

# BEYOND UNCITRAL: THE CHALLENGES OF PROCUREMENT REFORM IMPLEMENTATION IN AFRICA

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## 1 Introduction

In 1994, the United Nations Commission on International Trade Law (“UNCITRAL”) developed the first comprehensive model law for the procurement of goods, services and construction, to be used as a template for countries wishing to regulate or reform their public procurement systems. The model law was a huge success and was used by many developing countries that decided to regulate government procurement for the first time, or amend existing procurement legislation.<sup>1</sup> However, evolutions in procurement methods; innovations in relation to e-technologies; the trend towards harmonisation of procurement practices and regulation; and other changes such as the increasing move towards public-private partnerships, outsourcing and the use of concessions meant that by the mid-2000s, the 1994 model law was in danger of becoming obsolete as it did not take into account innovations in the rapidly changing procurement space. Thus, in 2004, UNCITRAL decided that the model law could benefit from being updated to reflect such changes and new procurement practices.<sup>2</sup> The new model law was finally adopted in 2011, with its accompanying guide being completed in 2012.<sup>3</sup>

Although the 1994 model law was used as the basis of procurement regulation in many countries in sub-Saharan Africa, the passage or reform of procurement regulation in line with the model law, in itself and without more, is insufficient to bring about the desired objectives of procurement reform and regulation. The main objectives of procurement reform in Africa have been stated to be the establishment of a public procurement framework that fosters “transparency, efficiency and mechanisms for enforcement,

<sup>1</sup> S Arrowsmith & C Nicholas “The UNCITRAL Model Law on Procurement of Goods, Construction, and Services” in S Arrowsmith & J Tillipman (eds) *Reform of the UNCITRAL Model Law on Procurement Regulation for the 21st Century* (2010) 1 3-5; R Hunja “The UNCITRAL Model Law on Procurement of Goods, Construction and Services and its Impact on Procurement Reform” in S Arrowsmith & A Davies (eds) *Public Procurement: Global Revolution* (1998) 97; R Hunja “Obstacles to Public Procurement Reform in Developing Countries” in S Arrowsmith & M Trybus (eds) *Public Procurement: The Continuing Revolution* (2003) 13. See B Basheka “Public Procurement Reforms in Africa: A Tool for Effective Governance of the Public Sector and Poverty Reduction” in KV Thai (ed) *International Handbook of Public Procurement* (2009) 131.

<sup>2</sup> C Nicholas “Reform of the UNCITRAL Model Law on Procurement” (2010) *EBRD Law in Transition Online* 1.

<sup>3</sup> See UNCITRAL Model law on Public Procurement (2011) General Assembly Resolution 66/95 <[www.uncitral.org/uncitral/en/uncitral\\_texts/procurement\\_infrastructure/2011Model.html](http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/2011Model.html)> (accessed 25-02-2014).

coupled with an institutional arrangement that ensures consistency in overall policy formulation and implementation”<sup>4</sup> as well as the development of a professional cadre of staff.<sup>5</sup> However, the objectives of public procurement reform often go beyond the establishment of an adequate procurement system, and Basheka identifies seven wide-ranging objectives of public procurement reform in Africa. These are: to improve the governance of the public sector; to respond to global forces and increase the participation of the private sector in public procurement; to increase transparency and minimise corruption; to improve accountability of procurement systems; to increase coordination in public procurement; to improve professionalism of the procurement cadre; and to improve service delivery and reduce poverty.<sup>6</sup> Evenett and Hoekman also suggest that procurement reform is important to development, as it will be difficult for a state to meet the needs of its citizens without a public expenditure system that includes effective public procurement policies.<sup>7</sup>

It can thus be surmised that apart from the establishment of an adequate, modern and well-functioning procurement system, procurement reform is also intended to improve public sector governance and accountability and aid socio-economic development.

As stated earlier, it has been suggested by the existing literature on public procurement reform that for procurement reform to succeed, certain elements are required beyond legal reform.<sup>8</sup> This article is an attempt to distil some of these elements using the South African and Nigerian procurement reform experience as case studies and discusses what is lacking in procurement reform efforts in sub-Saharan Africa and possibly undermining these reform efforts. The article is a result of research carried out on the public procurement systems of South Africa and Nigeria between 2011 and 2012.

## **2 Beyond legal reform: What is necessary for successful procurement reform?**

### **2 1 Capacity building**

A critical element that needs to accompany legal reform in public procurement is capacity building. This may be described as the process of developing or enhancing the skills of procurement personnel to enable them to function effectively and achieve measurable results. In particular, “capacity-

<sup>4</sup> Hunja “Obstacles to Public Procurement Reform in Developing Countries” in *Public Procurement: The Continuing Revolution* 15.

<sup>5</sup> 15.

<sup>6</sup> See Basheka “Public Procurement Reforms in Africa: A Tool for Effective Governance of the Public Sector and Poverty Reduction” in *International Handbook of Public Procurement* 131, 145.

<sup>7</sup> SJ Evenett & BM Hoekman *International Cooperation and the Reform of Public Procurement Policies* Research Working Paper (2005) 1 21-25 <<http://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-3720>> (accessed 24-02-2014). See also the views of S Karangizi & I Ndahiro “Public Procurement Reforms and Development in the Eastern and Southern Africa Region” in RH Garcia (ed) *International Public Procurement: A Guide to Best Practice* (2009).

