


# WHY COMPLIANCE WITH DUE PROCESS MATTERS

- Mrs Oby Ezekwesili




The Public Procurement Act 2007 provides the legal and institutional framework for the entronement of TRANSPARENCY, ACCOUNTABILITY, VALUE FOR MONEY and EFFICIENCY in the procurement of works, goods and services within the Federal Ministries, Extra Ministerial Department and various Institutions.”

“The legal and procedural requirements are that all contracts above \$20million would need to be reviewed and approved by the Board of NNPC, Mr. President. Over one year of Dr. Baru’s tenure, no contract has been run through the Board.

“The following major contracts were never reviewed by or discussed with me or Board of NNPC: The Crude Term contracts valued at over \$10billion, The DSDP contracts- value over \$5billion, The AKK pipeline contract- value approximately \$3billion, Various financing allocation funding contracts with the NOCs – value over \$3billion, Various NPDC production service contracts – value at over \$3billion-\$4billion.”

– Ibe Kachikwu to the President, 30th of August 2017



NNPC responded that it was “important to note from the outset that the law and the rules do not require a review or discussion with the Minister of State or the NNPC Board on contractual matters.

Part III, Section 15 of the Public Procurement Act says:

“The provisions of this Act shall apply to all procurement of goods, works, and services carried out by :

- a) the Federal Government of Nigeria and all procurement entities;
- b) all 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 this Act from the Federation share of Consolidated Revenue Fund.”

Examples of non-ministerial/parastatals/federal institutions covered under the Act include the Supreme Court, National Industrial Court (NIC), Nigerian National Petroleum Corporation (NNPC), Central Bank of Nigeria (CBN), Public Complaints Commission (PCB) and the National Health Insurance Scheme (NHIS).



The public procurement process is guided entirely as enshrined in the relevant laws and regulations which are primarily the Public Procurement Act 2007 and Procurement Procedures Manual.

Section 21 (1) of the PPA, 2015, provides:

“Subject to subsection (2), the Head of a procuring entity shall establish a procurement committee to review procurement proceedings for that procuring entity and such other committees for other aspects of the procurement process. “

Subsection (2)

“The operations of procurement committees established under subsection (1) shall be managed by procuring entities in accordance with the administrative guidance issued by the Office under section 7(l) (c).”h respect to the award of procurement contracts referred to in paragraph (a); and to maintain proper records.

Section 22 PPA, provides:

“The functions of a procurement committee shall be to-

- (a) review and make recommendations to the head of the procuring entity with respect to the award of procurement 19 contracts that the head of the procuring entity requires the procurement committee to review;
- (b) review evaluation reports on bids with respect to the award of procurement contracts referred to in paragraph (a); and to maintain proper records.

# The Accountability For Procurement Process Versus Power Of Approval Of Outcome of the Process:

## WHY THE CONFUSION?

Corporation tenders board, Ministerial tenders board, and BPP all have accountability for procurement process at different contracting thresholds.


The NNPC tenders board has the special status of a Ministerial Tenders Board, and so it has accountability for threshold of contract within that limit. The approving authority for outcomes of the Tenders Board is the Minister of Petroleum, who also is Chairman of the Board, and therein lies the powers of the board as an approving authority for contracts within those thresholds.

For contracts above the Ministerial/NNPC Tender Board threshold, it still has accountability for conducting the process. However, the final Review of Process and Certification resides with the Bureau of Public Procurement.

The Approving Authority is the National Council on Public Procurement consistent with Part 1 Sections 1 & 2 of the Act. (Regrettably, 10 years after the PPA came into effect, this power is still being usurped by the Federal Executive Council, thereby rendering all contracts that have been so far approved 'illegal'.

The NNPC stated that “the BPP expressly clarified that NNPC Tenders Board (NTB) is not the same as NNPC Board; The governing board (NNPC Board) is responsible for approval of work programmes, corporate plans and budgets, while the NTB is responsible for approval of day-to- day procurement implementation;

That the BPP referred to the SGF circular for the composition of the NTB to comprise the Accounting Officer (GMD NNPC) as the Chairman, with Heads of Department (GEDs) as members with the head of procurement (GGM SCM) serving as the Secretary of the NNPC Tenders Board.”



“As can be seen, all these clarifications were sought and obtained prior to August, 2015 and were implemented by Dr. Kachikwu as the GMD of NNPC. Dr. Kachikwu also constituted the first NNPC Tenders Board on 8th September, 2015 and continued to chair it until his exit in June, 2016.”



It added that what was required was the processing and approval of contracts by the NNPC Tenders Board, the President in his executive capacity or as Minister of Petroleum, or the Federal Executive Council (FEC), as the case may be.

