed on erring public officials/agencies.

This expansion of the power of the OAGF would not only ensure that more people would be able to appeal refusals – as there will be no legal costs incurred, and the timeline for reviews would relatively be shorter than court cases; but additionally it would give the OAGF real-time information about the level of compliance of the different public institutions, allowing it to perform its oversight and implementation powers more effectively, rather than the current process where it has to wait for annual reports from all the public institutions before getting the information necessary to carry out its oversight duties. Such an administrative review role being carried out by a different government Ministry/agency is not entirely novel to the Nigerian government process, this process is similar to the administrative review role which is played by the Bureau of Public Procurement (BPP), when reviewing procurement decisions²⁹ of procuring agencies. The role of the OAGF in reviewing FOIA refusal decisions can therefore be modelled on the BPP administrative review process, specifically requests for review would have to be made to the OAGF within a specified number of days, the request for review would contain the original FOI request and the letter from the public institution denying the request in full or partially, and on receipt of the request for review, the OAGF would notify the FOI officer in the public institution concerned informing them of the request for review. The AGF would then have a specified number of days within which to conduct the review and make a decision in writing, the office of the AGF would have the power to nullify in whole or part the decision to refuse the FOI request, and order that the information be disclosed to the requester either in full or in part.

Finally, if the office of the AGF fails to deliver a decision within the stipulated time, or the requester is dissatisfied with the decision of the office of the AGF, the

²⁹ PPA 2007 s 54

requester may appeal to the Federal High Court within a specified number of days of the receipt of the decision of the office of the AGF or the expiration of the time stipulated for the office of the AGF to deliver a decision. It is suggested that this recommendation if adopted would significantly reduce the barriers to access which currently exist within the FOI process, apart from improving access and bringing the Nigerian access to information process more in line with the three stage appeal process as advocated in the Principles, these changes would also ensure that there is better monitoring of the process by the OAGF, allowing the OAGF to carry out its statutory functions more effectively. Giving these powers to the OAGF would serve as a lever for ensuring accountability in the process and provide a bulwark for protecting privacy rights within the access to information process, and also provide a transparent process for how issues of access denial reviews are handled. Therefore, enhancing the powers of the OAGF within the procurement process, will guarantee transparency by request, and therefore improve horizontal accountability as a tool to supplement vertical accountability, and will serve to empower the citizens more to get involved in the accountability process.

Finally, it is important to ensure that the third stage in the appeal process is an effective stage. In other words, that the courts are properly empowered to be able to review appeals either within a one stage process or within a three-stage process. With respect to the provisions of the PPA which deal with access to record of proceedings, the PPA provides that where there is a refusal to disclose records of proceedings by a procuring entity, and the issue is taken before the courts, the procuring entity may refuse to disclose information when lawfully ordered to do so by a court, if its disclosure would be contrary to law; impede law enforcement; or prejudice legitimate commercial interests of the parties³⁰. This provision is a serious limitation on transparency by request, and as a consequence – effective horizontal accountability. The relevant section states that ³¹:

(3) A disclosure of procurement proceeding records, prior to award of contract may be ordered by a court, provided that when ordered to do so by a court. The

³⁰ PPA 2007 s 38(3)

³¹ Ibid.

procurement entity shall not disclose such information, if its disclosure would (a) be contrary to law; (b) impede law enforcement; or (c) prejudice legitimate commercial interests of the parties.

As can be seen from the provisions above, there is access to information on the record of proceedings for a procurement process after it has ended, however (3) of the section states that this refusal to grant access to information also extends to instances where a court has ordered that the information be disclosed. This section raises several issues. Firstly, the section provides that a procuring entity can refuse to obey a court order, this is unconstitutional as it is inconsistent with the provisions of the 1999 Constitution of the Federal Republic of Nigeria which gives the judiciary the power to adjudicate over matters, and makes decisions of the courts binding³². Further, it is also against the principles of right to information legislation in that the legislation should have processes in place to facilitate access, and this includes an unfettered appeal process which gives access to courts who can overturn decisions that restrict access. Secondly, and also very important is the fact that the legislation has only one test – that the information relates to a legitimate aim. All three exceptions (contrary to law, impede law enforcement, and prejudice legitimate commercial interests) are legitimate aims, however the fact that there is no subsequent test on the application of the exception means that access to information is practically nullified. It does not imbibe the two-part test of the FoIA, which is that there must be a legitimate aim which has no *overriding public interest*, and it also does not have the three-part test of Article 19, which is that there must be a legitimate interest, and the disclosure of the information would cause substantial harm to that legitimate aim, and there is no overriding public interest which compels the release of the information. Therefore, when one compares the provisions on access to record of proceedings against the standards of the FoIA, and the principles of Article 19, it is clear that access to record of proceedings hinders transparency by request.

³² 1999 Constitution s 287(3) - “The decisions of the Federal High Court, a High Court and of all other courts established by this Constitution shall be enforced in any part of the Federation by all authorities and persons, and by other courts of law with subordinate jurisdiction to that of the Federal High Court, a High Court and those other courts, respectively.”

Ordinarily one would think that when there is disparity between the FoIA and another law with respect to access to information, that the provisions of the FoIA would take precedence, unfortunately this is not the case. The FoIA states³³ that the provisions of the FoIA are intended to complement and not replace the existing procedures for access to public records and information, therefore the implication of this is that the two-part test of the FoIA cannot be imputed into the provisions of the PPA.

It should be noted that although the decision-making process for the authority when determining whether to grant access to information under the FoIA is the two-part test – legitimate aim and public interest, and the sector-specific test for the PPA is only the legitimate aim test. The process which the courts is required to follow when an appeal comes before it is a three-part test. The FoIA provides³⁴ that where a public institution denies an application for information, or a part thereof on the basis of a provision of this Act, the Court shall order the institution to disclose the information or part thereof to the applicant - if the Court determines that the institution is not authorized to deny the application for information; where the institution is so authorized, but the Court nevertheless determines that the institution does not have reasonable grounds on which to deny the application; or where the Court makes a finding that the interest of the public in having the record being made available is greater and more vital than the interest being served if the application is denied, in whatever circumstance.

This test to be applied by the court means that where the denial is of a matter that is not stated as a legitimate aim under the FoIA, the denial will be overturned, and further if it is stated as a legitimate aim, then the court will determine whether there were *reasonable grounds* to deny the request. The reasonable grounds test replaces the substantial harm test (which exists in the Article 19 principles), however there is no guidance in the FoIA as to what would constitute reasonable grounds, and therefore this would be at the discretion of the courts. Finally the FoIA states that the courts are to apply the overriding public interest test, and that if the interests of

³³ FoIA 2011 s 30

³⁴ FoIA 2011 s 15

the public in making the information available is greater and more vital than the interest being served if the application is denied, then the appeal would be allowed and the information should be disclosed.

In conclusion therefore, the transparency by request process contained in the PPA is quite restrictive on three levels. Firstly when assessing a request, the procuring entity need only determine whether it is a legitimate aim – it does not meet the three-part test standard as suggested by the *Article 19* principles; secondly when a request is denied, the appeal process is a one stage appeal process directly to the courts, this also does not measure up to the *Article 19* principles which suggests a three stage appeal process. Finally, the powers of the courts to order a release of information is curtailed by the PPA as it provides that procuring entities can disobey court orders. The PPA provisions therefore hamper transparency by request vis-à-vis access to record of proceedings. The provisions of the FoIA, which ordinarily would have stepped in to replace the deficient access to information provisions in the PPA, also suffers from its own shortcomings. Firstly, the FoIA provides that its provisions are complementary, and not meant to replace any stated procedures on access to information, and so one might not necessarily be able to plead the provisions of the FoIA to replace the deficient PPA provisions. Secondly, while the FoIA provisions on how an authority can assess an access to information request are an improvement on the provisions of the PPA, in that it provides for a two-part test – legitimate aim and public interest, it does not go far enough, as it neglects to introduce the concept of substantial harm. Thirdly, the appeal process for denial requests is also a one stage process, mirroring the PPA appeal process, it does however improve on the PPA process by including the three-stage test for determining whether an appeal should be allowed, and it also emphasizes the powers of the court to grant enforceable reliefs e.g. order release of information which must be followed, however the provisions still do not match up to the *Article 19* principles which have been widely endorsed by relevant international agencies.

It is suggested therefore that in order to ensure true transparency by request, these issues within the PPA and the FoIA process need to be addressed urgently, and the suggested solutions for this are an introduction of a three part test of legitimate aim,

substantial harm, and public interest when faced with a request for access to information; and further, that there should be a three stage appeal process which incorporates an initial appeal to a senior figure in the authority which initially denies the request, then a second stage appeal to an independent third party (it is suggested that the OAGF is presently best placed to take on this role), and then finally an appeal to the court with no limitation on the court's powers to order a release of the information where the requirements in the three part process have been met. For there to be true transparency by request, there must be no unnecessary impediments to access to information, and therefore any access to information legislation which creates these impediments to the process diminishes the effectiveness of horizontal accountability. In the context of the Transparency and Accountability Matrix therefore, a situation which should ordinary lead to *conditional accountability* for actors, is hampered as there is no true transparency by request.

4.2.3 Potential Effect of Improved Transparency by Request

If a strong transparency by request process as discussed above is achieved in the public procurement process in Nigeria, then this would solve some of the loopholes which have been identified in the process. For example, in chapter two, an analysis of the current situation in the Nigerian public procurement process was done where procurement of special goods; works and services involving national defence or national security are specifically excluded from the operation of the provisions of the public procurement Act³⁵, unless the President's express approval has been first sought and obtained. The loophole identified is that since the PPA in Nigeria does not apply to defence procurement, bad actors could operate outside of it and take advantage of the system. Applying the TAM to the loophole in defence procurement shows a system that has *transparency by request*, this is because citizens are able to request for information concerning spending in the defence procurement sector, in fact in December 2018, the Nigerian Military granted a request for information by non-governmental organisations regarding military spending³⁶ on defence

³⁵ PPA 2007 s 15(2)

³⁶ Bertram Nwannekanma and Emeka Nwachukwu, 'Buratai replies SERAP, others over military spending', (The Guardian 14 January 2019) <<https://guardian.ng/news/buratai-replies-serap-others-over-military-spending/>> accessed 4 November 2019

procurement contracts. However, the response to that request by the Nigerian Military cannot be taken to be a full representation of the actual state of transparency by request in Nigeria.

In order to determine the true state of transparency by request in Nigeria, we will review the results of the Annual Reports submitted by the Office of the Attorney General (OAGF) to the National Assembly for the years 2015-2019 on the implementation of the Freedom of Information Act 2011³⁷, and the annual FoIA Compliance Report ranking for those same years, published by the Public and Private Development Centre (PPDC)³⁸ a Nigerian non-governmental organisation focused on accountability in public procurement³⁹.

	Institutions Reviewed		FOI Requests		Refusals/No Response	
	OAGF	PPDC	OAGF	PPDC	OAGF	PPDC
2015	44	116	217	116	36	82
2016	54	131	405	131	7	46
2017	73	166	498	166	7	103
2018	70	187	1173	187	35	109

Figure 4.1: Analysis of annual OAGF and PPDC FoIA Compliance Reports

The OAGF Annual reports are compiled by the Federal Ministry of Justice (MoJ) by requesting that all public institutions send to the MoJ the total number of FoI requests they receive, and a breakdown of the responses sent to those requests, including the time period spent to respond to each request. The OAGF does not state if and how it verifies the accuracy of the information which is sent by the public institutions. On the other hand, the PPDC FoI compliance report is obtained by the PPDC sending FoI requests annually to all the listed public institutions, the FoI requests are sent at or around the start of each calendar year, and the PPDC publishes the acknowledgement copy of the FoI request sent to the public

³⁷ Federal Ministry of Justice Freedom of Information Act Annual Report 2017 <<https://www.justice.gov.ng/index.php/fmoj-downloads/reports/fmoj-foia-annual-report>> accessed 4 November 2019

³⁸ The PPDC was established in 2003. Its major activities are in the area of governance, public finance expenditure and advocacy, corruption prevention, and monitoring, promotion of popular participation in governance and development.

³⁹ Public and Private Development Centre Freedom of Information Act Compliance Reports <<http://procurementmonitor.org/foi-ranking/home/ranking>> accessed 4 November 2019

institutions, it then bases its reports on the responses or lack thereof from the concerned public institutions.

For the years 2015-2019, the OAGF report stated that for the institutions that filed their submissions in the time mandated by the FoIA there was a high level of compliance in responding to requests; for 2015 the number of requests which were refused constituted 17% of the requests, for 2016 the percentage was 2%, for 2017 the percentage was only 1%, and for 2018 the percentage was 3%. These figures as contained in the report would therefore seem to paint a picture of very high compliance and would suggest a system of a healthy transparency by request process. However, the PPDC annual compliance reports for that same period paint an entirely different picture, for the year 2015 the PPDC reported that 71% of requests were either refused or were not responded to, for 2016 the percentage for refusals/no responses was 35%, in 2017 the percentage was 62%, and in 2018 the percentage was 58%.