<sup>8</sup> See Basheka “Public Procurement Reforms in Africa: A Tool for Effective Governance of the Public Sector and Poverty Reduction” in *International Handbook of Public Procurement* 131, 145; Hunja “Obstacles to Public Procurement Reform in Developing Countries” in *Public Procurement: The Continuing Revolution* 15.

building involves establishing the conditions under which public servants are able to embark on a continuous process of learning and adapting to change – building on existing knowledge and skills and enhancing and using them in new directions”.<sup>9</sup>

In relation to public procurement reform, capacity building must be included in the reform agenda as short, medium and long-term strategies. This is particularly pertinent where legal reform created processes and requirements that previously did not exist.

Research on the public procurement systems of South Africa and Nigeria revealed that while attention is devoted to legal reform and the creation of new institutions, insufficient attention (especially in relation to Nigeria) is devoted to capacity building of public procurement officials to acquaint them with the procurement procedures, methods and technologies mandated by new procurement regulation. It is often the case that capacity building is cursory and does not take into account the often radical changes in orientation and process that legal reform requires. This means that in some cases, the new regulation is unable to deliver the benefits of procurement reform as the regulation is inadequately or badly implemented and enforced, owing to a lack of understanding of the rationales underpinning the laws and the “new” procurement outcomes sought to be achieved.<sup>10</sup>

As stated, building capacity is a short- to long-term strategy and the competence required to deliver on procurement reform initiatives must be developed and retained through various means. Qualifications such as those from the Chartered Institute of Purchasing and Supply (“CIPS”) or similar bodies are important, as are degree-level courses in procurement or purchasing and supply, where available.

In relation to the issue of capacity building in public procurement, South Africa and Nigeria took approaches that were at opposite ends of the spectrum. In South Africa, in recognition of the importance of relevant qualifications and capacity building in the procurement context, the government in 2007 prescribed minimum competency levels for persons involved in the procurement function in agencies that are governed by the Municipal Finance Management Act 56 of 2003.<sup>11</sup> Government agencies were to have been fully compliant with these regulations by 1 January 2013. Under the regulations, the head of a supply chain management unit in a municipality or municipal entity with an annual budget of below R500 million must possess at least a National Qualifications Framework Level 5 qualification or a National Diploma in Public Finance Management and Administration and a minimum of four years’ work experience of which one year must be at middle management level, or six years’ work experience at any level in a role related to the

<sup>9</sup> See United Nations Economic and Social Council, Committee of Experts on Public Administration *Definition of Basic Concepts and Terminologies in Governance and Public Administration* (2006) 8.

<sup>10</sup> IM Ambe & JA Badenhorst-Weiss “Procurement Challenges in the South African Public Sector” (2012) 6 *Journal of Transport and Supply Chain Management* 242 250.

<sup>11</sup> Municipal Regulations on Minimum Competency Levels in GG 29967 of 15-06-2007 (“Minimum Competency Regulations”).

position of the official.<sup>12</sup> Such a person must also possess competency in the areas of strategic financial management, operational financial management, governance, ethics and values in financial management, risk and change management, project management, legislation policy and implementation, stakeholder relations, and supply chain management. Where the procuring entity has an annual budget equal to or above R500 million, the head of the supply chain management unit must possess at least a National Qualification Framework Level 6 qualification and a minimum of five years' experience, of which two years must be at middle management level, or seven years' experience at any level in a role related to the position of the official. The person must also possess competency in the areas described above. Similar but lesser qualifications are also required under the regulations for supply chain management managers.<sup>13</sup>

While these requirements are welcome, one undesirable consequence of such detailed requirements is that many high-level procurement and supply chain management employees may be unable to meet the requirements and in future, job vacancies may remain unfilled if staff with the required qualifications and competencies simply do not exist.<sup>14</sup> In anticipation of this problem, the National Treasury, in April 2012, issued a circular<sup>15</sup> which mitigates the risk of municipalities not being able to meet the minimum competency regulations by providing that the National Treasury will extend the 1 January 2013 deadline for complying with the regulations for a further eighteen months (up till 1 July 2014) for municipalities experiencing difficulties in complying with the competency framework, on a special merit case basis, where there is evidence to suggest that the municipality in question has taken reasonable steps towards compliance. Further, the April 2012 circular also permits the recruitment of staff who do not meet the minimum competency requirements, as long as such municipalities apply for an extension of the deadline and ensure that such recruited staff have obtained the minimum competency requirements once the extended deadline has passed. It has been argued that where a procurement official does not meet the minimum competency requirements, once the deadlines have passed, this will affect the continuing employment of the official in question<sup>16</sup> and may also be the basis for the nullification of contracts entered into by such officials.<sup>17</sup>

Other efforts by the National Treasury to ameliorate any undesirable consequences of the minimum competency requirements, are the fact that the National Treasury has also spearheaded and coordinated the training of procurement personnel, which includes short-term training in supply

<sup>12</sup> Reg 11.

<sup>13</sup> Reg 12.

<sup>14</sup> See P Ntlizywana "The Implication of Non-Compliance with Treasury's Competency Requirements" (2011) 13 *Local Government Bulletin* 16.

<sup>15</sup> National Treasury "Minimum Competency Level Regulations, Gazette 29967 of 15 June 2007" (2012) *MFMA Circular* 60 1.

<sup>16</sup> Reg 18(2) Minimum Competency Regulations; National Treasury (2012) *MFMA Circular* 60 3. See also *Allen Paulse v Oudtshoorn Local Municipality* WCC 29-02-2012 case no 25790/2011 para 85.