NNPC stated that “there are therefore situations where all that is required is the approval of the NNPC Tenders Board while, in other cases, based on the threshold, the award must be submitted for expediential approval. Likewise, in some instances it is FEC approval that was required”.

The NNPC stated that “the approval of project proposal and contracting strategy by NTB includes placement of adverts for expression of interest in electronic and print media, Soliciting for tender (Technical and Commercial) Tender evaluation , Tender approval by NTB for contracts within its threshold; otherwise , Obtain BPP certificate of no objection before presentation to FEC and Present to FEC for approval.”

# WHERE ARE THE BUREAU FOR PUBLIC PROCUREMENT NO-OBJECTION CERTIFICATES?

The issuance of the No-Objection Certificate is what allows the Cabinet Secretariat to accept and schedule the Memo from the Minister for a FEC (currently illegal usurpation of the powers of the NCPP) for discussion and Approval of the Contract.



*Where are the evidences that BPP issued No Objection Certificates for the projects within their threshold?*

# CLARITY OF ACCOUNTABILITY THRESHOLDS

## BUREAU OF PUBLIC PROCUREMENT (BPP)

### APPROVED REVISED THRESHOLDS FOR SERVICE-WIDE APPLICATION

The Approved Revised Thresholds and Composition of Tenders Boards are as follows:

(a) **Procurement Approval Thresholds for Bureau of Public Procurement, Tenders Boards and Accounting Officers (PSs and CEOs) for All Ministries, Departments and Agencies**

(b) **Revised Special Financial limits and thresholds, Procurement Methods and Thresholds of Application and for expenditure related to the Nigerian National Petroleum Corporation:**

(c) **Procurement Methods and Thresholds of Application**

(d) **Composition of Tenders Boards**

Approving Authority/ "No Objection" to award	Goods	Works	Non-Consultant Services	Consultant Services
BPP issues "No Objection" to award/ FEC approves	N100 million and above	N500 million and above	N100 million and above	N100 million and above
Ministerial Tenders Board	N5 million and above but less than N100 million	N10 million and above but less than N500 million	N5 million and above but less than N100 million	N5 million and above but less than N100 million
Parastatal Tenders Board	N2.50 million and above but less than N50 million	N5 million and above but less than N250 million	N2.50 million and above but less than N50 million	N2.50 million and above but less than N50 million
Accounting Officer: Permanent Secretary	Less than N5 million	Less than N10 million	Less than N5 million	Less than N5 million
Accounting Officer: Director General/CEO	Less than N2.50 million	Less than N5 million	Less than N2.50 million	Less than N2.50 million

Approving Authority/ "No Objection" to award	Special Works (NNPC)
BPP issues "No Objection" to award/ FEC approves	N2.70 billion (US\$20m) and above
Ministerial Tenders Board ( <b>NNPC Tenders Board</b> )	N1.40 billion (US\$10m) and above but less than N2.70 billion (US\$20m) <b>for NNPC Tenders Board</b>
Group Headquarters/ Tenders Board	N540 million (US\$4m) and above but less than N1.40 billion (US\$10m) <b>for GEC NNPC</b>