Both the reports of the OAGF and the PPDC therefore seem to be contradicting themselves. As the OAGF report is an official government document which is presented to the National Assembly, there is the temptation to give extra weight and credibility to that report over the PPDC which is essentially a report by a private organisation, however the OAGF report itself states⁴⁰ that the OAGF had numerous challenges in getting the annual report together, including failure of public institutions to send in reports in time. When one adds that to the fact that the OAGF report also does not state whether any fact checking was carried out to confirm whether the information provided by the public institutions were indeed accurate, it diminishes the credibility of the report. However, in contrast the PPDC report is quite thorough and provides evidence of freedom of information requests which were sent to the public institutions concerned – with actual scans of the documents to prove that they were stamped and acknowledged by the public institutions involved, and so they were definitely received. It would seem that the PPDC report is more credible. In light of the discrepancy between both the OAGF report and the PPDC report, it is more likely that the PPDC report is more representative of the true

⁴⁰ n 34 (p.6)

state of transparency by request in Nigeria, and if this is the case then there is much work that needs to be done to improve transparency by request, as a system where there is such a high level of requests for information which are either refused or go un-replied, is indeed cause for alarm, as it is a danger to transparency by request, and by implication, a danger to the efficacy of horizontal accountability.

4.3 Improving Transparency by Default

This section submits that the use of open government data will facilitate a better horizontal accountability process, essentially by creating a system which is transparent by default, without the need for requests for information to be made to procuring entities as all the information necessary for the accountability process has already been made available.

In 2013, the Economic Commission for Africa (ECA) of the United Nations commissioned a study on the policy, legal and technical requirements for open government in Africa – *Unlocking the Potential for Open Government in Africa*⁴¹. The aim of this study was to determine how best ECA can assist African countries to improve transparency and unlock social and economic value, given the vast developmental, social and economic gains that have been realized in countries that have moved towards open government, in particular through open government data (OGD) platforms at national and subnational levels. This project focused on the use of open government and OGD to enhance governance initiatives and improve the social and economic conditions of African citizens. One of the outputs of the report was the development of guidelines, a step-by-step guide for countries wishing to follow best practices for the implementation of open government within a suitable contextual and technological framework. The report also highlighted the importance of the existence of laws and policies on the use of information including freedom of information laws, data protection laws, open data laws and copyright laws. The reporting identifies certain technical requirements that must exist for OGD and hence for efficient open government, which determine the manner in which open data may be obtained and used. They include the development of a data

⁴¹ United Nations Economic Commission for Africa, (2017), *Unlocking the Potential for Open Government in Africa: Legal and technical requirements for Open Government Implementation in Africa*

portal with machine readable data, existence of data centres to manage and store this data, development of information infrastructure, and interoperability of data, high data quality and validation, and security and data protection. These are the core issues that need to be addressed when approaching the issue of transparency by default.

In Nigeria, the FoIA provides that⁴² public institutions are to ensure that they keep records and information of all its activities, operations and businesses, and ensure the proper organisation and maintenance of all information in its custody in a manner that facilitates public access to such information, and shall cause to be published (amongst other things) information relating to the receipt or expenditure of public or other funds of the institution; the names, salaries, titles and dates of employment of all employees and officers of the institution; a list of files containing applications for any contract, permit, grants, licenses or agreements; a list of all materials containing information relating to any grant or contract made by or between the institution and another public institution or private organization etc. The effect of this section of the FoIA is that it mandates open government data for the itemised information by all public institutions. In order for open government data to work effectively however, there has to be a legal/regulatory system in place for it to be effectively implemented. Further, for it to be effective, the following key concerns need to be addressed - *data access, data reliability and data protection*.

4.3.1 Data Access

Data access presupposes that certain key legislations must be created or amended in order to ensure easy access of information that is critical in order for actors to be able to properly exercise their accountability duties within the horizontal accountability process. Without the legislation in place the information cannot be released, *Article 19* advocates for this in its principles on access to information, which states that public bodies should be under an obligation to proactively publish and disseminate widely information of significant public interest, subject only to reasonable limits based on resources and capacity, and that the law should establish

⁴² FoIA 2011 s 2

both a general obligation to publish and key categories of information that must be published including operational information about how the public body functions, including objectives, organizational structures, standards, achievements, manuals, policies, procedures, rules, and key personnel; information on audited accounts, licenses, budgets, revenue, spending, subsidy programmes public procurement, and contracts; and that the information should be made available in open and machine readable formats when applicable, and without restrictions on its further use and publication.

4.3.2 Data Reliability

Apart from ensuring data access, it is critical that it is accurate and trustworthy data – there must be reliability of the data and the data sources. Thurston⁴³ suggests that real openness must ultimately build upon a foundation of reliable, high quality source records that document government policies, activities and transactions. The anticipated benefits are only possible if the records from which the data are derived are complete and accurate. Data integrity is an issue in a lot of developing countries, and Nigeria is not different. As data is based on official government records, there is often scepticism about the quality of the data. In most government departments, even basic records management controls are not in place⁴⁴. In environments where these controls are not in place, the records are likely to be incomplete, difficult to locate and sometimes impossible to authenticate. In fact, in the OAGF Annual Reports on FoI Compliance for the years 2015-2019, the MoJ consistently stated that one of the issues facing the implementation of the FoIA is *'lack of record keeping and systematic means of record management in a manner that facilitates public access'*⁴⁵.

The potential of open government data within a horizontal accountability system can only be realised if there is a structure in place for accurately collecting the data, storing it, and accessing it. The relative success of open government data depends

⁴³ Anne Catherine Thurston, 'Trustworthy Records and Open Data', (2012) 8 The Journal of Community Informatics 2 <<http://ci-journal.org/index.php/ciej/article/view/951>> accessed 4 November 2019

⁴⁴ Chinyeaka Justine Igbokwe-Ibeto, 'Record Management in the Nigerian Public Sector and Freedom of Information Act', (2013) 8 International Journal of Development and Management Review 1

⁴⁵ Federal Ministry of Justice (2015) Annual Report On The Implementation Of The Freedom Of Information (FoI) Act 2011 – Page 6; Federal Ministry of Justice (2016) Annual Report On The Implementation Of The Freedom Of Information (FoI) Act 2011 – Page 5; Federal Ministry of Justice (2017) Annual Report On The Implementation Of The Freedom Of Information (FoI) Act 2011 – Page 7; Federal Ministry of Justice (2018) Annual Report On The Implementation Of The Freedom Of Information (FoI) Act 2011 – Page 5 - <https://www.justice.gov.ng/index.php/fmoj-downloads/reports/fmoj-foia-annual-report>

on governments' ability to create and maintain reliable, trustworthy and accurate information (records and data). It is crucial to the process that there is a verifiable method for collating and gathering this data, where the data gathered is incomplete or misrepresented there is the chance that the data becomes ineffective and worse, misleading. The technical specifications for obtaining and storing data needs to be agreed upon at a country-wide/institutional level. An acceptable global standard for achieving data integrity and viability is the use of Trusted Digital repositories (TDRs)⁴⁶ - TDRs are an internationally accepted, technology-neutral means of ensuring long-term access to digital records and datasets as assets and protecting their integrity, completeness, trustworthiness and traceability. They can be created to capture and provide access to authentic data and digital records; link active and inactive datasets to hard copy or digital records that provide context; etc. If a country implementing open government data has a TDR, it builds a level of trust and confidence in the records and the data regarding the completeness and the fact that they have not been compromised.

Apart from the use of TDRs, what is fast becoming the world-wide standard for data standards for public data generally, and for public procurement particularly is the *Open Contracting Data Standard* (OCDS). The OCDS enables disclosure of data and documents at all stages of the contracting process by defining a common data model. It was created by the Open Contracting Partnership⁴⁷ to support organizations to increase contracting transparency and allow deeper analysis of contracting data by a wide range of users. In Nigeria, a civil society group - the Public and Private Development Centre (PPDC) is actively involved in promoting open contracting through its project - 'Budeshi'⁴⁸, which means 'open it' in the Hausa language, is aimed at exposing the processes of public service delivery to public scrutiny. The project promotes open contracting by requiring that data from budget to procurement are structured and their various stages linked to the intended public service delivery. Using the Open Contracting Data Standard (OCDS), the PPDC has

⁴⁶ A trusted digital repository is one whose mission is to provide reliable, long-term access to managed digital resources to its designated community, now and in the future. There are different certifications for TDRs, however generally they all tend to assess things like organisation, management of the data, infrastructure, security, and audit processes.

⁴⁷ An independent not-for-profit created in 2015 and working in over 30 countries. That focuses on a drive for massively improved value for money, public integrity and service delivery by shifting public contracting from closed processes and masses of paperwork to digital services that are fair, efficient and 'open-by-design'.

⁴⁸ Budeshi < <https://www.budeshi.ng/> > last accessed 18 February 2020

recorded significant success by providing a single platform for obtaining information on public contracts across the 36 States of Nigeria. It currently has details of about 9,000 contracts, however it appears that the platform has not been updated since 2018 as there are no contracts for the entire 2019.

In 2017, the BPP launched the Nigeria Open Contracting Portal (NOCOPO)⁴⁹. NOCOPO is about opening up public procurement in Nigeria through increased disclosure of procurement information to all stakeholders with a view to ensuring improved transparency and competition, prevent corruption, enhance active citizen participation towards achieving better service delivery and improved ease of doing business in Nigeria. The portal publishes procurement records and information on all stages of the procurement process, from planning through advertisement, tendering and award. Through the portal, Ministries, Departments and Agencies (MDAs) are able to submit their procurement plans and records to include information such as project title, cost, name of vendor, procurement method, project location, and implementation status. The two crucial features on the portal are the contract administration and citizen feedback. The portal won a global innovation award in 2017 organized by the Open Contracting Partnership and Open Data Institute. These innovations and projects show that Nigeria is already on the right path to ensuring data reliability, however, it is important that these innovations and projects are sustained. For instance, the NOCOPO portal is yet to get the requisite engagement from most MDAs as the information on the portal is not yet all encompassing.

Apart from the issue of accurately collected information, there is also the issue of proper storage which prevents data from being easily manipulated, fragmented, or lost. The danger in having incorrect data is arguably even worse than not having the data at all, as it could lead to inaccurate information upon which decisions and policies are made. Thurston argues that once citizens doubt the reliability of the data, the goal of openness and trust in government are undermined. Even where the record management system is digital, the risk also exists, and in some cases is even more pronounced. The risk is that in the digital environment, if records are not

⁴⁹ Bureau of Public Procurement – NOCOPO < <http://nocopo.bpp.gov.ng/> >

managed professionally, their availability and integrity, as an authoritative source for open data initiatives, can be compromised. Issues such as migration to new software, storage in multiple electronic locations, inaccurate metadata etc. are all issues which arise when the data being stored, and access is digital.

In Nigeria, the National Archives is responsible for managing government data. The National Archives Act⁵⁰ makes provision for the preservation and management of all categories of records – public, private, individual and business. The Act provides that every public office shall designate an officer to be the departmental records management officer who shall have as his function (among others), the planning, development and organisation of records management programme for that office and shall apply tested standards, procedures, and techniques, in all matters relating to record making and record keeping, records preservation and protection etc. Abioye⁵¹ in his research on the state of the archives administration in Nigeria says it best when he states that the National Archives role in taking the lead and setting the standard in proper records management in Nigeria has been lacking, and in the light of advances in technology and the important role which public data has in the world today, the National Archives needs to play a bigger role in setting standards across public offices, and ensuring consistency and uniformity. The trustworthiness and integrity of the data gathering and retention process currently in Nigeria would need to be addressed in order for open government data to effectively be implemented to tackle the transparency issue. A system where the data cannot be trusted is not one upon which meaningful transparency and accountability solutions can be built.

The Global Open Data Index– an annual global benchmark for publication of open government data, which is run by the Open Knowledge Network⁵², measures the openness of government data, and in its most recent report⁵³ it ranked the following countries as joint first place in openness of the procurement system – Australia, Canada, Colombia, Hong Kong, Mexico, Paraguay, Singapore, Slovakia, Taiwan, and

⁵⁰ Cap. N6. LFN.2004.

⁵¹ Abiola Abioye, 'Fifty years of archives administration in Nigeria: lessons for the future', (2007) 17 Records Management Journal, 1, pp.52-62

⁵² The Open Knowledge Network < <https://okfn.org/> > accessed 4 November 2019

⁵³ Global Open Data Index 2016/17 < <https://index.okfn.org/dataset/procurement/> > accessed 4 November 2019

Uruguay. The key features of the open government data procurement platforms of all these countries being – the information is openly-licensed, is available in open and machine-readable format, is downloadable at once, is up to date, is publicly available, and finally is available free of charge. The Nigerian government could therefore use these key features as goals to work towards when implementing open government data. It presents a well thought out and structured plan which links enabling laws with data and reporting standards, as this is critical for any serious open government data implementation to be successful.

