

## **PUBLIC PROCUREMENT IN GHANA: THE IMPLEMENTATION CHALLENGES TO THE PUBLIC PROCUREMENT LAW 2003 (ACT 663)**

Collins Ameyaw, Department of Building Technology, Kumasi Polytechnic, Kumasi, Ghana  
Sarfo Mensah, Department of Building Technology, Kumasi Polytechnic, Kumasi, Ghana  
Ernest Osei-Tutu, Building and Road Research Institute, Kumasi, Ghana

### **ABSTRACT**

*The purpose of this study was to identify various implementation bottlenecks to the Ghana Public Procurement Law 2003 (Act 663). The study adopted multiple research approaches, including; review of relevant literature, interviews and questionnaire survey of 49 District Assemblies and Metropolitan and Municipal Assemblies in the Ashanti and Brong Ahafo Regions of Ghana. The study identified low capacity of procurement professionals, low interaction between procurement entities and Public Procurement Authority (PPA), deliberate controlling of competition, non-compliance with provisions of the law, splitting of contracts into smaller lots, lack of funds and non-cooperativeness of suppliers, as the major challenges militating against the implementation of the Public Procurement Law.*

**KEYWORDS:** Challenges, Ghana, Public Procurement, Public Procurement Authority, Public Procurement Law.

### **INTRODUCTION**

The Public Procurement Law, 2003 (Act 663) is a comprehensive legislation designed to eliminate the shortcomings and organizational weaknesses which were inherent in public procurement in Ghana. The government of Ghana, in consultation with its development partners had identified the public procurement system as an area that required urgent attention in view of the widespread perception of corrupt practices and inefficiencies, and to build trust in the procurement system. A study by the World Bank (2003a) reported that about 50-70% of the national budget (after personal emoluments) is procurement related. Therefore an efficient public procurement system could ensure value for money in government expenditure, which is essential to a country facing enormous developmental challenges.

To ensure sanity and value for money in the public procurement landscape, the government of Ghana in 1996 launched the Public Financial Management Reform Programme (PUFMARP). The purpose of the programme was to improve financial management in Ghana. PUFMARP identified weaknesses in the procurement system. Some of these weaknesses included: lack of comprehensive public procurement policy, lack of central body with technical expertise, absence of clearly defined roles and responsibilities for procurement entities, absence of comprehensive legal regime to safeguard public procurement, lack of rules and regulations to guide, direct, train and monitor public procurement. The programme also identified that there was no independent appeals process to address complaints from tenderers. These findings led

to the establishment of the Public Procurement Oversight Group in 1999. The aim of this group was to steer the design of a comprehensive public procurement reform programme which led to the drafting of a public procurement bill in September 2002 that was passed into law on 31 December 2003.

This paper outlines the events leading to the public procurement reforms in Ghana and discusses challenges that confront the smooth implementation of the law. Some pragmatic ways, which if adopted, could improve the effectiveness of the law and reduce the operational challenges are suggested. Substantial evidence in literature suggests that procurement problems relating to Ghana are similar to the situations in many African and some Asian countries (Aniekwu & Okpala, 1988; Kumaraswamy, 1994; Rwelamila, Talukhaba & Ngowi, 1999). The challenges observed and the remedial steps suggested are therefore of wider importance to many developing economies.

A number of authors have investigated the factors that militate against procurement reforms around the globe (Thai, 2004; Wittig & Jeng, 2004; NPPA Annual Report, 2005). However, these previous studies have not reported on obstacles to the procurement reforms in Ghana. There is therefore the need to undertake a rigorous analysis of factors that have prevented the law in Ghana from achieving the purpose for which it was enacted.

The object of this paper is to identify the specific challenges, in the case of Ghana, that militate against the smooth implementation of the Public Procurement Law and to proffer some solutions to address the issues that confront the successful implementation of the law. Further this study aims at promoting discussion and reflection on steps needed to promote procurement reforms.

## LITERATURE REVIEW

The challenges to the institutionalisation of national laws are pervasive in developing countries, Ghana not being an exception. The National Public Procurement Authority of Sierra Leone in its 2005 report outlined several challenges bedevilling the operations of the Authority. Some of them include: inadequate funding, deficient staff strength and organisational and logistical limitations. The report recommended among other things, that the law could achieve its objective if there is a concerted effort by all stakeholders, backed by very firm political will and adequate budgetary support, to streamline and improve public procurement procedures in Sierra Leone (NPPA Annual Report, 2005). Annual reports of the Public Procurement Authority (PPA), since its establishment, have always cited inadequate funding as the leading barrier to smooth operations of the Authority. Lack of adequate office accommodation was specifically reported in the 2008 and 2007 annual reports (PPA Annual Report, 2007 & 2008).