Parastatal Tenders Board (Refinery & Petrochemicals/ Exploration & Production/Corporate Supply Chain Tenders Boards)	N270 million (US\$2m) and above but less than N540 million (US\$4m) <b>for SBU B/GED/ (DEXCOM)</b>
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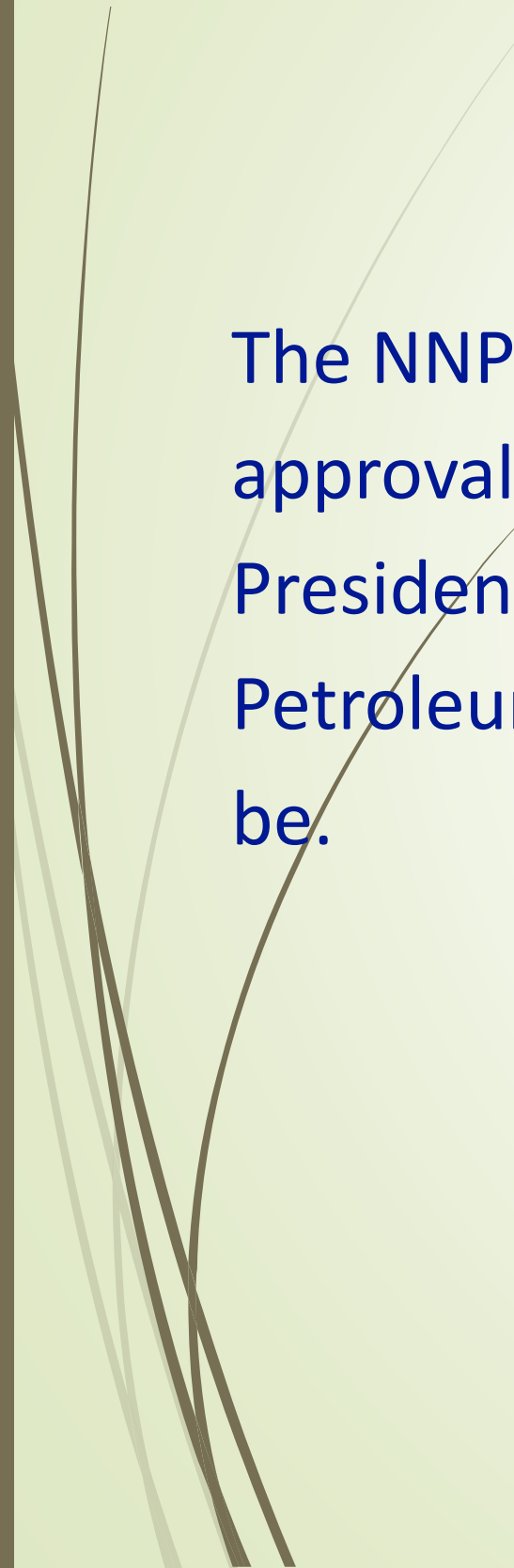
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Parastatal Tenders Board ( <b>Minor</b> Refinery & Petrochemicals/ Exploration & Production/Corporate Supply Chain Tenders Boards)	N70 million (US\$0.5m) and above but less than N270 million (US\$2m) <b>for SBU MD/MT/ (MEXCOM)</b>
Parastatal Tenders Board ( <b>Business Unit</b> Refinery & Petrochemicals/Exploration & Production/Corporate Supply Chain Tenders Boards)	N13.50 million (US\$0.10m) and above but less than N70 million (US\$0.50m) <b>for SBU ED/MT/ (DIVCOM)</b>
Accounting Officer: Permanent Secretary (Group Managing Director at CHQ Level)	Less than N40 million (US\$0.30m)
Accounting Officer: Director General/CEO (Managing Directors at SBU Level)	Less than N13.50 million (US\$0.10m)

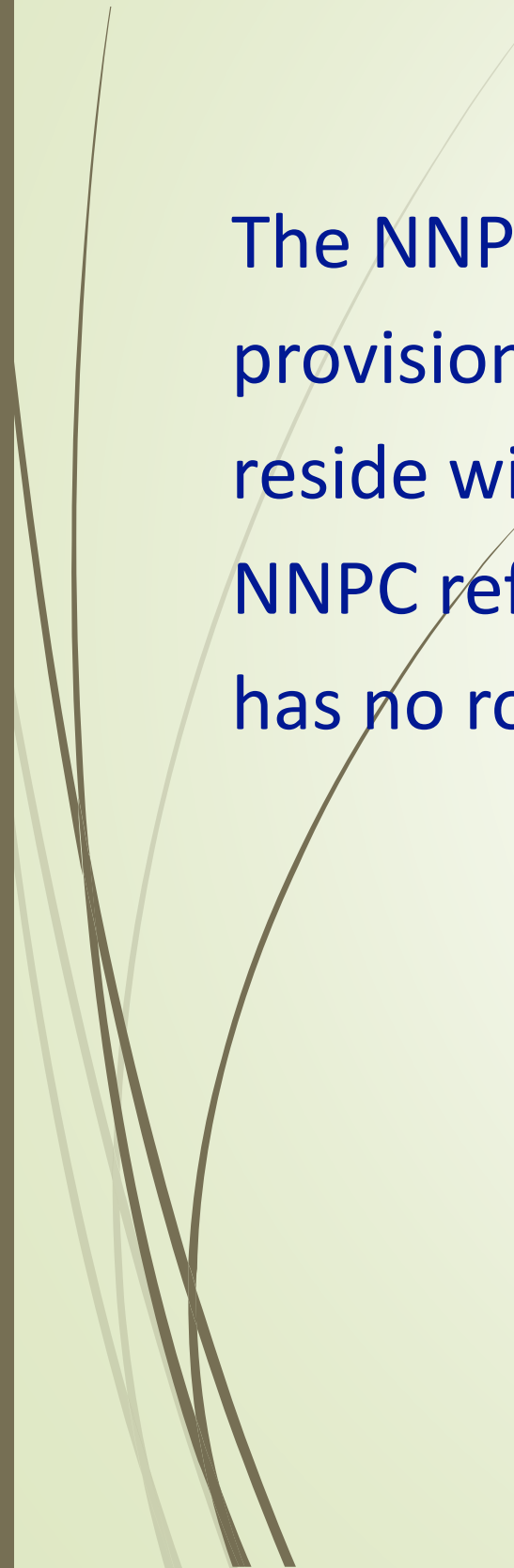
Procurement/ Selection Method and Prequalification	Goods	Works (N)	Non-Consultant Services (N)	Consultant Services (N)
International/ National Competitive Bidding	N100 million and above	N1 billion and above	N100 million and above	Not Applicable
National Competitive Bidding	N2.5 million and above but less than N100 million	N2.5 million and above but less than N1 billion	N2.5 million and above but less than N100 million	Not Applicable
Shopping (Market Survey)	Less than N2.5 million	Less than N2.5 million	Less than N2.5 million	Not Applicable
Single Source/ Direct Contracting (Minor value procurements)	Less than N0.25 million	Less than N0.25 million	Less than N0.25 million	Less than N0.25 million
Prequalification	N100 million and above	N300 million and above	N100 million and above	Not Applicable
Quality and Cost Based	Not Applicable	Not Applicable	Not Applicable	N25 million and above
Consultant Qualifications	Not Applicable	Not Applicable	Not Applicable	Less than N25 million
Least Cost	Not Applicable	Not Applicable	Not Applicable	Less than N25 million