4.3.3 Data Protection

The final critical issue that needs to be discussed as regards open government data implementation is the issue of data protection. Data protection is an important component of any successful open government data implementation because it is the shield that exists to protect individuals whose data has been gathered, from being exploited under the guise of open government data. One of the key issues faced in trying to implement open government data in Nigeria is the fact that Nigeria does not have any overarching privacy legislation, Nigeria sits within the 43% of the world which does not have any active legislation on Data Protection⁵⁴. Therefore, it is imperative in a country which wants to implement open government data that the appropriate safeguards be in place to protect the privacy and data of individuals. The appropriate safeguards would include putting in place measures to protect the privacy and personal information of individuals. In Nigeria, comprehensive data protection legislation at a Federal level has not yet been enacted — even as several government and private organisations routinely collect and process personal data, including compulsory biometric information. Instead, the existing regulatory frameworks that apply to personal data protection are from the very widely worded provisions of the 1999 Constitution. Under the Nigerian 1999 Constitution, the right to the privacy of the citizen is enshrined. The Constitution provides that ‘...*the privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected.*’ The provision of Section 37 of the 1999 Constitution is the only over-arching piece of legislation

⁵⁴ ‘Data Protection and Legislation Worldwide’, United Nations Conference on Trade and Development (UNCTAD) <https://unctad.org/en/Pages/DTL/STI_and_ICTs/ICT4D-Legislation/eCom-Data-Protection-Laws.aspx > accessed 4 November 2019

which deals with privacy of data. In addition to the constitutional provision on the right to privacy, the National Information Technology Development Agency (NITDA) which is statutorily mandated by the NITDA Act 2007⁵⁵ to, inter alia: develop regulations for electronic governance and monitor the use of electronic data interchange and other forms of electronic communication transactions as an alternative to paper-based methods in government, commerce, education, the private and public sectors, labour and other fields, where the use of electronic communication may improve the exchange of data and information; enacted the Nigeria Data Protection Regulations (NDPR) 2019 to safeguard the rights of natural persons to data privacy through the safeguards afforded by a just and equitable legal regulatory framework on data protection in tune with global best practices. The NDPR has certain governing principles including ensuring that personal data is collected and processed in accordance with specific, legitimate and lawful purpose consented to by the Data Subject. It classifies lawful processing as including processing which is necessary for compliance with a legal obligation to which the data controller is subject, and also processing which is necessary for the performance of a task carried out in the public interest or in the exercise of official public mandate vested in the data controller. Therefore, the activities of public procurement officials would be under the purview of the NDPR.

In chapter two, suggestions were made as regards the publication of assets disclosures by public officials, and the publication of company ownership information. Both suggestions have data privacy implications, and it is therefore important that the necessary laws exist to protect the privacy of the individuals concerned. A paramount requirement should be that the data subject has the right to object to the data being made public, and there should be a process for the review of such requests, with preferably an independent and specialised body like an Ombudsman that can review these requests. Unfortunately, this is not present in the NDPR, as it only gives the right to an NITDA administrative redress panel with the power to investigate allegations of any breach of the provisions of the NDPR. It is therefore suggested that the OAGF can perform this function as it is the government agency which is entrusted with the implementation of the FoIA, and as one of the

⁵⁵ NITDA Act 2007 s 6

goals of the FoIA is ensuring public access to information, the privacy of the individuals whose data is made public is a consequence of that goal, and therefore under the ambit of the legislation.

In conclusion therefore, if the issues of data access, data reliability, and data protection can be addressed, it creates a solid foundation for the introduction of open government data into the public procurement process in Nigeria, and thereby solving the first half of the equation in trying to improve horizontal accountability.

4.3.4 Potential Effect of Improved Transparency by Default

If a strong transparency by default process as discussed above is achieved in the public procurement process in Nigeria, then this would solve some of the loopholes which have been identified in the Nigerian public procurement process. In chapter two while discussing the many loopholes of the public procurement process in Nigeria, we discussed that one of the areas which created a loophole was with respect to the disclosure of assets of public officials which have to be mandatorily declared but are not made public. The publication of the information is critical to ensuring transparency in the asset declaration process, since the information is then made available by default, without the need for people to make a request for it. Making the information transparent by default is an important tool for horizontal accountability, as it provides the information necessary for members of the public to be able to check if certain public officials have an existing conflict of interest during a procurement process. Currently, the Code of Conduct Bureau has the task of receiving and verifying all the information provided in asset disclosure forms, it cannot be expected to be able to house and verify all this information, even if it has a robust verification system in place. Making this information public would serve as a sort of pooled investigation and verification effort allowing concerned members of the public who are pro-active about conflict of interest and corruption issues to be able to verify this information, and also to be able to run conflict of interest checks on government contracts awarded. This is a form of transparency by default which would enhance horizontal accountability within the public procurement process. However, the point should be made here that there are privacy concerns with respect to making this information public, and a system that adopted open

publication of this information would have to address those concerns, these concerns are discussed in some more detail at the end of this chapter.

Also discussed in chapter two was the issue of opacity in the company ownership register controlled by the Nigerian Corporate Affairs Commission (CAC). Currently, in order to access company ownership information there must be an official request for the information (at a cost), and this process sometimes takes several days. If this system was made transparent by default, members of the public would be able to easily crosscheck information on owners of companies making public procurement contract bids, with information on the public officials who are in charge of the procurement bids, in order to ensure that there is no conflict of interest. As with making information on asset disclosure public, this is a proactive method of ensuring that there is more compliance with conflict of interest rules and laws, as public officials and/or contractors know that they are unable to hide conflicts of interest links behind the corporate personality of a company. The information currently made available online by the CAC is not sufficient from a transparency perspective, and therefore the recommendation would be to make the information about ownership of companies' public and available without restrictions. This would be similar to the process in the United Kingdom where online searches can be made on the Companies House website⁵⁶ to get information about the registered address and date of incorporation, current and resigned officers, document images, mortgage charge data, previous company names, insolvency information etc.

To achieve this, the Nigerian Companies and Allied Matters Act would have to be amended to include the provision that companies registers be made public. It is critical that this information be made public in order for the recommendation of mandatory publication of income and assets declaration to work, because if made public, searches can be made against the names of public officials on the companies register to identify any companies in which they have an undeclared interest in. The open companies register therefore would serve as a complement to the open public officials' assets disclosure register, each portal helping to verify or interrogate the information in the other.

⁵⁶ Companies House <<https://www.gov.uk/get-information-about-a-company>> accessed 4 November 2019

It should be noted that Nigeria is currently a member of the Open Government Partnership (OGP)⁵⁷ and under its current Action Plan⁵⁸, it has committed to establish a *Public Central Register of Beneficial Owners of companies*⁵⁹. If this is achieved, this would go a long way to addressing the loopholes identified in this section. As with making public officials asset disclosures public, the likely argument against this would be the issue of privacy, and this will be discussed in more detail later in this chapter.

In applying the TAM to both the issue of publication of asset disclosure information and companies registers, we can see that these processes currently have *transparency by request* and *low legal empowerment*. Therefore, both accountability systems are currently of *declaratory accountability*, and in order to improve accountability, we would need to improve the access to information. The suggestion therefore is to increase access to information by implementing transparency by default, and thereby make both systems – *transparent by default* and *low legal empowerment* which would then lead to *conditional accountability* based on the TAM.

Another loophole which we analysed was the fact that under the current framework of procurement methods in Nigeria, *single/sole source procurement* was permitted in certain circumstances⁶⁰, and that the lack of sufficient oversight over the single source procurement process created transparency and accountability risks and therefore a loophole within the system leading to issues like *contract splitting* and dubious procurement awards. The method of accountability here is primarily vertical accountability, with accountability safeguards like the fact that when emergency procurement is used, this needs to be ratified by the BPP (where above the threshold)⁶¹. From a horizontal accountability perspective, the observers and the bidders, are completely excluded from the accountability process as they do not have any visibility on the contracting process, since bidding is not carried out. In

⁵⁷ The Open Government Partnership is a multilateral initiative founded in 2011 that aims to secure concrete commitments from national and subnational governments to promote open government, empower citizens, fight corruption, and harness new technologies to strengthen governance. It currently has 79 members

⁵⁸ Nigeria Action Plan 2019-2021 <<https://www.opengovpartnership.org/documents/nigeria-action-plan-2019-2021/>>

⁵⁹ Commitment 6 Nigeria Action Plan 2019-2021.

⁶⁰ PPA 2007 s 41-43

⁶¹ PPA 2007 s 43(4)

applying the *TAM*, we can see that this process has *transparency by request* and *low legal empowerment*. Therefore, the single source procurement system is currently one of *declaratory accountability*, and in order to improve accountability, there needs to be an improvement in the access to information. The suggestion therefore is to increase access to information by implementing transparency by default - by ensuring the list of files containing applications for any contract, permit, grants, licenses or agreements and all materials containing information relating to any grant or contract made by or between the institution and another public institution or private organization is published as mandated by section 2 of the FoIA. Such a move would mean that the accountability system would then be one of *conditional accountability* based on the TAM.

Finally, it was also noted that the PPA did not specify the manner in which debriefs should be carried out, and this was therefore identified as one of the loopholes which existed in the procurement process in Nigeria. Currently debriefs have to be requested by the losing bidders, and so it is a system of *transparency by request* with *high legal empowerment* therefore, based on the TAM this is a process that has *conditional accountability*. In order to move to a process of *full accountability* therefore, the system would have to operate one where transparency is by default. If the record of proceedings of all bids were to be made available through open government data, as is mandated in the FoIA⁶² which mandates the publication of a description of documents containing final opinions including concurring and dissenting opinions as well as orders made in the adjudication of cases, which can be interpreted to include decisions on procurement awards, then this would achieve transparency by default, and *full accountability*.

The next sections will discuss some of the concerns that arise within the access to information debate, specifically around transparency by default. Two of the biggest concerns which transparency by default in the public procurement process raises are – a challenge on privacy rights, and a challenge on commercial confidentiality.

⁶² FoIA 2011 s 2(3)(c)

4.4 Privacy Concerns with enhanced Access to Information

The first, and arguably the most important, issue which arises when attempting to implement enhanced access to information is the issue of *privacy*. When government collects data, they collect data about the citizens, and this data often involves personal and private information. Scassa⁶³ identifies three broad privacy challenges raised by open government - the first is how to balance privacy with transparency and accountability in the context of “public” personal information, the second flows from the disruption of traditional approaches to privacy based on a collapse of the distinctions between public and private sector actors, and the third challenge is that of the potential for open government data to contribute to the big data environment in which citizens and their activities are increasingly monitored and profiled.

Generally, the legal framework for protecting privacy especially in a commercial context tend to be based on “control” models⁶⁴ that permit individuals some latitude in choosing whether and to what extent their personal information will be collected, used or disclosed, however, in the public sector context individuals do not have these choices, they have fewer choices and can therefore not opt out of providing some personal information before accessing government services. It is this personal information that is collected that constitute the vast amount of data which the government has, and some of which the open government data advocates would like the government to make open. Therefore, because the citizens largely have less of a say in whether or not their data can be collected, the obligations on government to protect this data tends to be more onerous. Scassa⁶⁵ refers to this type of information as “*public personal information*” and defines it as information about identifiable individuals that is in the hands of government. In this discussion about privacy, two specific scenarios will be identified, the first will be privacy of information linked to company ownership, and the second will be privacy of information disclosed through mandatory asset disclosure by public officers, as these are the two specific suggestions on how access to information can improve

⁶³ Teresa Scassa, ‘Privacy and Open Government’ (2014) 6Future Internet, 2, p. 397

⁶⁴ Colin Bennett and Charles Raab, *The Governance of Privacy: Policy Instruments in Global Perspective*, (Massachusetts Institute of Technology Press 2006)

⁶⁵n 53

horizontal accountability in the public procurement process in order to address the conflict of interest loopholes identified .

4.4.1 Company Ownership Information

The government through the company's registry – the Corporate Affairs Commission (CAC), is mandated to hold personal information about company ownership and shareholders. This information is not made public or open, but there is a process in place to make a formal application to access this information. This information is key from a transparency perspective in a public procurement context because it can give citizens visibility of the shareholders/directors of companies who are awarded or bidding for government contracts. In an era of open government, it may seem self-evident that such records and information on a public register like the Companies Registry should be made digitised and made available online as open government data, however, this has significant privacy concerns, digitised information can be rapidly copied, mined and matched, and can be used for a broad range of purposes which could be considered as invasive of privacy. A recent ruling⁶⁶ of the European Court of Justice (ECJ) further illustrates this complicated relationship between open data, public data, and privacy. In the case, a Finnish company Satakunnan Markkinapörssi (*'Markkinapörssi'*) had each year collected public tax data from Finnish tax authorities for the purposes of publishing extracts from that data in regional editions of a newspaper called *Veropörssi*. The information published by the magazine included the full names of natural persons whose income exceeded certain thresholds in alphabetical order. *Markkinapörssi* further transferred the data published in the newspaper to Satamedia Oy (*'Satamedia'*). Satamedia used the data to distribute data regarding individual persons to customers via a text-messaging system for a fee (about €2). The Finnish Data Protection Ombudsman received several complaints from natural persons accusing *Markkinapörssi* and Satamedia of infringing their right to privacy. Consequently, the Finnish Data Protection Ombudsman requested the other Finnish Data Protection Authority, the Finnish Data Protection Board, to prohibit the processing of personal data conducted by *Markkinapörssi* and Satamedia. The

⁶⁶ Satakunnan Markkinapörssi Oy C-73/07

decision made by the Finnish Data Protection Board was appealed against, and the case proceeded all the way to the Finnish Supreme Administrative Court which consequently referred it to the ECJ for a preliminary ruling.