<sup>17</sup> P Ntlizywana "Municipalities' Readiness to comply with Treasury's Competency Requirements" (2012) 14 *Local Government Bulletin* 4.

chain management, medium-term training in all elements of supply chain management as well as specialist skills, and long-term support of diploma and degree courses by tertiary institutions.<sup>18</sup> In addition, the National Treasury has in place a number of programmes which support municipalities, such as the Municipal Finance Management Internship Programme, the Municipal Finance Improvement Programme, a technical advisory programme and sector specific support measures.<sup>19</sup> The National Treasury has also issued detailed guidance on the manner in which municipalities may implement the minimum competency requirements by providing unit standards that match the skills and knowledge required in each competency area.<sup>20</sup>

It is hoped that with time, the capacity building initiative will serve to enhance financial management and control by municipalities, improve the utilisation and optimisation of scarce resources; lead to a reduction in audit queries due to non-compliance with regulations and enhance the alignment of planning and implementation of projects; as well as improve service delivery of municipalities.<sup>21</sup>

As stated, capacity building in relation to the public procurement function in Nigeria took a very different approach from that of South Africa, which specified detailed and comprehensive minimum competency requirements for procurement officials. One of the criticisms of Nigerian public procurement prior to the spate of procurement reforms in the 2000s was that public procurement was not regarded as a special or distinct function in the civil service and was carried out by officials who were not recognised as conducting a distinct function and who were not trained to conduct or manage the procurement process.<sup>22</sup> To improve the low level of procurement capacity, the Bureau of Public Procurement (“BPP”) was given the statutory task to “organize training and development programmes for procurement professionals”<sup>23</sup> and “co-ordinate relevant training programs to build institutional capacity”.<sup>24</sup> Since the enactment of the Public Procurement Act in 2007, the BPP has assumed responsibility for training and certifying persons wishing to join the Nigerian federal procurement cadre.<sup>25</sup> In addition to trainings and certifications, the BPP also created a Procurement Manual,

<sup>18</sup> National Treasury “Practice Note SCM 5 2004: Training of Supply Chain Management Officials” (27-10-2004) *Treasury* <<http://www.treasury.gov.za/divisions/ocpo/sc/PracticeNotes/SCM-PracNote%2004%205.pdf>> (accessed 24-02-2014).

<sup>19</sup> National Treasury (2012) *MFMA Circular 60 1*.

<sup>20</sup> See National Treasury “Municipal Finance Management Programme (MFMP)” *Treasury* <[www.mfma.treasury.gov.za](http://www.mfma.treasury.gov.za)> (accessed 24-02-2014).

<sup>21</sup> See A van Schalkwyk *Regulations on Minimum Competency Requirements and its Contribution to the Improvement of Governance and Compliance* paper delivered at *Women in Local Government Seminar* hosted by the Institute of Municipal Finance Officers, 08-02-2013.

<sup>22</sup> World Bank *Nigeria: Country Procurement Assessment Report II: Main Text and Annexes* (2000) 5 35 (“CPAR II”); see also World Bank *Nigeria: Country Procurement Assessment Report I: Summary of Findings and Recommendations* (2000) 5 (“CPAR I”).

<sup>23</sup> S 5(k) of the Public Procurement Act 2007 (Nigeria) (“PPA”).

<sup>24</sup> S 5(s).

<sup>25</sup> See ME Onyema “Challenges and Prospect of Public Procurement Practice in Nigeria” (30-09-2011) *NewsDiary* <<http://newsdiaryonline.com/procured.htm>> (accessed 26-02-2014).

which explains the PPA procurement process and the PPA requirements for procurement staff in government agencies.<sup>26</sup>

In an attempt to professionalise the procurement workforce, the Nigerian government in 2005 issued circulars creating a procurement cadre and a procurement department in all government agencies, headed by a director of procurement who is directly responsible for managing the procurement function.<sup>27</sup> The directors and their staff were trained and certified by the BPP to conduct public procurement and had to undergo an examination to be transferred to the procurement cadre.

Nevertheless, in relation to the training and continuing development of the procurement cadre, some shortcomings remain. Interviews with procurement staff revealed that the initial training that saw some civil servants moved to the procurement cadre lasted for just one week, after which the examination was conducted and successful candidates became part of the new procurement workforce. This training appears to have been insufficient and this was clear from talking to some procurement officials, some of whom appeared to be struggling with the demands of the job and the requirements of the PPA. In relation to continuing professional development, the director of procurement in one federal ministry admitted that it was often difficult to get staff to take training seriously, as the staff derived no financial benefits from attending training.<sup>28</sup> Unlike in South Africa, there are no minimum competency levels prescribed or required for public procurement officials and building capacity is driven by the demands of the public agency or individual officials. However, another initiative of the BPP to increase the capacity of Nigerian procurement officials in the long term was the commissioning in October 2012 of a Public Procurement Research Centre, sponsored by the BPP within the Federal University of Technology, Owerri. The aim of this Centre is to “provide the public procurement community quality research, advanced educational opportunities, and continued professional development by advancing theoretical and practical knowledge in public procurement”.<sup>29</sup> The Centre offers training to public procurement officials and is also expected to undertake research on public procurement.

One way by which the capacity of procurement officials may be enhanced in the Nigerian public sector is through reliance on independent qualifications such as those issued by the Chartered Institute of Purchasing and Supply or the Nigerian Institute of Purchasing Management and Supply. Also, similar to the South African system, minimum competency levels may be established for procurement officials, but at the same time, existing procurement staff should be supported either through sponsorship or paid study leave to obtain

<sup>26</sup> See generally Bureau of Public Procurement *Procurement Procedures Manual: Public Procurement in Nigeria* (2008).

<sup>27</sup> World Bank *Nigeria: A Fiscal Agenda for Change: Public Expenditure Management and Financial Accountability Review (PEMFAR) I: Main Report 134* (2007) 137 (“Fiscal Agenda for Change”).

<sup>28</sup> *Interview with Director of Procurement in a Federal Ministry* in Abuja, Nigeria, 07-2011 (on file with author).