Ministry:		
	Chairman:-	Permanent Secretary
	Members:-	Heads of Departments





The NNPC stated that, “What is required is the processing and approval of contracts by the NNPC Tenders Board, the President in his executive capacity or as Minister of Petroleum, or the Federal Executive Council, as the case may be.



The NNPC stated that “The above clarifications of the provisions of the procurement process show that approvals reside within the NTB and where thresholds are exceeded, the NNPC refers to FEC for approval. Therefore, the NNPC Board has no role in contracts approval process as advised by BPP.

The statement further stated that “It should be noted that for both the Crude Term Contract and the Direct Sale and Direct Purchase (DSDP) agreements, there were no specific values attached to each transaction to warrant the values of \$10billion and \$5billion respectively placed on them in the claim of Dr. Kachikwu.

“It is therefore inappropriate to attach arbitrary values to the shortlists with the aim of classifying the transactions as contracts above NNPC Tenders Board limit.

They are merely the shortlisting of prospective off-takers of crude oil and suppliers of petroleum products under agreed terms. These transactions were not required to be presented as contracts to the Board of NNPC and, of course, the monetary value of any crude oil eventually lift by any of the companies goes straight into the federation account and not to the company.”

- NNPC

## PPA PROVISION ON DISPOSAL OF ASSETS PART X SECTION 55 & 56

- Every procuring entity shall also be a disposing entity
- Open Competitive Bidding shall be the primary source of receiving offers for the purchase of public property
- Methods of disposal shall include; sales and hire purchase, licenses and tenancies, franchise and auction
- Planning of disposal shall include valuation by independent professional.”



The act provides for sale of asset to follow the same review and certification process for procurement of goods services and works.

Hence it is wrong for NNPC to contest that each of the companies selected would turn around series and hence cumulative value of transactions worth the amount stated by the minister.



1. *Specific values can be estimated for the Crude Term Contract and the Direct Sale and Direct Purchase (DSDP) agreements guided by previous years' values, and the Minister obviously knows that the range is in the order of \$10billion and \$5billion respectively.*
2. *The NNPC Tenders Board is in breach for usurping, not just the NNPC Board, but the Bureau for Public Procurement as well as the currently illegal approving authority of the FEC.*
3. *The values are implicit in the pre-qualification of the companies. Therefore the exercise is not a mere shortlisting. Each firm that was qualified to lift crude or provide products was offered a contract that can be discounted for money value with third parties.*

No where in the response of the GMD NNPC did we read any involvement of the BPP Certification process. For as long as the cumulative value would reach a xxx threshold, it was MANDATORY BY THE PROVISIONS OF THE BPP ACT for NNPC to submit the open bidding process to the Bureau for completeness.

“Furthermore, contrary to the assertion of Dr. Kachikwu that he was never involved in the 2017/2018 contracting process for the Crude Oil Term Contracts, Dr. Kachikwu was in fact expressly consulted by the GMD and his recommendations were taken into account in following through the laid down procedure.”