The ECJ ruled that the way *Markkinapörssi* was processing public tax information was deemed to constitute the processing of personal data as defined in the European Union Data Protection Directive⁶⁷ and that documents that include personal data and are in the public domain under national legislation, must be considered to constitute activities involving the processing of personal data carried out 'solely for journalistic purposes' as defined in Article 9 of the Data Protection Directive if the sole object of the activities is 'the disclosure to the public of information, opinions or ideas'. The ECJ did not conclude whether the processing in question fulfilled these criteria but decided that it was a matter for the national court to determine. The ECJ was further of the opinion that the consideration of activities undertaken 'solely for journalistic purposes' is not dependent on whether the object is profit-making or not, nor the medium which is used to transmit the data. The Finnish Supreme Court ended up ruling that the processing was not carried out for solely journalistic purposes as qualified by the ECJ and that the processing conducted by either *Markkinapörssi* or Satamedia was not allowed on the basis of the national Personal Data Act. Therefore, the mere fact that the data in question was public, did not constitute a right for the recipient to use this data for all types of purposes or to neglect the rules set out in the applicable data protection legislation.

This Finnish case is important because it illustrates how public personal information could be used in ways which a number of owners of the information would not be inclined to have their data used. In the context of Nigerian public procurement, if open government data with respect to company ownership were to be fully implemented, an individual or member of the public could theoretically obtain a list of all the companies which have been awarded government contracts within a specified time frame, and then based on publicly available information would be able, via the Company's Registry, to compile the list of all the shareholders in those companies, match the data together and write an article – '*The Top 100*

⁶⁷ 95/46/EC

Nigerians profiting from Government Contracts’, thereby sharing information which has wide reaching privacy implications. The point being made here is not a value-based judgment on whether such data use would be good or bad (most likely if the data supported a theory that certain *usual suspects* were being awarded contracts then it would generally be viewed as a good thing as it would put the contracts under more scrutiny). However, the issue is that the data clearly shows the private information of the citizens and once made available, could potentially be used for other purposes once the data is mapped⁶⁸. Using the same scenario, we can imagine a situation where that same data is then used as data for profiling for potential criminals trying to choose wealthy targets. The latter potential is not mere idle speculation, in a recent article⁶⁹ the authors describe a scenario where open data can be used by unscrupulous individuals to perpetrate fraud and scams by the use of social engineering, data analysis, knowledge discovery and data visualization. It lays out the exact technology that can be used for this, and how the data could be processed and converted for nefarious purposes.

In order to solve the privacy and open data conundrum, the first step is to ensure that an adequate data protection system is in place before one can consider moving towards a system of open government data. As can be seen from the Finnish case, references were made to the European Union Data Protection Directive, the Finnish Data Protection Act, the Finnish Data Protection Ombudsman and the Finnish Data Protection Authority. Having a system in place where complaints about data protection can be submitted, reviewed and adjudicated on not only ensures that an adequate system exists but would also serve to build up the requisite national jurisprudence on data protection issues.

⁶⁸ In the USA, a local newspaper paper based in New York published the names and addresses of handgun permit holders — a total of 33,614 — in two suburban counties, Westchester and Rockland, and put maps of their locations online. The maps, which appeared with the article “*The Gun Owner Next Door: What You Don’t Know About the Weapons in Your Neighborhood*,” received more than one million views on the Web site of newspaper, the article, which left gun owners feeling vulnerable to harassment or break-ins, also drew outrage from across the country. The newspaper received threatening calls and e-mails and the paper had to hire armed guards to monitor the newspaper’s headquarters, some of their reporters received notes saying they would be shot on the way to their cars; bloggers encouraged people to steal credit card information of Journal News employees and other forms of intimidation and harassment. The paper published the data taken from publicly available records of people with local gun permit data. The data was obtained via multiple requests for public and then subsequently used in data mapping software to provide street numbers. – Christine Haughney, ‘After Pinpointing Gun Owners, Paper is a Target’, (New York Times, 6 January 2013) < <https://www.nytimes.com/2013/01/07/nyregion/after-pinpointing-gun-owners-journal-news-is-a-target.html>> accessed 4 November 2019

⁶⁹ Matteo Mauri, Alessio Mulas, Davide Ariu, ‘The Dark Side of Open Data’ <<http://ceur-ws.org/Vol-1748/paper-19.pdf>> accessed 4 November 2019

4.4.2 Public Officer Asset Disclosure

The issue of privacy also arises in the conversation about whether assets disclosed by public officials should be made public, or whether making this information publicly available would be an infringement of privacy rights. A recent World Bank study⁷⁰, found that in the one hundred and six (106) countries in which the World Bank works which require some form of asset disclosure, a third of them require public disclosure, and two-thirds require disclosure only to a government agency. Nigeria is one of those countries where the requirement is not for public disclosure, but one for disclosure to a government agency – the Code of Conduct Bureau.

In *Legal Defence & Assistance Project (Gte) Ltd. V. Clerk of the National Assembly of Nigeria*⁷¹, a case where the issue was about whether the salary of a public officer is protected by the right to privacy - the Legal Defence & Assistance Project (LEDAP) applied to the National Assembly of Nigeria (NAN) for information “on details of salaries, emolument, and allowances paid to the Honourable Members of Representatives and Distinguished Senators, both of the 6th Assembly, from June 2007 to May 2011”. The NAN did not respond to the request, prompting LEDAP to file a lawsuit in the Federal High Court. The NAN argued that the information constituted personal information that was exempted under Section 14 of the FoIA. The Federal High Court after reviewing argument, concluded that LEDAP “did not request any of the personal information relating to the Honourable Members, but simply what was paid to them while they were in service from the public fund,” and that such information was “not among those exempted” under Section 14(1) of the Freedom of Information Act and so the information should be released. Also, in *Uzoegwu F.O.C. Esq v. Central Bank of Nigeria & Attorney-General of the Federation*⁷², the Plaintiff requested from the Central Bank of Nigeria (CBN) information regarding “the amount payable to the Governor, Deputy Governor and Directors of the CBN as monthly salary”. The CBN did not reply, although the Director of Finance at the CBN had acknowledged receipt of the request. One month later, Uzoegwu sued

⁷⁰ Aisuluu Aitbaeva, Daniel Barnes, Tammar Berger, Lissa Betzieche, Ruxandra Burdescu, Alexandra Habershon, Thomas Iverson, Modest Kwapinski, Massimo Mastruzzi, Hari Mulukutla, Yousef Nasrallah, Chiara Rocha, Susana Simonyan, Stephanie Trapnell, *Income And Asset Disclosure: Case Study Illustrations*, (World Bank 2013) <<http://documents.worldbank.org/curated/en/664561468340842190/Income-and-asset-disclosure-case-study-illustrations>> accessed 4 November 2019

⁷¹ FHC/ABJ./CS/805/2011

⁷² FHC/ABJ./CS/1016/2011

for access to this information, the Defendants responded by arguing that the requested information was “personal information which was communicated [to the officers] upon their appointments” at the CBN” and that “the information is protected by trade and commercial secrets. The issue before the Court was whether the requested information regarding the salaries of high-level officials of the CBN qualified as “personal information” under Section 14(1) of the Act. The Court held that by the wording of Section 14(3) of the Act, the *“legislature clearly intended that the public interest [be] placed above all else, including the personal interest of the individuals”*. The Court therefore ordered disclosure of the information about the salaries of CBN officials.

In a similar case of *Wypych v. Poland*,⁷³ wherein the issue of whether the salary of a public official was private, the European Court of Human Rights (ECHR) rejected the complaint of a local council member in Poland who refused to submit his asset declaration claiming that the obligation to disclose details concerning his financial situation and property portfolio imposed by legislation was in breach of Article 8 of the European Convention of Human Rights, which provides a right to respect for one's "private and family life, his home and his correspondence". The ECHR found that the requirement to submit the declaration and its online publication were indeed an interference with the right to privacy, but that it was justified and the comprehensive scope of the information to be submitted was not found to be excessively burdensome. The Court *“considers that it is precisely this comprehensive character which makes it realistic to assume that the impugned provisions will meet their objective of giving the public a reasonably exhaustive picture of councilors’ financial positions ... that the additional obligation to submit information on property, including marital property, can be said to be reasonable in that it is designed to discourage attempts to conceal assets simply by acquiring them using the name of a councillor’s spouse.”* The ECHR also endorsed the publication and internet access to declarations arguing that “the general public has a legitimate interest in ascertaining that local politics are transparent and Internet access to the declarations makes access to such information effective and easy. Without such access, the obligation

⁷³ (October 25, 2005, application no. 2428/05), <

would have no practical importance or genuine incidence on the degree to which the public is informed about the political process.”

This ECHR case therefore illustrates the fact that the ECHR has admitted that while making IADs public might *prima facie* be an interference of the right to privacy, however it is a violation which is justified⁷⁴. Nigeria has a similar process with regard to its jurisprudence on human rights, as discussed above the right to privacy is guaranteed by the S.37 of the 1999 Constitution, however, S. 45 provides that ‘*..nothing in sections 37, 38, 39, 40 and 41 of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society (a) in the interest of defence, public safety, public order, public morality or public health; or (b) for the purpose of protecting the rights and freedom of other persons...*’, the 1999 Constitution therefore has a provision which allows for justifiable interference with the fundamental rights, similar to the position with the European Charter on Human Rights.

Applying the reasoning of the court in the above Nigerian cases and the ECHR case (which is included as a persuasive authority), it is suggested that if the details of the salaries of the public officers in an Agency was to be made public data, and the argument of the privacy of these individuals were to be raised, it is unlikely that the argument would be upheld in a Nigerian court, as breaching privacy, and in the event it were upheld as breaching privacy, it is extremely likely that such a violation of the right to privacy would be permitted on the ground that it is a justifiable interference, however this would be based on the circumstances of the case⁷⁵. It can be further argued that the judicial reasoning in the above two Nigerian cases mirror the position of the FoIA, where it states⁷⁶ that a public institution shall cause to be

⁷⁴ The right to privacy is guaranteed by Article 8 ECHR as the right to respect for private and family life, home and correspondence, and is what is known as a ‘qualified right’. It may be subject to limitation on one or more of the following grounds: national security; public safety; the economic well-being of the country; the prevention of disorder or crime; the protection of health or morals; and the protection of the rights and freedoms of others.

⁷⁵ The discussion on Asset declaration in Nigeria by public officials was recently brought to the front burner of national discourse when the Senate President of the Nigerian National Assembly (the nation’s number 3 public official)- Senator Bukola Saraki, was charged by the CCB with false declaration of assets among other things, the matter went all the way to the Nigerian Supreme Court⁷⁵ which threw out the charges. In another case the Chief Justice of the Supreme Court of Nigeria - Justice Walter Onnoghen was suspended and is being prosecuted by the Code of Conduct Tribunal for failing to declare his assets as prescribed by the law, as well as operated foreign bank accounts in contravention of the code of conduct for public officials. Both these cases brought against the heads of 2 of the arms of Government in Nigeria – the Legislature and the Judiciary, show just how pervasive the issue of failing to declare assets, is in Nigeria and only further solidifies the reasoning that if this information was made open, there would be transparency to know which government officials have not complied with these directives, and therefore would be a tool in driving accountability.

⁷⁶ FoIA 2011 s 2(3)(c)(vi)

published the names, salaries, titles and dates of employment of all employees and officers of the institution. Therefore, it is quite clear that information about the names and salaries of employees of public institutions, does not constitute personal information which is subject to protection as private information.

4.5 Commercial Confidentiality and enhanced Access to Information

Apart from the privacy argument, another argument which is frequently brought up against open government data in the contracting process is the fact that introducing complete open government data would provide details of the contracts awarded by these agencies, and making it public would potentially breach commercial confidentiality, and could therefore adversely affect the financial/economic interests of private parties. The crux of the arguments against disclosure which are made here is that there is commercially sensitive information in contracting documents and so they can't be disclosed, in situations like this there would be the need to actually determine the existence of commercially sensitive information.

The Office of the Information and Privacy Commissioner in Canada⁷⁷ provides some persuasive guidance on how to deal with these issues, it states that in proving the existence of legitimate commercially sensitive information, there must be a clear cause and effect relationship between the disclosure and the alleged harm, the harm must be more than trivial, and the likelihood of harm must be genuine and conceivable⁷⁸. If indeed the information is determined to be commercially sensitive, then a way to cater for this would be to undertake minimal redaction of the commercially sensitive information before it is made public. Some countries including the United Kingdom and Australia insist that where redaction is carried out, the government agency needs to indicate and provide reasons for why the information was redacted.