<sup>29</sup> See The Public Procurement Research Centre Mission <[http://www.bpp.gov.ng/index.php?option=com\\_content&view=article&id=130&Itemid=835](http://www.bpp.gov.ng/index.php?option=com_content&view=article&id=130&Itemid=835)> (accessed 26-02-2014).

the required qualifications within a set time frame. This will ensure first that existing staff obtain the skills required for the procurement function in a growing economy and second that new competency requirements do not lead to a shortage of qualified staff in the medium to long term.

## 2.2 Supporting infrastructure

Procurement in the 21st century requires the presence of adequate digital and telecommunications infrastructure. As more of the procurement function is moved to electronic and digital platforms, basic infrastructure such as dependable electricity supply, fast and reliable internet broadband services, reliable telecommunications platforms and user-friendly software is a necessity for carrying out the procurement function. Unfortunately, this infrastructure is inadequate in many African nations, where unreliable power supply, inadequate telecommunications facilities and limited broadband penetration impact negatively on the performance of the procurement function and the quality of delivery.

Interviews with procurement officials in both Nigeria and South Africa revealed that power outages and obsolete or non-functional equipment and platforms affect the ability of procurement officials to do their jobs.<sup>30</sup> Infrastructure upgrades are not usually considered when procurement reform is underway, but the absence of adequate supporting infrastructure will undermine procurement reforms. It must be mentioned that this is more of a problem in Nigeria than in South Africa. As an example, in a few government offices visited in Nigeria in 2011 and again in 2012, computer and internet facilities were not functional and some staff had resorted to using personal computers as well as personal mobile modems to function at work.<sup>31</sup> This is problematic and a security risk and means that the ability of such staff to work will depend on their ability to afford the necessary facilities.

In South Africa, the Office of the Chief Procurement Officer within the National Treasury is tasked with the responsibility of designing and implementing effective Information and Communication Technology (“ICT”) systems that will improve government procurement services. Although Nigeria does not currently have a coordinated strategy for the use of ICT in public procurement, in July 2013, the BPP launched a software platform to be used in reviewing contract approval processes in government agencies.<sup>32</sup>

As was discussed in the part on capacity building above, it is crucial that providing the necessary supporting infrastructure should be included in a procurement reform agenda, where such infrastructure is inadequate. It is clearly counterproductive for new regulation to establish several requirements

<sup>30</sup> *Interviews with Federal Procurement Officials in Abuja, Nigeria, 07-2011 and Interviews with Local Government Officials in Cape Town, South Africa, 10-2011* (on file with author).

<sup>31</sup> In the Federal Ministry of Women’s Affairs, Federal Secretariat, Abuja, Nigeria, some high level officials (who wish to remain anonymous) were using personal laptops and mobile internet, which they provided for themselves, as the office computer was not functioning and the internet service was unreliable at best.

<sup>32</sup> See BPP’s Presentation of Public Procurement Review Software <[http://www.bpp.gov.ng/index.php?option=com\\_content&view=article&id=142:bpp-s-presentation-of-public-procurement-review-software&catid=83:latest-news&Itemid=435](http://www.bpp.gov.ng/index.php?option=com_content&view=article&id=142:bpp-s-presentation-of-public-procurement-review-software&catid=83:latest-news&Itemid=435)> (accessed 26-02-2014).

and be accompanied with stiff penalties where these are not met, without the provision of the tools necessary to meet the most basic of the requirements. While it may not be possible to quickly overcome infrastructure challenges such as inadequate power supply or broadband penetration, it is possible to provide working back-up systems and reliable (if not fast) internet services. Where new software is required as part of procurement reform such as bidding or auction platforms, these must of course be accompanied by training on the usage of new or upgraded technologies.

### 2.3 Change drivers

In many areas of endeavour where there has been reform or change, this is often due to the presence of a “change driver” or a person who champions the cause of the reform or the change until the desired results are obtained. This is often seen in relation to areas like human rights, democratic changes and good governance campaigns. A similar “champion” appears to be needed in cases of procurement reform. This champion may be a high-level politician or a public servant in charge of the state procurement organisation whose responsibility it is to implement or manage the reform program.

In Africa, a procurement reform champion may be required as those with entrenched interests who benefit from the *status quo* and wish it to remain often resist reform.<sup>33</sup> For example, where reform contains an anti-corruption element as is most often the case, stakeholders such as public sector officials and even contractors may not all necessarily support the reform program or desire a level playing field and may seek to undermine reforms through various means. This is not to suggest that this will always be the case, but it remains a possibility in jurisdictions where government contracts are used as a form of political patronage and are characterised by fraud and corruption.

For instance, both the South African and the Nigerian procurement systems were used as a means of entrenching and satisfying minority interests to the detriment of the wider community. During the apartheid regime in South Africa, public procurement was used to protect the interests of the minority of large, white-owned enterprises<sup>34</sup> and discriminated against small, medium and black owned businesses. In particular, “tender procedures were complicated and favoured large firms to the detriment of small emerging firms”.<sup>35</sup> At the demise of apartheid, it was determined that public procurement would be utilised to do two things – promote good governance and address certain socio-economic objectives<sup>36</sup> through the democratisation of the economy,

<sup>33</sup> Hunja “Obstacles to Public Procurement Reform in Developing Countries” in *Public Procurement: The Continuing Revolution* 17.

<sup>34</sup> C Rogerson “Pro-Poor Local Economic Development in South Africa: The Application of Public Procurement” (2004) 15 *Urban Forum* 180 181; Ambe & Badenhorst-Weiss (2012) *Journal of Transport and Supply Chain Management* 242.