- NNPC

# Problem?

The Procurement Act implicitly places the responsibility for strategic discussions of programs requiring procurements in a Board/ a Minister/ NCPP (currently usurped by the FEC). They also are the approving authorities at different thresholds following the processing by the Tenders Board and review and certification of outcomes by BPP for relevant thresholds.



*In the spirit of the FG's commitment to transparency and to NEITI specifically, can the minutes of the Board meetings of NNPC be shared with the Public?*

## Section 130(2), Section 148(1) of the 1999 Constitution and Section 1(1) of the NNPC Act: THE ROLE OF A MINISTER OF THE FEDERAL REPUBLIC

“By virtue of Section 130(2) of the Constitution, “the president shall be the Head of State, the Chief Executive of the Federation and Commander-in-Chief of the Armed Forces of the Federation,” and by virtue of Section 148(1) of the Constitution, ‘the president may, in his description, assign to the Vice-President or any Minister of the Government of the Federation responsibility for any business of the Government of the Federation, including the administration of any department of government.’

Section 148(1) above shows the supervisory role that a minister appointed by the president has over a parastatal or corporation under their ministry consistent with relevant Acts like the NNPC Act and the PPA. It is wrong for the GMD of a corporation under the ministry of petroleum to challenge the role of the minister that supervises the corporation’s activities within the confines of extant legislation.

“The NNPC Act in Sections below are clear.

S. 1(1) says: ‘There shall be established a corporation by the name of the Nigerian National Petroleum Corporation (hereinafter in the Act referred to as “the Corporation”) which shall be a body corporate with perpetual succession and a common seal and may sue or be sued in its corporate name.

(2) The affairs of the Corporation shall be conducted by a Board of Directors of the Corporation which shall consist of a Chairman and the following other members, that is (a) the Director-General, Federal Ministry of Finance and Economic Development;

(b) The Managing Director of the Corporation; and

(c) Three persons to be appointed by the National Council of Ministers, being persons who by reason of their ability, experience or specialised knowledge of the oil industry or of business or professional attain.”



# THE PRESIDENT MUST ADDRESS THE BREACH

1. An Administration which professes an anti-corruption mantra should not be in breach of laws, guidelines and procedures. President Muhammadu Buhari should restore confidence in NNPC contracting process immediately.
2. All contracts so far awarded by NNPC in the manner publicly stated by the GMD are in breach of the Public Procurement Act (PPA). The President should order an Operational Review and Contract Audit of NNPC Procurements starting May 29th 2015.
3. On conclusion of the Operational Review and Contract Audit of the NNPC, all contracts awarded in breach of process should be immediately cancelled and a new process that is compliant with the PPA launched .
4. Similar to its recent action on the #MainaGate scandal, the two relevant committees of the National Assembly— the Public Procurement and the Petroleum committees respectively of the House of Representatives and the Senate should hold Public Hearing into the breach of contracting processes. This is with a view to identifying additional measures that can be taken by the National Assembly to institutionalize adherence to Due Process by NNPC.

# THE PRESIDENT MUST ADDRESS THE BREACH (2)

5. Bureau for Public Procurement and the NNPC should work jointly to bring clarity, consistency and transparency to NNPC Contracting process. Develop and Publish a new Manual/ Chart of NNPC Public procurement process and the PPA - compliant approving authorities of the various contract thresholds.
6. The President should quickly constitute the membership of the National Council on Public Procurement (NCP) and inaugurate it as enshrined in the Public Procurement Act 2007. This step will END the ILLEGALITY of the Federal Executive Council's decade long usurpation of the NCP's powers and bolster confidence in the administration's anti-corruption program.
7. Raise the profile of NEITI Act and the Agency within the administration and with the public. Nigeria is a member of the global EITI and has the NEITI Law to underpin the operation of the Oil, Gas and Mining Sector. It is not clear that the FG has shown abiding fidelity to a WHOLESale TRANSPARENCY of the Nigerian Extractive Industry as provided in the NEITI Act. We therefore advise the President to accord NEITI the high profile status it deserves. NNPC must be directed by the President as Minister of Petroleum to fully abide by and lead by example by being COMPLIANT with all the principles of NEITI Act.
8. The Minister of Petroleum (who confusingly also happens to be the President ) and his Minister of State should define their roles and operational approach as colleagues responsible for the sector. Such clarity of roles between the two is urgently imperative to bring an end to current confusion in the supervision of the NNPC.
9. The President as Minister of Petroleum should present the Nigerian people with his agenda of bold Reform of the Oil and Gas Sector with timelines of delivery of a transparent, efficient and deregulated sector consistent with global Best Practice.