The *Article 19* three stage test discussed earlier in this Chapter is also quite illustrative as it suggests the three-part test in determining whether commercial

⁷⁷ Canada is ranked joint first in the Open Data Barometer - <https://opendatabarometer.org/?year=2017&indicator=ODB> ; and the Global Open Data Index - <https://index.okfn.org/dataset/procurement/>

⁷⁸ Office of the Information and Privacy Commissioner, Canada. (2016) Business Interests of a Third Party <www.oipc.ni.ca/pdfs/Section_39_Revised_Guidance_Document.pdf> accessed 12 March 2019

information should be disclosed. As commercial information is a legitimate aim, the next step is to determine whether substantial harm will be done to that aim, and then finally to determine whether there is an overriding public interest in disclosing that information.

The Nigerian general process is a two-part test⁷⁹, which is to determine if there is a legitimate aim, and after which to determine whether there is an overriding public interest for the information to be disclosed. However, the FoIA has a more specific provision for the disclosure of trade secrets or commercial information, it provides⁸⁰ that a public institution shall deny an application for information that contains trade secrets and commercial or financial information obtained from a person or business where such trade secrets or information are proprietary, privileged or confidential, or where disclosure of such trade secrets or information may cause harm to the interests of the third party, information the disclosure of which could reasonably be expected to interfere with the contractual or other negotiations of a third party; and proposal and bids for any contract, grants, or agreement, including information which if it were disclosed would frustrate procurement or give an advantage to any person, however a public institution shall disclose the information if that disclosure would be in the public interest as it relates to public health, public safety or protection of the environment and, if the public interest in the disclosure clearly outweighs in importance any financial loss or gain to, or prejudice to the competitive position of or interference with contractual or other negotiation of a third party.

It would seem that the FoIA legislative protection on trade secrets and confidential information has a three-part test, the second part includes *harm to the interests of the third party*. The FoIA therefore states that mere harm would be sufficient, it does not have to be *substantial harm*. Apart from harm to third party interests, another limiter stated in the FoIA is if the disclosure would *interfere with contractual or other negotiations of a third party*. The introduction of a three-part test at first glance would seem to suggest an improvement on the two-part test as contained in the rest

⁷⁹ FoIA 2011 s 12

⁸⁰ FoIA 2011 s 15

of the FoIA concerning other legitimate aims, but the reasons for refusal of disclosure seem to undermine access to information as only *harm* needs to be shown, and only some measure of interference with negotiations need be shown, these are arguably very flimsy grounds on which access to information may be denied on the grounds of commercial confidentiality.

In Nigeria the issue of how to balance the need for transparency and the need to protect commercially sensitive information has been tested in the courts in the context of a Freedom of Information request. In *Public & Private Development Centre v. Power Holding Company of Nigeria & The Honourable Attorney-General of the Federation*⁸¹ the Public & Private Development Centre Ltd. (PPDC) requested information from the Power Holding Company of Nigeria (PHCN) regarding the award of a contract for the supply and installation of 300 power units in several Nigerian cities. Among the requested items were a procurement plan for the project, the bidding documents issued to all interested bidders on the project, a list of all contractors that submitted bids, a copy of the bid evaluation, the minutes of the board meeting where the winning bids were approved, and copies of final contract award documents. The PHCN refused to furnish the requested information, prompting the PPDC to bring suit. The PHCN argued that the requested information fell under Section 15(1)(b) of the FoIA which allows public institutions to “*deny an application for information that contains information the disclosure of which could reasonably be expected to interfere with the contractual or other negotiations of a third party*”, and that since the bid evaluation report involved contractual information between the PHCN and the third party company who won the contract, the PHCN claimed it would be an injustice to the third party contractor and a breach of the privity of contract doctrine to grant PPDC’s request for information. The court considered the Section 15(1)(b) argument, and it outlined the three conditions which must be concurrently present for a public institution to deny a request for information on these grounds: *(1) the transaction must still be at the negotiation stage, (2) a third party must be involved, and (3) the disclosure of the information must reasonably be expected to interfere with the contractual or other negotiations of a third party*. The Court found that the first condition had not been met; and even if

⁸¹ FHC/ABJ/CS/582/2012

the transaction had been at the negotiation stage at the time of PPDC's request, the third condition also would not have been met. The court therefore ordered the PHCN to produce the requested information.

In another case, *Public & Private Development Centre v. The Hon. Minister of The FCT & The Secretary, FCT Transport Secretariat*⁸², the Court held that for exemption under Section 15 (1)(a) Freedom of Information Act, 2011 to apply, it must be shown that the information contains trade secrets or commercial and financial information which must be proprietary, privileged or confidential; that the information is in the possession of a third party and that the disclosure of such information may cause harm to the interest of the third party.

Therefore, a reading of the decisions in the above cases shows that making contractual procurement information available as part of open government data is not an absolute fiat to release any and all information, and the law already has in place certain safeguards to protect commercially sensitive information. However, in order for contractors to assert this right, there is a high bar which they will need to scale, specifically the transaction must still be at negotiation stage, and the disclosure must be reasonably expected to interfere with the negotiation of a third party, the information contains trade secrets and actually commercially sensitive information, and most importantly that the publication of this information may cause harm to the party's interests.

4.6 Conclusion

This Chapter has advocated for the improvement of access to information as a way to enhance horizontal accountability. It highlighted the importance of the FoIA to transparency in the Nigerian public space, but also addressed the many issues which the application of the FoIA has had to contend with, which has limited its effectiveness. It suggests improvements in the transparency by request process (FoIA application process), and also advocates for a move from transparency by request to transparency by default (open government data). It posits that in order

⁸² FCT/HC/CV/M/3057/13

for open government data to work effectively there has to be a legal/regulatory system which adequately addresses the key issues of data *access*, *data reliability* and *data protection*.

The Chapter also addressed the critical issue of privacy and commercial confidentiality which are frequently used as reasons and arguments for the restriction of access to information. It discussed the issue of privacy and security concerns in the context of corporate ownership information and public officer asset disclosures, and used examples of cases from other jurisdictions to highlight how negative consequences have arisen, and then looked at what the approach of the courts in Nigeria has been with respect to those issues.

The conclusion of the argument of this chapter is that in order for horizontal accountability to work as an effective corollary to vertical accountability, the issue of access to information is extremely critical, and access to information goes beyond just creating freedom of information legislation, as the experience in Nigeria as shown that the efficacy of a law is not only in its creation, but more importantly in its implementation. The implementation of the FoIA has left a lot to be desired, and in addressing those deficiencies in its implementation a lot of progress can be made in institutionalising an effective transparency by request regime. Ultimately however the ultimate goal should be introducing transparency by default through open government data, but this can only be effectively done where the relevant data access laws exist, the relevant data standards have been agreed upon which would ensure reliability, and the relevant legislation and institutions have been created to ensure privacy of data and protection of personal information and commercial confidentiality interests with the public interest being the paramount determiner.

Chapter 5 - Improving Legal Empowerment

5.1 Introduction

The previous chapter discussed the first half of the accountability equation in the Transparency and Accountability Matrix (TAM) – the issue of access to information and how transparency by request and transparency by default can aid the horizontal accountability process. In introducing the *Transparency and Accountability Matrix*, it was quite clear that access to information is but a part of the horizontal accountability equation in order to achieve *full accountability*, and while access to information for the actors within the horizontal accountability system is essential, the other critical challenge of being able to use the information in order to achieve a legal solution still exists.

In 2011, a legislation came into force in Slovakia¹ which was focused on increasing active government transparency and openness. Under the new law, the government was required to publish almost all contracts, receipts and orders online, regardless of whether a citizen had made an active request for information. Most importantly, government contracts were not considered valid unless they were published within three months of being signed. After the portal was launched, there was a 25% increase in stories on procurement in the mainstream media, and an overall increase in the number of NGOs and scope of work undertaken by watchdog groups as a result of the legislation². Kunder³, from the Slovakian Fair Play Alliance, noted: *“one lesson that we learned from publishing data ... is that it is critical and totally important to have the state publish the data, but it is only one part of the success. The second part is that other institutions in the society and other aspects in the society need to work – judiciary, police and public pressure – and that is nowadays a bigger problem in Slovakia than the publishing of information.”*

¹ Act No.546/2010

² Gabriel Sipos, Samuel Spac, and Martin Kollarik, 'Not in Force Until Published Online: What the Radical Transparency Regime of Public Contracts Achieved in Slovakia', (Transparency International Slovakia, 2015) <http://transparency.sk/wp-content/uploads/2015/05/Open-Contracts.pdf>. accessed 4 November 2019

³ Alexander Furnas, 'Transparency Case Study: Public Procurement in the Slovak Republic', (Sunlight Foundation Blog. August 12, 2013) <<http://sunlightfoundation.com/blog/2013/08/12/case-study-public-procurement-in-the-slovak-republic/>> accessed 4 November 2019

Therefore, the experience in Slovakia apart from highlighting the benefits of open government data and transparency, is also illustrative of an important point, which is that transparency on its own is not enough, and the mere presence of transparency does not necessarily lead to accountability. In other words, effective freedom of information laws and open government data solves the access to information problem, but there has to be an accompanied similar increase in enforcement or institutional capacity to enforce accountability.

For horizontal accountability to be carried out effectively, a key aspect of the implementation is to ensure that the other side of the accountability equation exists to be able to enforce the process. Therefore, this Chapter will look at the issues surrounding legal empowerment, how it can be enhanced, and the potential effect which an engaged group of actors with the right legal empowerment tools within a horizontal accountability process can work to improve accountability in the procurement process. This chapter analyses the other half of the accountability equation – legal empowerment. The TAM states that there are two types of empowerment – low legal empowerment and high legal empowerment. *Low legal empowerment* is characterised by a system where the necessary legal framework, and remedies available to the person (the accountee) seeking to exercise accountability tools are either non-existent or have been severely hampered as to make their efficacy illusory, while one of *high legal empowerment* is where the accountee has all the necessary structure, reliefs, remedies and tools at their disposal in order to guarantee the effectiveness of the legal empowerment. This chapter therefore will focus on those issues within the public procurement process specifically, and within the wider Nigerian legal system framework more generally, which play a part in either improving or reducing the efficacy of the legal empowerment, and will identify how these issues interplay with the loopholes that currently exist in the process.

5.2 Access to the Courts

In order to competently bring an action in court, a claimant has to show some special interest in the matter. This issue of proving interest in order to exercise some

legal right is one of the bedrocks of a legal system, as it ensures that only parties who have a genuine right/claim in a matter should be allowed to bring a case to court, as this would weed out meddlesome interlopers. This concept is known as *locus standi*, and the term denotes the legal capacity to institute proceedings in a court of law and it has been held in several cases to be the right or competence to initiate proceedings in a court of law for redress, or assertion of a right enforceable at law⁴. *Locus standi* focuses on the question of whether a party instituting or originating an action for remedies or judicial review is entitled to invoke the jurisdiction of the courts⁵.

Locus standi in Nigeria, has its roots in English common law, and traditionally under the English common law, a person who approaches a court for relief is required to have an interest in the subject matter of the litigation in the sense of being personally adversely affected by the alleged wrong. The applicant/plaintiff must allege that his or her rights have been infringed. It is not enough for the applicant/plaintiff to allege that the defendant has infringed the rights of someone else, or that the defendant is acting contrary to the law and that it is in the public interest that the court grants relief. Thus, under the common law, a person could only approach a court of law if he or she had some special interest or had sustained some special damage greater than that sustained by an ordinary member of the public. The standard of interest to be shown for a declaratory order was stricter than the standard for prerogative remedies⁶, for non-prerogative remedies the applicant had to show that the declaration he/she sought related to a right that was personally vested in him/her and he had a 'real interest' at stake. This test was affirmed by the House of Lords in *Gouret v Union of Post Office Workers*⁷. In the *Gouret* case, the claimant sought an injunction to prevent the respondent Trade Union calling on its members to boycott mail to South Africa. In his pleadings he had not pleaded any special interests other than as a member of the public, and the House of Lords *inter alia* held that the action must fail as he had not proved any personal right or special

⁴ *Owodunni v Reg. Trustees of CCC* (2000) 2 WRN 29; *Ladejobi v Oguntayo* (2004) 7 SC (Pt. 10 159 at 170; *Sunday v INEC* [2008] 33 WRN 141 at 164.