<sup>35</sup> World Bank *Public and Private Sector Procurement Programmes and their Contribution to Emerging Enterprises in South Africa* Report prepared for the Workshop on Small, Medium and Micro Enterprise Development and Financing (1994). See also D Sharp, P Mashigo & P Burton *Assessment of Public Sector Procurement to Small, Medium and Micro-Enterprises* (1999).

<sup>36</sup> National Treasury *Policy Strategy to Guide Uniformity in Procurement Reform Processes in Government* (2003).



providing employment and business opportunities for those previously excluded from the system, and marginalised and disadvantaged individuals and communities, commonly referred to as “target groups”.<sup>37</sup> Of course, these minority, but ultimately powerful, interests would attempt to undermine the reforms and there has been resistance to policies aimed at including small and non-white owned enterprises in South African public procurement.<sup>38</sup>

In Nigeria, a similar situation existed and before the spate of reforms, which commenced with a World Bank Country Procurement Assessment Report (“CPAR”) in 1999,<sup>39</sup> there was the absence of clear, detailed and transparent regulation on public procurement – there was also no supervisory mechanism for implementing the rules which did exist.<sup>40</sup> This meant that public officials possessed a wide measure of discretion in conducting and managing the procurement process, which was often exploited, especially in a culture where corruption is endemic.<sup>41</sup> The lack of clear regulation in public procurement also fostered unpredictability, as contract award criteria or guidelines could be changed at any time and also facilitated the award of contracts on a non-commercial basis, or in a non-competitive manner. This often meant that the government did not get value for money, especially where nepotism or cronyism prevailed. Anecdotal evidence suggests that procurement contracts were often awarded to political cronies and public officers themselves, in blatant disregard of existing rules and of formal processes.

After the legal reform process, however, although there are clearer procedures that must be adhered to in conducting the procurement process, with stiff penalties for non-compliance, in some cases, these procedures are being manipulated in order to ensure that the procurement conforms to a pre-determined outcome.<sup>42</sup> One reason for this may be the resistance to the procurement reforms by the political class who benefits from the opportunities to profiteer presented by the pre-reform state of the procurement system.<sup>43</sup>

In both Nigeria and in South Africa, therefore, it is suggested that while legal reform is necessary to provide the framework for efficient, transparent and ethical procurement, more is needed through the identification of a procurement reform “champion” who will ensure that procurement reform objectives are met, long after the initial excitement generated by the reform agenda has passed. Such a person needs to have sufficient seniority and clout as a civil servant or a politician to ensure that he or she can push for the changes and value reorientation that are required for procurement reform to succeed. In Nigeria, a reform champion existed briefly during the Obasanjo

<sup>37</sup> TE Manchidi & I Harmond *Targeted Procurement in the Republic of South Africa: An Independent Assessment Report for the Dept. of Public Works, the Development Bank of Southern Africa and the International Labour Organisation* (2002).

<sup>38</sup> A Jeffrey “BEE is Flawed and should be Scrapped” *Mail & Guardian* (18-01-2013).

<sup>39</sup> World Bank *CPAR I*; World Bank *CPAR II*.

<sup>40</sup> World Bank *CPAR I 5*.

<sup>41</sup> N Goodling “Nigeria’s Crisis of Corruption - Can the UN Global Programme Hope to Resolve this Dilemma?” (2003) 36 *Vand J Transnat’l L* 997; O Oko “Subverting the Scourge of Corruption in Nigeria: A Reform Prospectus” (2002) 34 *NYU J Int’l L & Pol* 397.

<sup>42</sup> *Interview with Director of Procurement at a Federal Ministry*.

<sup>43</sup> Hunja “Obstacles to Public Procurement Reform in Developing Countries” in *Public Procurement: The Continuing Revolution* 17-18.

administration (1999-2007) in the form of Obiageli Ezekwesili, who earned the sobriquet of “Madam Due Process” while she headed the Budget Monitoring and Price Intelligence Unit<sup>44</sup> (“BMPIU”), which was the precursor to the BPP, before the advent of the Nigerian procurement legislation and institutions. Unfortunately, Ezekwesili’s stint at the BMPIU was short-lived and she left the BMPIU and the Nigerian public service before the completion of the procurement reform agenda.

Although the Nigerian procurement space contains personalities who are committed to procurement reform, it is difficult to identify a person whose reputation, passion and commitment to integrity and the rule of law in relation to public procurement can match that of Ezekwesili.

Another example of a time when a procurement champion greatly assisted a procurement reform agenda was during the spate of procurement reforms that occurred in the United States during President Bill Clinton’s administration. These reforms were championed by the President himself and Steven Kelman, who was appointed as administrator of the Office of Federal Procurement Policy in the Office of Management and Budget, making him the most senior procurement policy official.<sup>45</sup>

Thus it is suggested that in the African context also, especially where it is clear that change will be resisted by powerful groups, to the extent that is possible, a procurement champion should be located who can drive the reforms for as long as it is needed to see them succeed.

## 2 4 Academic interest in public procurement

Academic interest in procurement reform and in public procurement more generally has never been considered as necessary for the success of a procurement reform agenda. While academic interest may not be as critical for the success of procurement reform as building capacity or supporting infrastructure, it is likely that academic interest in the subject matter may provide the basis for the implementation of ideas and concepts that may further the reform process. Further, where academic interest leads to the provision of degree-level or professional courses in procurement, purchasing and supply, this will of course assist in building procurement capacity in that jurisdiction. An examination of jurisdictions with established academic programmes in public procurement such as the United States, the United Kingdom and several European Union countries reveals that academic interest and procurement reform appear to be mutually reinforcing. Thus, academic interest and writing may garner interest in and support for reform, while procurement reform initiatives stimulate academic interest and writing. For instance, the United States has several universities with dedicated procurement law programs such as the George Washington University, the Defense Acquisition University (which focuses on defence procurement), Webster University, and Georgetown

<sup>44</sup> GT Aduda *Governance and Public Procurement: An Appraisal of Public Procurement Mechanisms in Nigeria* Pillars of Governance Series (2006) 9.