⁵ Oyelowo Oyewo, 'Locus Standi and Administrative Law in Nigeria: Need for Clarity of Approach by The Courts' [2016] 3 International Journal of Scientific Research and Innovative Technology 1 78-99

⁶ Prohibiting, quashing and mandatory orders are prerogative remedies

⁷ [1978] AC 435

damage. The court applied the principle laid down in *Boyce v Paddington Borough Council*⁸ that a private plaintiff has locus standi to sue for an injunctive relief in respect of a matter of public import only where (1) the interference with the public right also involves an interference with his private rights; or where (2) the impugned action causes him "special damage". In 1978, England reformed its procedural rules on the requirement for standing⁹, now all prerogative remedies and declaration can be obtained under a single procedure with a unified standing requirement which is that the applicant must show a '**sufficient interest**'. Therefore, in the subsequent case of *R v I.R.C. ex parte National Federation of Self-Employed and Small Businesses*¹⁰, the House of Lords applied this test.

In Nigeria, the position has changed as well, and the test which is adopted is the sufficient interest test, as set out in the relevant court procedure rules¹¹. Therefore, in order for an accountee to bring an action in the courts, the sufficient interest test will need to be met. The import of this position of the courts on locus standi is that a member of the public who wants to bring an action for a public procurement issue e.g. contesting a contract award, would have to show that he/she has sufficient interest in the matter. Members of the public looking to exercise their accountability rights would therefore have to consider this. For observers within the process or NGOs, this sufficient interest threshold would likely be met if they can show that they have been registered as civil society organisations created to ensure transparency and accountability within the procurement process, and in many cases, the courts have allowed such actions by civil society organisations¹².

Apart from the right to be able to bring an action in court, also important is the legal process for it. The accountability process and the process through which actors in the accountability framework can bring an action to enforce accountability is an important determiner of whether or not a system has low or high legal

⁸ 1903 1 Ch 109 (at 114)

⁹ It was done through Ordinance 53 rule 3(7) that was incorporated in what was previously the Supreme Court Act 1981, but renamed the Senior Courts Act 1981, s.31(3)

¹⁰ [1982] AC 617

¹¹ Federal High Court Civil Procedure rule

¹² PPDC v. FCT Minister & FCT Transport Secretariat FCT/HC/CV/M/3057/13; PPDC v. PHCN & AG Federation FHC/ABJ/CS/582/2012; LEDAP. v Clerk of the National Assembly of Nigeria FHC/ABJ/CS/805/2011

empowerment. The bid review process under the PPA was identified in chapter two as one of the loopholes existing with the public procurement process in Nigeria. In actual fact, this loophole is one which has a direct effect on the efficacy of legal empowerment under the accountability framework. Under the provisions of the PPA, in order for legal proceedings to be initiated against the Bureau of Public Procurement (BPP), there are certain requirements which must be met¹³. A thirty-day pre-action notice is required before an action notice can be commenced, however under the appellate powers of the Federal High Court they are mandated to hear appeals from bid review decisions of the BPP and this can only be done within thirty days of the BPP's decision. The loophole identified therefore was that the wait period for appeals on BPP decisions, and the notice period for suits against the BPP seem to run concurrently, and the confusion with respect to the appropriate process to follow could lead to the disenfranchisement of the claimant.

Section 14(1) provides – *“Subject to the provisions of this Act, no suit shall be commenced against the Bureau before the expiration of 30 days after written notice of an intention to commence the suit shall have been served upon the Bureau by, the intending plaintiff or his agent...”*.

Section 54(7) which states – *“...where the Bureau fails to render its decision within the stipulated time, or the bidder is not satisfied with decision of the Bureau, the bidder may appeal to the Federal-High Court within 30 days after the receipt of the decision of the Bureau, or expiration of the time stipulated for the Bureau to deliver a decision”*.

The literal application of *Sections 14(1) and 54(7) of the PPA* therefore raises the fear that it disenfranchises actors within the accountability framework, as on one hand they are required to wait thirty days before filing a suit, and on the other hand they must file an appeal within thirty days.

Ordinarily, an assessment of the bid review process in the TAM should in theory result in one with *conditional accountability*, as there is *transparency by request + high legal empowerment*. However, the high legal empowerment in that process is

¹³ PPA 2007 s 14

put in jeopardy by the uncertainty that is created by a literal application of the provisions of *Sections 14(1) and 54(7) of the PPA*. In order to ensure high legal empowerment however there is an argument that can be made to ensure that the conditional accountability is not made redundant, this is the fact that if the *golden rule*¹⁴ is used in the interpretation of the section 14(1), it shows that the thirty-day pre-action notice may not be the required in certain instances. The use of the words 'subject to' presupposes that there are certain sections in the legislation which will take pre-eminence over the provisions of Section 14, and where there is a section that makes provisions contrary to section 14, that section will take pre-eminence, as section 14 is subject to it. Therefore, such an interpretation would mean that the provision of section 54(7) would take pre-eminence, and that would therefore mean that the bidder can bring a request for a review within thirty days of the decision (or lack thereof) without having to file a pre-action notice.

The uncertainty discussed above therefore highlights a critical way in which a system which would be assumed to have high legal empowerment could still be ineffective and in actual fact could become one with low legal empowerment. Therefore, the relevant provisions of the PPA would benefit from an amendment to the section which clarifies the provision, a suggestion would be an amendment to section 14 to state thus: *"Subject to the provisions of this Section 54(7) of this Act, no suit shall be commenced against the Bureau before the expiration of 30 days after written notice of an intention to commence the suit shall have been served upon the Bureau by, the intending plaintiff or his agent..."*.

5.3 Remedies

In the context of the actors within the horizontal accountability framework of the public procurement process, the remedies available to the actors in the horizontal accountability process are essentially the tools which they use to ensure accountability. We will now review the available accountability remedies within the

¹⁴ The golden rule is a rule of statutory interpretation which states that if the literal rule produces an absurdity, then the court should look for another meaning of the words to avoid that absurd result. The rule was closely defined by Lord Wensleydale in *Grey v Pearson* (1857) HL Cas 61

horizontal accountability framework in a public procurement process which are important to ensure high legal empowerment.

5.3.1 Administrative Review of Contract Award

When an actor in the horizontal accountability process alleges that there has been a breach of the procurement rules, or there has been some kind of malfeasance in the process, one of the potent tools used is to request that the award decision be reviewed. Where the reviewing authority agrees that there has been some breach of the rules, then the reviewing authority can order either the cancellation of the award or that the contract be re-awarded to another bidder. Under the PPA¹⁵, a bidder may seek administrative review for any omission or breach by a procuring or disposing entity. It further provides an appeal process that leads from the procuring authority to the Bureau of Public Procurement (BPP) and then finally the courts.

Specifically, the process is that when a bidder wants to make what is termed a 'complaint' against a procuring entity, the bidder shall first submit the complaint in writing to the accounting officer of the procuring entity, at this stage the accounting officer has the power to make any corrective measure, if any, including the suspension of the proceedings. If the decision of the accounting officer is unsatisfactory, or a decision is not made within the required time, the bidder may make a further complaint to the BPP, the BPP on receiving the complaint has the power to either dismiss the complaint or nullify in whole or in part an unlawful act or decision made by the procuring entity, declare the rules or principles that govern the subject matter of the complaint; and revise an improper decision by the procuring entity or substitute its own decision for such a decision. If the bidder is dissatisfied with the decision of the BPP, the complaint can be appealed to the court.

In chapter two, this thesis identified a loophole as the fact that the PPA is silent on the issue of how complaints can be made with respect to the period before bids have been put in/or a selection has been made. Thus resulting in a situation that only a bidder has the right to request administrative review or make a complaint, and

¹⁵ PPA 2007 s 54

therefore if there are contractors who are unable to bid for a project e.g. in a case where selective tendering has been allegedly unfairly used, they would not be able to make a complaint as they are not 'bidders' in the process. This category of actors who are excluded from the administrative review process would however be able to access the judicial review process as they would probably be able to prove that they have the right of access to the courts using the sufficient interest test. If it is accepted that the contractors who are excluded from the bid process are actors who can exercise the same rights as bidders in the judicial review process by proving sufficient interest to exercise high legal empowerment, then the right to be able to request administrative review should be extended to them as well. The exclusion of contractors who have not made bids/were unable to make bids in the administrative review of the horizontal accountability process is an issue which needs to be addressed in order to enhance legal empowerment. The PPA needs to broaden the base of who can request an administrative review, and to include those who may not necessarily have put in a bid, as allowing individuals who may not have put in bids to challenge decisions, is a way of improving horizontal accountability.

The net effect of this in practice is that only contractors who have made bids can request for administrative review of a contract award. However, contractors who have not made bids, and also observers (NGOs) are able to still request for a review of a contract award, however they are only able to exercise this right by directly engaging the courts through a judicial review, and because of issues like the cost of taking cases to courts, it is unlikely that many actors in the process who were not bidders would engage the courts, therefore leading to a situation where legitimate actors are being effectively disenfranchised, thus leading to low legal empowerment.

5.3.2 Judicial Review

As discussed in the previous section, the bidders in a procurement process have access to the courts as a last resort when an administrative review of a contract award has been unsuccessful. However, access to the courts is also open to other actors within the horizontal accountability framework who do not have access to the administrative review process. Both observers, and the contractors/bidders

have access to the courts since both actors would be able to show *sufficient interest* in the matter they will be heard by the courts and can exercise this tool of seeking a review of the contract award. In an action to the courts for a judicial review, the courts have a number of remedies that it can grant, these include quashing orders¹⁶, prohibiting order¹⁷, injunction¹⁸, mandatory order¹⁹, declaratory order²⁰, and damages²¹. Within the Nigerian procurement process all these remedies available for actors in the horizontal accountability framework can be useful to address loopholes which have been identified in the public procurement process.

For instance, in chapter two of this thesis, we discussed the loopholes around the National Council on Public Procurement (NCPP), the major issue being the fact that over 12 years after the PPA has been passed, the NCPP is still yet to be constituted by the President. However, a way horizontal accountability could help in improving the overall accountability framework as it regards the NCPP, would be by an actor in the horizontal accountability process filing an action in court to seek a mandatory order compelling the Presidency to appoint the members of the NCPP. The PPA provides in section 1(4) that the Chairman and other members of the Council ***shall be appointed*** by the President. The Act unfortunately does not specify a time frame within which the President must appoint the NCPP. In the case of *Ugwu v Ararume*²², the Nigerian Supreme Court held that the word "shall", in its ordinary meaning is a word of command which is normally given a compulsory meaning because it is intended to denote obligation. Therefore, if that decision is to be applied, then there is an obligation created on the President to constitute the NCPP.

A request for a mandatory order is a judicial review remedy which is open to the actors within the horizontal accountability framework, and it is more likely that this action would be brought by an observer/NGO. The actor can bring an action seeking an order to compel the President to act upon the obligation which has been placed

¹⁶ This is an order which overturns or undoes a decision already made by the procuring entity.

¹⁷ This stops a public body from taking an unlawful decision or action it has not yet taken.

¹⁸ This is a temporary order requiring a public body to do something or not to do something until a final decision has been made in your case

¹⁹ This makes a public body do something the law says it has to do

²⁰ The court states what the law is or what the parties have a right to do

²¹ A pecuniary award by the court when it is proven that the claimant has suffered some special wrong.

²² (2007) LPELR-3329(SC)

on the office of the President to appoint the NCPP, this mandatory order is known as an order of *mandamus*²³. In the case of *Akilu v Fawehinmi*²⁴ it was held by the Nigerian Supreme Court inter alia that the conditions required for the grant of an order of mandamus are - that the respondent is a public officer, in this case this requirement is met as the President is a public officer; that s/he has a public duty, in this case the public duty is clear from Section 1(4) of the PPA 2007, the President *shall* constitute the NCPP; that all conditions necessary for the performance of his public duty have been satisfied, in this case no condition precedents have been specified save for the establishment of the NCPP and this has been done by virtue of Section 1(1) of the PPA 2007; that s/he has neglected to perform his duty, this is met as well because the President has not yet performed this duty. The fourth condition is that the applicant is aggrieved by such neglect - this deals with the issue of *locus standi*²⁵ as was decided in *Abraham Adesanya v President, Federal Republic of Nigeria*²⁶.

From the earlier discussion on locus standi it is clear that the courts will grant standing to any observer/NGO who can show sufficient interest in the case, and this has been the position of the courts as regards NGOs in Nigeria in some decided cases. All that is necessary to prove is that the observer/NGO has sufficient interest or legal right in the subject matter of the dispute – this is proven if the NGO is one which has one of its stated aims and objectives to be ensuring probity, transparency or accountability in the public procurement process (or similar aims and objectives), and that their collective right or interests were in jeopardy or had been violated by the non-compliance with the statute and thirdly, that they had justiciable cause of action²⁷. This is a way that this loophole in the public procurement process can be addressed by actors within the horizontal accountability framework.

²³ This is a judicial remedy in the form of an order from a superior court, to any government body, or public authority, to do (or forbear from doing) some specific act which that person/body is obliged under law to do (or refrain from doing), and which is in the nature of public duty, and in certain cases one of a statutory duty.

²⁴ (1987) 4 NWLR, 797

²⁵ This is a right to be heard by a court of competent jurisdiction. This right arises where a party to a case shows that he has interest enough to link him with a court case and without showing such an interest, the court would not entertain his claims. This was introduced to prevent meddlesome interlopers from involvement in court claims and bringing vexatious litigation.

²⁶ (1981) 5 SC 112

²⁷ Bannuram v. Hillary (2013) LPELR-20854(CA)

A final issue to be discussed here is the issue of damages. The PPA does not provide this remedy, in fact one of the loopholes identified in chapter two was the fact that the PPA precludes liability to procuring authorities in certain situations including bid cancellation²⁸. This does not prevent the contractor from approaching the courts to request damages if it can be shown that there has been some loss to the contractor as a result of the actions of the procuring authority. In fact, this is the position which is advocated for by the UNCITRAL Model Law on Public Procurement. Article 19 of the UNCITRAL Model Law on Public Procurement 2011²⁹, prescribes that the procuring entity should not incur liability to bidders, '*unless the decision for the cancellation is a consequence of irresponsible or dilatory conduct by the procuring entity*'. The award of damages is one of the discretionary remedies at the disposal of the courts and is an order which a court of law can make when the relevant criteria for the award of damages has been met. Under Nigerian law, a claimant can claim special damages if the claimant can specifically plead and strictly prove the damages claimed³⁰. It should be noted that there is no provision in the PPA for an award for monetary damage for breach and there is no case law on this in Nigeria yet, however an instructive case from the United Kingdom is *NDA v Energy Solutions*³¹ where the Supreme Court held that for there to be an award of monetary damages, the breach complained of must have been *sufficiently serious*. Arrowsmith³² has also suggested that the legal principle of promissory estoppel could form the jurisprudential foundation for the award of compensation to bidders in certain cases where a procurement has been cancelled to the detriment of a bidder.

From the above, it is clear therefore that in a system that guarantees some level of legal empowerment to actors within the horizontal accountability structure, either low or high legal empowerment, that empowerment allows the actors to be able to exercise some accountability over the system and these are by using the remedies

²⁸ PPA 2007 s 28

²⁹ This is the United Nations Commission on International Trade Law model law which deals with Public Procurement and serves as a template for procurement laws in several jurisdictions worldwide (particularly in developing and emerging economies)

³⁰ GTB v. DIEUDONNE (2017) LPELR-43559(CA)

³¹ This was the case in Nuclear Decommissioning Authority (Appellant) v EnergySolutions EU Ltd (now called ATK Energy EU Ltd) (Respondent) [2017] UKSC 34 – where Energy Solutions were paid nearly £100m for lost earnings due to irregularities in the procurement process.

³² Sue Arrowsmith, 'Protecting the Interests of Bidders for Public Contracts; The Role of the Common Law' (1994) 53 *The Cambridge Law Journal*, 1, pp. 104-139.

available either during the administrative review or judicial review process. These actors are therefore able to ensure horizontal accountability is present, and supports the vertical accountability system, in order to create a dual accountability system that works side by side effectively.

5.4 Dual Accountability - The Ideal Structure?

Some scholars have highlighted the negative elements that are associated with multiple accountability models, which include the fact that having it is too expensive³³ and that it leads to situations where public officials are faced with competing and incompatible expectations³⁴. The issue of *multiple accountability*³⁵ has also been identified as one of the challenges faced when trying to enthrone horizontal accountability as a corollary to vertical accountability. It refers to the demands for accountability from different relevant stakeholders which could serve to create confusing expectations in the public officers, not knowing whose goals and expectations to live up to, should it be those of the super ordinates within the hierarchical vertical accountability, or the citizens within a horizontal accountability framework. Koppell refers to this issue as *multiple accountabilities disorder*³⁶, which is when there are conflicting demands for accountability which instead of improving accountability may actually serve the reverse function and paralyse the agents from performing their tasks by causing confusion and therefore paralysis. Organisations trying to meet conflicting expectations are likely to be dysfunctional, pleasing no one while trying to please everyone³⁷. Linked to the perceived fear of multiple accountability, is the issue of *accountability overload*, Halachmi³⁸, states that another issue assailing the quest for accountability and transparency in general, and the use of performance management in particular, is that the focus of public officers when they know they are being placed under intense scrutiny as a result of more improved transparency is that they focus on ensuring that things are done *right*, but not

³³ Christopher Pollitt, *The Essential Public Manager*, (Open University Press 2003).

³⁴ Donald E. Klingner, John Nalbandian, and Barbara S. Romzek. Klingner, 'Politics, Administration and Markets. Conflicting Expectations of Accountability', (2002) 32 American Review of Public Administration, 2, pp. 117-144

³⁵ Thomas Schillemans and Mark Bovens 'The Challenge of Multiple Accountability: Does Redundancy Lead to Overload?' in Melvin Dubnick and H. George Frederickson, (eds.), *Accountable Governance: Problems and Promises* (M.E. Sharpe 2011)

³⁶ Jonathan Koppell, 'Pathologies of Accountability: ICANN and the Challenge of "Multiple Accountabilities Disorder"', (2005) Public Administration Review 94.

³⁷ n 35

³⁸ Arie Halachmi, 'Accountability Overloads' in Mark Bovens, Robert E. Goodin, and Thomas Schillemans (eds), *The Oxford Handbook of Public Accountability* (Oxford University Press 2014)

necessarily that the *right things* are done, and one of the reasons for this is the short-term perspective used to establish accountability. Asserting that greater transparency can induce behaviour that makes blind following of the letter of the law and the desire to do things right prevail over the need to consider the spirit of the law and do the right thing from a rational, fairness or equity point of view. The argument therefore being that because the public officers are worried about the intense scrutiny which they are placed under when there is transparency, they become pre-occupied with trying not to make mistakes and therefore this impacts their decision making and the quality of their output. This is an issue also echoed by Hood³⁹ where he refers to it as *blame avoidance*.

On the opposing side of the argument, there have been some who have argued that there is the likelihood of better accountability when there are overlapping channels of accountability⁴⁰. Landau⁴¹ argues that systems increase in reliability when they consist of different parallel and overlapping elements, with the advantage that these separate channels can serve as backups for each other, working independently. The idea being if one system fails to identify an issue, there is more likelihood that the other system would catch the issue if they were working independently.

In this context therefore, this thesis is arguing that where vertical accountability and horizontal accountability exist as dual accountability systems over the same issues – contract awards, there is a greater likelihood of conflict of interest situations being identified and addressed. Another important advantage of having a dual accountability system is that such a system is able to legitimately incorporate different interests which may or may not be aligned. For instance, the interests of a contractor in seeking a review of a contract award would be to get the award reversed and probably re-awarded to his/her company, whereas the interest of the BPP in conducting an audit on the same award would be to ensure the public officers

³⁹ Christopher Hood, 'What happens when Transparency meets Blame Avoidance?', (2007) 9 Public Management Review, 2, pp. 191-210

⁴⁰ Colin Scott, 'Accountability in the Regulatory State', C. (2000) 27 Journal of Law and Society, 1, pp. 38-60; John Braithwaite, 'Accountability and Governance under the New Regulatory State', (1999) 58 Australian Journal of Public Administration, 1, 90-93; Thomas Schillemans, 'Redundant Accountability: The Joint Impact Of Horizontal And Vertical Accountability On Autonomous Agencies', (2010) 34 Public Administration Quarterly, 3, pp. 300-337.

⁴¹ Martin Landau, 'Redundancy, Rationality and the Problem of Duplication and Overlap', (1969) 29 Public Administration Review, 4, pp. 346-358

in the procuring entity were following the proper procedures, and ensuring that if there were any issues identified, these could be corrected with proper training, or disciplinary sanctions.

Another fear which is expressed towards multiple accountability systems is that it could create a situation where there are too many accountability challenges in essence, that this would lead to too much litigation. That it would lead to a situation where there is too much engagement by the actors within the horizontal accountability framework, and the system is strained from allowing all these actors access to challenging the decisions of public officers, thereby potentially grinding the activities of the public office to a halt, or introducing unnecessary financial costs and burden to defending actions. It is argued that this scenario is even more likely where the actors in the process are not able to properly grasp the information that they are accessing, and in missing the nuance of the procurement transactions, they run the risk of working with assumptions based on improperly understood data or information, this problem is referred to as *information assimilation*⁴², it is a well-known and often-cited finding of behavioural economics that very often the public is unable to properly process even rather simple information because of “wired in,” congenital, systematic cognitive biases⁴³. The solution to this fear lies in the standard of *sufficient interest* in *locus standi* which is necessary before an action can be brought before the courts, as the use of this will weed out meddlesome interlopers who have no real stake in the accountability process.

In advocating for enhanced horizontal accountability, this thesis is not in any way suggesting that horizontal accountability as a standalone process is sufficient to ensure accountability in the procurement process. This thesis is arguing that both vertical and horizontal accountability have to exist side by side and only with both functioning optimally can there be true accountability. The focus on horizontal

⁴² Amitai Etzioni, ‘Is Transparency the Best Disinfectant?’, (2010) 18 The Journal of Political Philosophy 4, pp. 389–404

⁴³ Daniel Kahneman, Jack Knetsch and Richard Thaler, ‘Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias,’ (1991) Journal of Economic Perspectives, 5, pp.193–206; Edward Russo and Paul J. H. Shoemaker, *Decision Traps*, (Simon and Schuster, 1989); Arthur Lefford, ‘The influence of emotional subject matter on logical reasoning’, (1946) 34 Journal of General Psychology, pp. 127–51; Amos Tversky and Daniel Kahneman, ‘Judgment under uncertainty: heuristics and biases,’ (1974) 185 Science, pp. 1124–31; Marco Cipriani and Antonio Guarino, ‘Herd behavior and contagion in financial markets,’ (2008) The B.E. Journal of Theoretical Economics, 8; Robert H. Frank, Thomas Gilovich, and Dennis T. Regan, ‘Does studying economics inhibit cooperation?’, (1993) 7 Journal of Economic Perspectives, pp. 159–71.

accountability as the key is because of the multiplicity of actors who are able to exercise these accountability functions, thereby creating a veritable army of actors within the accountability framework, as opposed to vertical accountability which exists in a closed group. Ideas for this sort of dual accountability model within the public space, have existed throughout history, for instance in World War II private citizens voluntarily supplemented the enforcement activities of the United States Office of Price Administration by checking prices in retail stores and reporting violations of the price control rules to the public authority⁴⁴. Becker and Stigler opine that where rules are mainly or exclusively enforced by the public bureaucracies, the result will be under-enforcement and some degree of corruption. They argue that a scheme of privatised law enforcement would make law enforcement more efficient and transparent⁴⁵, and this is in essence what horizontal accountability advocates for a sort of privatised accountability mechanism.

5.5 Conclusion

This Chapter analysed the second part of the horizontal accountability equation – legal empowerment and discussed issues which are relevant to have a proper accountability process in place which ensures that the actors within the horizontal accountability process are able to exercise their accountability duties effectively. Issues like locus standi and the remedies available within the judicial process were addressed, and the current state of the Nigerian process as it relates to those issues were discussed. Also addressed were some of the loopholes identified previously within the public procurement process in Nigeria, and how high legal empowerment can be used to address some of those loopholes. Ultimately, it was determined that having the tools available to be able to challenge actions by the relevant procurement authorities through legal empowerment is a critical aspect of the horizontal accountability process, it is *the tip of the spear*, with the possibility of addressing quite a number of the loopholes that were highlighted in chapter two, if only the actors within the process would take advantage of the platform which legal empowerment provides.

⁴⁴ Marver H Bernstein, *Regulating Business by Independent Commission*, (Princeton University Press, 1955).

⁴⁵ Gary Becker and George Stigler, 'Law Enforcement, Malfeasance, and Compensation of Enforcers', (1974) 3 *Journal of Legal Studies*, pp. 1-18.

Finally, the Chapter addressed the issue of a dual accountability systems and its alleged downsides including multiple accountabilities, accountability overload and improper information assimilation; noting that even though there are some procedural duplications which might arise out of a multiple accountability process, ultimately both the vertical and horizontal accountability processes work hand in hand for the overall health of the accountability framework, with the horizontal accountability system picking up the slack where the vertical accountability system has failed, or has blind spots.

Chapter 6 - Regulations, Frameworks, and the Future

6.1 Introduction

This thesis has put forward the argument that horizontal accountability if deployed properly can be one of the key weapons in the arsenal used to fight conflict of interest, and ultimately corruption in the Nigerian public procurement process. The rationale for this argument has been to acknowledge that currently the Nigerian public procurement process manages conflict of interest by using a dominant model of *vertical accountability* - a model wherein the activities of the public officers are managed or controlled by those who are super-ordinate to them within a hierarchical framework, and while this on its own works in certain instances as a tool of accountability, it is limited in certain respects, and therefore the key to improving this process of managing accountability is by broadening participation in the accountability process by introducing *horizontal accountability*.