<sup>45</sup> See generally, S Kelman *Unleashing Change: A Study of Organizational Renewal in Government* (2005).

University, to name a few. Many practising procurement officials in the US begin their careers after having studied government contract law at university and the US change driver referred to in the previous part is a renowned scholar of public procurement.<sup>46</sup>

Finally, as is the case in all areas of endeavour, academic programs in public procurement will lead to the exposition of new ideas and technologies and the creation of a procurement workforce that understands both the conceptual and the practical elements of procurement. This is of course beneficial for the procurement system as a whole and meets the issue of long-term capacity building.<sup>47</sup>

It is thus suggested that where it is possible, academic interest in public procurement ought to be stimulated in countries undergoing procurement reform. This can be done through the provision of research or teaching grants or the establishment of undergraduate or postgraduate programs in public procurement.

In both Nigeria and South Africa, there is a budding and increasing academic interest in public procurement law as a discipline. While both countries have established organisations that train and certify procurement officials in areas such as financial management, project management, logistics, and supply chain management, especially in relation to private sector purchasing,<sup>48</sup> as well as business school courses on those topics; universities have in the last five years begun to promote teaching, training and research in public procurement law. This recognises the extensive and often complex legal obligations and arrangements that are peculiar to public sector purchasing. For instance, the University of Cape Town runs an annual public procurement law short course which is targeted at practitioners and public sector officials,<sup>49</sup> while Stellenbosch University teaches both an undergraduate and a master's level course in public procurement law, the first of its kind in Africa. In addition, it also hosts the African Public Procurement Regulation Research Unit, which is comprised of African procurement experts and researchers and doctoral students of public procurement law and aims to foster academic engagement in the field of public procurement regulation on the African continent.<sup>50</sup> In Nigeria, the establishment of the Public Procurement Research Centre at the Federal University of Technology, Owerri, as discussed above, is intended to provide research and training opportunities in public procurement to procurement practitioners.

It is hoped that in the long term, more universities and academic institutions in Africa will see the value in stimulating academic interest in public

<sup>46</sup> See Professor Steven Kelman <<http://www.hks.harvard.edu/about/faculty-staff-directory/steven-kelman>> (accessed 26-02-2014).

<sup>47</sup> Ambe & Badenhorst-Weiss (2012) *Journal of Transport and Supply Chain Management* 242, 254-255.

<sup>48</sup> Such as the Chartered Institute of Purchasing and Supply, South Africa; the Chartered Institute of Purchasing and Supply Management, Nigeria and the Chartered Institute of Purchasing and Supply, Nigeria.

<sup>49</sup> See <<http://www.lawatwork.uct.ac.za/government-contracts-and-procurement-law/>> (accessed 26-02-2014).

<sup>50</sup> See <<http://blogs.sun.ac.za/apprru/>> (accessed 26-02-2014).

procurement, given the importance of public procurement to socio-economic development.

## 2.5 A functional enforcement system

An efficient public procurement system cannot exist in the absence of a functional system of ensuring compliance with the procurement rules. This system of ensuring compliance will be comprised of a means of complaining and obtaining administrative or judicial redress by aggrieved persons. The procurement system of most jurisdictions provides suppliers with some form of remedies where the procurement legislation is not complied with or there are other breaches of the procurement process.<sup>51</sup> The availability of remedies for procurement violations is necessary to secure the functioning of the procurement system by securing compliance with and correcting violations of the procurement rules.<sup>52</sup> The nature and availability of remedies for procurement violations may depend on the nature of the forum reviewing the procurement decision and the kind of breach that has occurred. There are various approaches that may be adopted in implementing a procurement remedial system, which have been detailed elsewhere,<sup>53</sup> which include a review of procurement decisions by the procuring authority or review by an external authority that could be judicial or administrative. Most jurisdictions generally adopt a multiple forum approach in providing for a system of review of procurement decisions, the appropriate forum being determined by the nature of the breach complained of, the kind of relief sought and the supplier's standing to obtain this relief.<sup>54</sup>

In cases where there has been procurement reform in the form of new regulation, this is almost always accompanied by the creation of a new procurement remedial system or strengthening and improving the existing system. This means that unless the reform agenda also includes the creation of new remedial fora such as special judicial or administrative organs to hear procurement disputes, the existing dispute resolution institutions will be required to handle procurement disputes arising from the creation of new offences or breaches of the procurement regulation. Two issues arise from this necessity – the first is that existing institutions may have shortcomings, which

<sup>51</sup> S Arrowsmith *Remedies for Enforcing the Public Procurement Rules* (1993); S Arrowsmith *The Law of Public and Utilities Procurement* (2005) ch 21; AR Tyrrell & B Bedford *Public Procurement in Europe: Enforcement & Remedies* (1997); S Arrowsmith, J Linarelli & D Wallace *Regulating Public Procurement: National and International Perspectives* (2000) ch 12; X Zhang "Supplier Review as a Mechanism for Securing Compliance with Government Public Procurement Rules: A Critical Perspective" (2007) 16 *Public Procurement L Rev* 325; D Gordon "Constructing a Bid Protest Process: The Choices that Every Procurement Challenge System must Make" (2006) 35 *Pub Cont LJ* 427; GAO *Bid Protests at GAO: A Descriptive Guide* (2009); MJ Shaengold & R Brams "Choice of Forum for Government Contract Claims: Court of Federal Claims vs. Board of Contract Appeals" (2008) 17 *Federal Circuit Bar J* 279; MJ Schaengold, TM Guiffré & EM Gill "Choice of Forum for Federal Government Contract Bid Protests" (2009) 18 *Federal Circuit Bar J* 243.