The right of actors in the horizontal accountability process to get involved in the accountability process is predicated within a stakeholder paradigm where the actor in the system is able to make accountability demands on the basis of the actor being a stakeholder within the procurement process, and that the acts of the authority or officials in the public procurement process have a direct impact on the actor or on its stated mission. Therefore, in order to create a framework within which the role and powers of the actors in the horizontal accountability system can be properly encapsulated, this thesis adopted a *Transparency and Accountability Matrix* as a framework for ensuring optimal actor participation in the horizontal accountability process to ensure full accountability. The thesis showed, that the first key determiner of whether a horizontal accountability process will be effective is the issue of access to information, and this issue needs to be solved effectively or else any drive for horizontal accountability would be meaningless. For access to information, transparency by request and transparency by default are the two ways in which access is allowed. Transparency by request, being firmly embedded within the freedom of information jurisprudence and legislation has multiple moving parts - like what information can be requested, who can request it, when can requests be

denied etc, and these multiple moving parts could all conspire to create a situation where there is the illusion of transparency by request, when in reality the opposite is the case. This was what was discovered within the Nigerian system and the transparency by request regime, a system plagued with technical roadblocks and challenges which made access to information a difficult goal to achieve, roadblocks like the exceptions regime and its two-part test, the appeal process and its one-stage process, the lack of an independent body for appeals from a public authority, and finally the actual reality of most public authorities either ignoring or refusing requests for information (in contrast to the information being presented to the National Assembly by the Ministry of Justice). It was made clear that these issues in transparency by request need to be addressed properly or else any drive for horizontal accountability would be dead on arrival, this was made more evident when a number of the conflict of interest loopholes which were identified as existing in the public procurement process were predicated on a transparency by request process, in order to lead to conditional accountability, and therefore in all those instances of loopholes, a failed transparency by request process would mean failed conditional accountability.

This thesis however argued that a way that a number of the challenges in the transparency by request process could be surmounted or *leap-frogged*, was to move to a transparency by default process through open government data. Open government data would make the access to information instant, steady and easy to access. The steady flow of information would allow the actors unfettered access to be able to properly engage in the accountability process without having roadblocks put in front of the requests for information, as the information would already have been made available. The thesis however acknowledged that even though certain sections of the Freedom of Information Act seem to provide for open government data, and the Nigerian government seems to be in favour of its implementation as evident from its involvement in the Open Government Partnership, there are foundational issues which need to be addressed around data access, data reliability, and data protection. Specifically, around data reliability and data protection, as those are the areas where there could be unforeseen negative consequences if the process is not managed properly with the right safeguards in place. Key pieces of

legislation need to be enacted, and key institutions created in order to midwife and manage the process. The thesis argues that while transparency by default should be the optimal end goal as it concerns access to information, that goal should not be rushed until the relevant things are in place to ensure it can be run effectively and with the proper safeguards.

For horizontal accountability to be effective, access to information is the bigger challenge however that is not the only important ingredient, and chapter five discussed the fact that legal empowerment is what gives the actors within the horizontal accountability process the means to be able to hold the authorities and officials accountable, and in fact the enforcement tools that are needed for horizontal accountability by and large already exist within the system – access to administrative review and access to courts, with varying degrees of remedies available to the actors. If access to information is still a challenge that needs to be overcome, the legal empowerment aspect of the equation is one which it seems has not been properly exercised by the actors within the horizontal accountability system. The thesis identified that a number of the loopholes in the system can be managed by the actors actually taking action which they already have access to be able to carry out. Access to information creates the ammunition for an accountability challenge, but ultimately the actors will still need to pull the trigger, and legal empowerment gives them the means to be able to pull the accountability trigger.

6.2 Recommendations

From the discussion over the course of this thesis, it is quite clear that the area of the transparency and accountability matrix which needs the most support is around the access to information, and in that regard therefore a number of the recommendations which flow from the analysis of the relevant issues within the Nigerian public procurement process are targeted at improving access to information, either by ensuring a better transparency by request process, or by moving to a transparency by default process. This section, reviews some of the recommendations for enhancing horizontal accountability within the public

procurement process in Nigeria in order to effectively manage the conflict of interest loopholes that exist therein.

6.2.1 Enacting a Data Protection Act

As has been mentioned at various points in this thesis, Nigeria does not have any overarching legislation on Data protection. It is quite clear that having appropriate data protection legislation is critical to ensuring a robust Open Government Data system in any country. Therefore, the first step is to ensure that an adequate data protection system is in place before one can consider moving towards a system of open government data.

Such a Law when enacted should adequately deal with the key issues like data collection and how organisations or public agencies may collect personal information and the purposes to which they can make use of it, it should cover consent and notice which the individual whose data is being collected must give before the data is collected and how the individual may withdraw that consent. The legislation should also make provision for what uses the personal information which is collected may be put to and which uses they cannot be put to, specifically detailing the limits to the use of the personal information. Disclosure should also be provided for, when and how the organisation may disclose the details of personal information collected. Apart from the above, the Data protection legislation should also cover issues like security of personal information, retention of records, and notification procedures when there has been a breach. As was mentioned in chapter four, there is currently a subsidiary legislation – Nigeria Data Protection Regulation, which has been created to fill the void, however a more encompassing legislation is needed to address certain legal and structural issues which subsidiary legislation is ill-equipped to handle, and examples of these issues are mentioned in the next couple of recommendations below.

6.2.2 Three-Part Test for Requests for Information Exceptions

This thesis identified that the current process for refusals for information requests citing an exception is generally a two part test under the FoIA, which states that the exception must be a legitimate aim, and then there must be no overriding public

interest that prevents the information for the release of the information. For requests for information where the exception being argued is confidential commercial or proprietary information, the test is a three-part test, which is that there must be a legitimate aim, then there must be harm to a confidential commercial or proprietary information interest of a third party or that would prejudice third party negotiations, and there must be no overriding public interest. The recommendation here is that the harm requirement should be one of *substantial harm* and *substantial prejudice*. It should not be enough that a third party can cite harm or prejudice, the harm or prejudice complained of should be substantial in that the release would do irrevocable damage. The bar to be able to use this exception should be set very high.

6.2.3 Three Stage Appeal Process for Freedom of Information Denials

This thesis determined that the appeal process when a request for information has been denied, under the Nigerian FoIA is that the appeal for review of the denial of freedom of information request goes directly to the court. The recommendation here is that there should be two other layers introduced – appeal to a supervisory individual within the public authority where the information request was made, and then a subsequent appeal to an independent authority or body, before an appeal to the courts. This would ensure that there is more access, as a direct court appeal leads to a lengthier and costlier appeal process for the information requester.

6.2.4 Independent Authority for Freedom of Information Request Appeals

Linked to the above recommendation, is the recommendation of an independent body/office which would be in charge of data protection issues in Nigeria, similar to the Data Protection Ombudsman which a number of countries have¹, this Ombudsman would essentially be responsible for Data protection policy and for conducting reviews on complaints for unlawful access or processing of data. Such an office would ensure that there is better access to restitution in cases of data breach, without the need for a potentially cumbersome and expensive court litigation process. This thesis has suggested that based on the current legislation,

¹ Albania, Australia, Denmark, Canada, Iceland, Ireland, Mexico, Trinidad and Tobago amongst many other countries have special purpose Commissions or Ombudsmen to deal with data protection and privacy issues, including reviewing Freedom of Information denial request

the Office of the Attorney General of the Federation (OAGF) could be given these powers, however best practice would be for the creation of an independent body, as the OAGF still sits within the government structure as well, and is not an independent authority

6.2.5 Implementation of Data Standards for Public Data

This thesis has advocated for the creation and implementation of an acceptable global standard for achieving data integrity and viability, for example the use of Trusted Digital repositories (TDRs)². TDRs are an internationally accepted, technology-neutral means of ensuring long-term access to digital records and datasets as assets and protecting their integrity, completeness, trustworthiness and traceability. They can be created to capture and provide access to authentic data and digital records; link active and inactive datasets to hard copy or digital records that provide context; etc.

Apart from the use of TDRs, what is fast becoming the world-wide standard for data standards for public data generally, and for public procurement particularly is the *Open Contracting Data Standard* (OCDS). The OCDS enables disclosure of data and documents at all stages of the contracting process by defining a common data model. It was created by the Open Contracting Partnership³ to support organizations to increase contracting transparency and allow deeper analysis of contracting data by a wide range of users. The OCDS approach is to advocate that organisations publish early, and iterate: improving disclosure step-by-step, use simple and extensible JSON structure; publish data for each step of the contracting process; create summary records for an overall contracting process; adopt re-usable objects: organizations, tender information, line-items, amounts, milestones, documents etc.; recommended data and documents at basic, intermediate & advanced levels; organisations use common open data publication patterns; that organisations provide guidance on improving data collection and data quality; and cultivate a

² A trusted digital repository is one whose mission is to provide reliable, long-term access to managed digital resources to its designated community, now and in the future. There are different certifications for TDRs, however generally they all tend to assess things like organisation, management of the data, infrastructure, security, and audit processes.

³ An independent not-for-profit created in 2015 and working in over 30 countries. That focuses on a drive for massively improved value for money, public integrity and service delivery by shifting public contracting from closed processes and masses of paperwork to digital services that are fair, efficient and 'open-by-design'.

growing community of users and range of open source tools. The OCDS has a number of guides that advise on how best to implement it, and these are provided open source and publicly available.

Under Nigerian Law⁴, the National Archives is statutorily charged with the responsibility for protecting and preserving public sector records, therefore that agency could by default be the appropriate agency to house the TDR.

6.2.6 Implementation of Open Government Data provisions

Finally, in chapter four it was identified that the current FoIA actually mandates that there should be open government data, where it states that⁵ public institutions are to ensure that they keep records and information of all its activities, operations and businesses, and ensure the proper organisation and maintenance of all information in its custody in a manner that facilitates public access to such information, and shall cause to be published (amongst other things) information relating to the receipt or expenditure of public or other funds of the institution; the names, salaries, titles and dates of employment of all employees and officers of the institution; a list of files containing applications for any contract, permit, grants, licenses or agreements; a list of all materials containing information relating to any grant or contract made by or between the institution and another public institution or private organization etc.

This provision has not been taken advantage of by the relevant actors in the horizontal accountability system, and a recommendation is that the relevant actors like NGOs, and other civil society organisations could test the provisions of the FoIA by seeking mandatory orders against public institutions for the publication of this information as mandated by the FoIA.

6.3 Future Research and Conclusion

The introduction of the transparency and accountability matrix into the discussion on horizontal accountability is one which is worthy of further research and analysis,

⁴ National Archives Act 1992

⁵ FoIA 2011 s 2

specifically the matrix can be further analysed within other public agencies in order to refine it and make it more amenable to analysis of horizontal accountability outside of public procurement. The utility of the matrix is that it has the potential to work in a toolkit for determining levels of horizontal accountability in any system with a view to identifying which areas of the matrix need enhancement in order to increase horizontal accountability. Within the Nigerian public procurement process, the transparency and accountability matrix has been able to identify access to information as the aspect which needs the most enhancement and improvement, and the matrix has the potential to serve the same purpose in order sectors in other countries around the world.

There is also scope for further research around the administrative review process of the Bureau of Public Procurement (BPP) in Nigeria, this thesis uncovered a lot of data on the administrative redress process of the BPP which has built up over the period of time since the PPA was passed in 2007. This data presents a rich research pot for analysis on the approach of the BPP when dealing with administrative redress requests, and the analysis which is provided could serve as a helpful resource for creating a feedback mechanism in improving the administrative redress process.

The overall thrust of this thesis has been that the public procurement sector, as with all sectors where there are public officers, is prone to incidences of conflict of interest, it is inevitable, however, there are certain steps which the system can take to minimise the risk of conflict of interest situations in public procurement resulting in corruption. The key lies in creating an accountability framework that is able to effectively identify and manage those risks. The thesis has argued that the optimal accountability framework is a dual framework that includes both vertical and horizontal accountability systems. The vertical accountability system by default is the predominant one based on the hierarchical network, and is the command and control system which most bureaucracies the world over operate to ensure accountability, however, the vertical accountability system cannot on its own be the sole system, as it is prone to its own mistakes, its own failings, and its own blind spots, and therefore needs support. It is this support that the horizontal

accountability system exists to provide, the horizontal accountability system has multiple actors who sit outside of the hierarchical network but who provide the necessary safeguards to ensure that the system is being checked by multiple actors.

For the actors in the horizontal accountability system to be able to properly carry out their accountability tasks, there are two critical issues that arise – information and empowerment. The transparency and accountability matrix provide a framework for how these two critical issues are understood and identifies where either can be enhanced in order to improve the horizontal accountability system. Horizontal accountability could therefore be failing either from a lack of information or a lack of empowerment, the Nigerian public procurement process when analysed within the transparency and accountability matrix shows that the main problem is lack of information, and therefore in order to improve horizontal accountability within this process, access to information must be enhanced either through transparency by request or transparency by default. This thesis has suggested solutions for how access to information can be improved, and examples of how that can impact on the public procurement process were discussed in the context of the conflict of interest loopholes in the current public procurement process in Nigeria.

Ultimately the goal of any accountability system should be to ensure full accountability at best, and conditional accountability at worst, and the analysis and suggestions contained in this thesis creates a framework for the Nigerian public procurement system to achieve that.

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