<sup>52</sup> Arrowsmith et al *Regulating Public Procurement* ch 12; Zhang (2007) *Public Procurement L Rev* 326-328; United Nations Commission on International Trade Law *Guide to Enactment of the UNCITRAL Model Law on Public Procurement* (2012).

<sup>53</sup> Arrowsmith et al *Regulating Public Procurement* ch 12.

<sup>54</sup> X Zhang "Forum for Review by Suppliers in Public Procurement: An Analysis and Assessment of the Models in International Instruments" (2009) 18 *Public Procurement L Rev* 201.

will also affect the functioning of the procurement remedial system and thus affect the procurement reform program.

For instance, in Nigeria, prior to the procurement reform program and the passage of the Public Procurement Act (“PPA”) in 2007, suppliers only had access to judicial remedies in procurement disputes, although the courts were not and are still not regularly used as a forum for procurement litigation for three reasons. First, because litigation in Nigeria is expensive and time consuming and it can take upwards of ten years for judgments to be issued. This issue of delays makes Nigerian courts an unrealistic forum for procurement disputes.<sup>55</sup> Second, there is evidence to suggest that many Nigerian judges are corrupt and will rule in favour of the litigant with the deepest pockets,<sup>56</sup> that powerful litigants are often able to manipulate the judiciary, and that the courts are not a “realistic forum of obtaining justice” for persons unable to influence the outcome of judicial proceedings.<sup>57</sup> Finally, as is the case in other jurisdictions, the fear of retaliation makes genuinely aggrieved suppliers unwilling to sue the government as this may affect their ability to obtain contracts in the future.<sup>58</sup>

The PPA, however, mitigates some of these issues by providing aggrieved bidders with access to both administrative and judicial relief in the event of breaches of the PPA, breaches of the procurement process or breaches of a concluded procurement contract. The administrative forum is being greatly utilised as it provides a quicker and less expensive means of dispute resolution.<sup>59</sup>

While South Africa possesses a better functioning judicial system than Nigeria, it still suffers from problems of access, poor court management and inefficiency that affect the delivery of justice,<sup>60</sup> and ultimately, the efficiency of the public procurement system.

The second issue that arises from the necessity of having to rely on the existing system of dispute resolution is that in the short to medium term, the courts, litigants and their representatives may at first struggle to understand the nature of procurement litigation, where there has been the creation of new offences or breaches of the procurement process. Some of the tricky issues in procurement litigation include determining that a breach or a violation has occurred and determining appropriate damages, given the difficulty that may arise in proving that a loss has occurred.

<sup>55</sup> In May 2012, the Chief Justice of Nigeria stated that over 150,000 criminal court cases were pending in the Federal and State high courts. See Channels Television “Over 150,000 Pending Criminal Cases in Nigeria - Chief Justice” *Channels TV* <<http://www.channelstv.com/home/2012/05/28/over-150-000-pending-criminal-cases-in-nigeria-chief-justice/>> (accessed 26-02-2014).

<sup>56</sup> O Oko “Seeking Justice in Transitional Societies: An Analysis of the Problems and Failures of the Judiciary in Nigeria” (2005) 31 *Brook J Int'l L* 11 15.

<sup>57</sup> 16.

<sup>58</sup> Arrowsmith *The Law of Public and Utilities Procurement* 1435; Zhang (2007) *Public Procurement L Rev* 333-334; D Pachnou *The Effectiveness of Bidder Remedies for Enforcing the EC Public Procurement Rules: A Case Study of the Public Works Sector in the United Kingdom and Greece* PhD thesis University of Nottingham (2003) 318, 384.

<sup>59</sup> Bureau of Public Procurement *Petitions in the BPP* unpublished document (on file with author).

<sup>60</sup> A Gordon & D Bruce *Transformation and the Independence of the Judiciary in South Africa* Centre for the Study of Violence and Reconciliation, Johannesburg (2007).

Mitigating these issues is possible, even in countries with an inadequate judiciary, by providing for an administrative forum for procurement disputes, manned by persons conversant with public procurement law. Similar to Nigeria, South Africa also provides aggrieved bidders with administrative rights of review in three forums. First the Municipal Supply Chain Management Regulations provide that a procuring authority must appoint an independent and impartial person to assist in the resolution of disputes arising from a procurement procedure of contract award decision.<sup>61</sup> The Public Finance Management Act Regulations also require the National Treasury and each provincial treasury to establish a mechanism to consider complaints regarding alleged non-compliance with the prescribed minimum norms and standards and make recommendations for remedial action if non-compliance is established.<sup>62</sup> In addition, the Local Government Municipal Systems Act 32 of 2000 also gives aggrieved persons the right to challenge or appeal an administrative decision made under a delegated power or authority.<sup>63</sup> This means that an aggrieved bidder may approach the procuring authority or the relevant Treasury for redress in the procurement context. However, apart from these fora for review, the Office of the Public Protector, established under the Constitution of the Republic of South Africa, 1996 (“the Constitution”), is empowered to investigate improper conduct in the public administration or conduct that will result in an impropriety or prejudice and take appropriate remedial action.<sup>64</sup>

## 2.6 An effective supervising organisation

In 2003, Walker, in writing on the six steps required for setting up a procurement system, included the establishment of a central public procurement office, division or board as the sixth step.<sup>65</sup> Ten years later, this still rings true. The arguments for establishing a central procurement organisation have been covered elsewhere,<sup>66</sup> but needless to say, such an organisation will supervise procurement policy and procurement of government agencies, and ensure coherence and compliance with public procurement regulation and policy. As procurement policy becomes increasingly complex and has to balance various tensions, it is necessary that an organisation exists, which possesses a macro-understanding of the procurement system and can ensure that there are no areas of conflict in relation to procurement policy.

In the countries under review – Nigeria and South Africa – the effectiveness of such an organisation is yet to be established. In Nigeria, the PPA provided for the creation of the BPP as well as the National Council

<sup>61</sup> Reg 50(1) of the Municipal Supply Chain Management Regulations in GG 27636 of 30-05-2005 (“MSCM Regulations”).

<sup>62</sup> Reg 16A9.3 of the Public Finance Management Act Regulations in GG 22219 of 09-04-2001, as amended by GG 23463 of 25-05-2002, as amended by GG 27388 of 15-03-2005 (“PFMA Regulations”).

<sup>63</sup> S 62(1) of the Local Government Municipal Systems Act 32 of 2000 in GG 21776 of 20-11-2000.

<sup>64</sup> S 182(1) of the Constitution; Preamble to the Public Protector Act 23 of 1994.

<sup>65</sup> C Walker “Setting up a Public Procurement System: The Six Step Method” in S Arrowsmith & M Trybus (eds) *Public Procurement: The Continuing Revolution* (2003) 3.

<sup>66</sup> Basheka “Public Procurement Reforms in Africa: A Tool for Effective Governance of the Public Sector and Poverty Reduction” in *International Handbook of Public Procurement*.

on Public Procurement (“NCPP”). The NCPP is intended to function as the supreme oversight procurement body in Nigeria and is made up of high-level politicians and officers such as the Minister of Finance, the Attorney-General, the Secretary to the Government, the Head of the Civil Service, the Economic Adviser to the President, the Director-General of the BPP and representatives of civil society, the media, the Bar, the Chamber of Commerce, the Society of Engineers and the Institute of Purchasing and Supply Management.<sup>67</sup>

The functions of the NCPP are to consider and approve the monetary and prior review thresholds for the purposes of the PPA, consider and approve policies on public procurement, approve the appointment of the Directors of the BPP, audit and approve the accounts of the BPP, approve changes in procurement processes necessary to adapt to modern technology, and perform any other functions necessary to achieve the objectives of the PPA.<sup>68</sup> The NCPP is also required by law to formulate regulations for the conditions of service of employees of the BPP<sup>69</sup> and regulate the use of funds by the BPP.<sup>70</sup>

As stated, the NCPP is intended to be the overall supervisory body, overseeing the work of the BPP, which in turn supervises the procurement function of government agencies. However, as at February 2014, the NCPP had not been constituted and presently does not exist. This has meant that in practice, the functions which ought to be performed by the NCPP are currently being performed by the President and the Federal Executive Council and other functions remain unperformed, leading to gaps in the procurement scheme.

In South Africa, the National Treasury, in addition to its constitutional functions, also serves as the procurement coordinating agency, through the Office of the Chief Procurement Officer (“OCPO”), which was created in February 2013 by the South African Minister of Finance.<sup>71</sup> A Chief Procurement Officer was appointed, and given the task to “modernize the state procurement system to be fair, equitable, transparent, competitive and cost-effective; enable the efficient, economic, effective and transparent utilisation of financial and other resources; including state assets, for improved service delivery; and promote, support and enforce the transparent and effective management of state procurement and the sound stewardship of government assets and resources”.<sup>72</sup> The OCPO has taken over the functions of supply chain policy; norms and standards; and contract management and now provides policy direction, monitors compliance and implements strategic procurement practices to ensure cost savings.

The creation of the OCPO is a welcome development and underscores the recognition of the necessity for a coordinating agency dedicated to the procurement function. It is hoped that given time, the OCPO will fulfil its

<sup>67</sup> S 1 of the PPA.

<sup>68</sup> S 2.

<sup>69</sup> S 10.

<sup>70</sup> S 13.

<sup>71</sup> P Gordhan *2013 Budget Speech* (2013) 28-29.

<sup>72</sup> See National Treasury “Divisions” *Treasury* <<http://www.treasury.gov.za/divisions/info.aspx>> (accessed 26-02-2014).

objectives and reduce the waste that plagues public procurement in South Africa.<sup>73</sup>

### 3 Conclusion

This article has attempted to distil some of the elements that may enhance the success of a procurement reform agenda in the African context. It is likely that procurement reform in Africa may not deliver on its objectives where the elements described above are not adequately considered or provided for in the procurement agenda. As can be seen from the above, public procurement reform requires more than legal or institutional reform to succeed and it is hoped that in the 21st century, procurement reformers in Africa will consider reform from a much more holistic perspective and ensure that the obstacles to procurement reform are also taken into account in defining the scope of procurement reform.

### SUMMARY

Most of the countries in sub-Saharan Africa have undergone some form of public procurement reform in the last two decades. This reform usually takes the form of the passage of new procurement regulation, which is usually based on the UNCITRAL model law as well as the creation of new institutions or the strengthening of existing ones. In addition, procurement reform may be accompanied by capacity building measures directed at the professionalisation of the procurement cadre and the enforcement of a remedial system where there are breaches of procurement regulation. Despite the extensive efforts directed at procurement reform, in some countries, the reformed system does not always yield the desired results in terms of more efficient, transparent and effective procurement. This research examines some of the factors that may undermine public procurement reform in Africa, using South Africa and Nigeria as case studies and concludes that procurement reform in the 21st century may need to be considered from a more holistic perspective if it is to deliver an adequate, modern and well-functioning procurement system, improve public sector governance and accountability and aid socio-economic development through prudent public spending.

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<sup>73</sup> See Gordhan 2013 *Budget Speech* 28-29.