Political will is the demonstrated credible intent of political actors (elected or appointed leaders, civil society watchdogs, stakeholder groups etc.) to attack perceived causes or effects of corruption at a systemic level (Sahr, 1998). Historically, successful reform programmes around the globe indicate that the paramount success factor is strong political will demonstrated by a commitment from leadership at all levels of government (Sahr, 1998). However, those who wield power lack the moral courage or capacity to exercise that power to ensure the needed change. Kosack (2008) argued strongly that success chalked in several countries around the world in areas of access to basic education was due to political will of

the leaders in those countries and their commitment to increasing access to education. Thus new rules and campaign gimmicks adopted by politicians alone are not enough for procurement reforms (Philip, 2002). The principal challenge in assessing political will is the need to distinguish between reform approaches that are intentionally superficial and designed only to bolster the image of political leaders and substantive efforts that are based on strategies to create change (Sahr, 1998). Political commitment is a necessary condition for procurement reforms to curb corruption. Without political will and commitment by the leadership of a country, grand corruption is perpetuated at an alarming rate with petty corruption becoming endemic and more difficult to stop (Philip, 2002). There are tangible indications of political will by some stakeholders at the lower levels to effect change, but this cannot be achieved if those at the apex of the pyramid, lean back (Szeftel, 1998). Thus the battle against corruption should begin with a strong political will and explicit commitment to eradicate all its manifestations (Osei-Tutu, Badu & Owusu-Manu, 2009).

Reform efforts are oftentimes unsuccessful due to the combined influence of inadequate strategies, political resistance, failure to sustain long-term reform efforts and the lack of knowledge about appropriate tools to establish systemic change (World Bank, 1994). Kagwe (2005) indicated that the perceptions among Kenyans about corruption in public service have unfortunately gone higher despite all the laws passed to fight against this menace. This was attributed to several factors including, loopholes in the legislative provisions of the public procurement and conflicts of interests (Kagwe, 2005).

It is worth noting that studies have shown that corruption pervades developing countries because of weak institutional infrastructures and lack of effective monitoring mechanisms (Lengwiler & Wolfstetter, 2006). Public procurement has been perceived as an area of waste and corruption (Thai, 2004) that is widespread (Jones, 2007). If procurement laws and regulations are not enforced to the letter, issues of corruption will continue to cover headlines in both the print and electronic media.

Wilson (2004) argued that in a situation where there is huge system loopholes coupled with laxity in legal and administrative systems, compounded by non-transparency and extensive discretionary powers at the hands of politicians, there needs to be concerted effort to ensure strict enforcement of laws to achieve the purpose for which those laws were enacted. Studies in Uganda, Tanzania and Kenya reveal that corruption in public procurement has mainly been through hidden violation of laid down procurement rules (Transparency International, 2009). Low detection of breaches of the law (Kanaga, 1999), weak enforcement of rules (Larmour, 2006) and regulations will also strengthen the hands of wrongdoers to misapply the law with impunity.

Ghana remains one of the most corrupt nations in the world judging from the annual Corruption Perceptions Index (CPI) released by Transparency International in 2012 (Transparency International, 2012). Though corruption is said to be present in all societies (Sahr, 1998), Lengwiler and Wolfstetter (2006) revealed that the quantum of money changing hands through corruption in public procurement is estimated between \$390-400 billion per annum all over the world. However it is estimated that corruption in Sub-Saharan Africa exist in about 70% of public contracts and results in about 20-30% rise in contracts sums. The cost of corruption in Africa is estimated at around \$148 billion a year (Mawenya, 2008). Corruption occurs throughout the procurement process and project cycle, through the actions

and inactions of political officers, public servants, clients, consultants, contractors and suppliers (Osei-Tutu, Badu & Owusu-Manu, 2009).

There is no evidence that the passage of the Public Procurement Law and its implementation has made any significant impact in curbing corruption in public procurement in Ghana. According to the 2010 and 2011 annual Corruption Perceptions Indices (CPI) released by Transparency International, Ghana ranked the 62nd and 69th most corrupt country respectively, out of 183 countries worldwide (Transparency International, 2012). With only 4.1 CPI in 2010 and a further slump in 2011 to 3.9 CPI score, corruption in Ghana remains a significant impediment to effective resource utilisation and efficient service delivery. There is no real evidence that Ghana has made serious gains through the enactment of corruption targeted legislation, thus their impact cannot be discounted completely.

Schiele and McCue (2006) described the public procurement implementation challenges as environmental factors. These include market conditions, legal and political environment, organisational and socio-economic environmental factors. It was established further that, regardless of the effort by central government and its related agencies to overcome implementation challenges, and an understanding of the value adding potential of procurement departments, a large number of internal customers act on their own and frequently bypass the procuring department.

The Country Procurement Assessment Report of Ghana produced in 2003, revealed that most staff members of Ministries, Departments and Agencies (MDAs) and District Assemblies (DAs) responsible for procurement were not procurement-proficient, even though they have been trained. The report contended that application of the PPA and the Standard Tender and Contract Documents will not be successful without broad training and 'refresher' programmes for officials in charge of procurement. Similarly Forgor (2007) agrees that lack of proper training of managers on the procurement process is a challenge that confronts procurement reforms. This supports the assertion that poor dissemination of procurement law is one of the challenges facing the smooth implementation of public procurement laws (Azeem, 2007).

Political interference with the procurement process poses a challenge to the implementation process and public procurement reforms. A good number of politicians think that they have the right to intervene in the procurement procedures thereby leading to capricious procurement decisions (World Bank, 2004).

The lack of career development path and low salaries of procurement personnel also militate against procurement reforms implementation (World Bank, 2003b). Poor record keeping (World Bank, 2003b), delays in payment of contractors and suppliers are also cited as some of the crucial factors that challenge procurement reforms implementation (Azeem, 2007).

In a similar vein, low level or absence of capacity building for service providers has been identified as one of the factors inhibiting successful public procurement reforms in Malawi. Many of its bidders are limited in various capacity issues including lack of basic knowledge of the law, inadequate capacity to appreciate the standard tender documents, poor access to tender information and insufficient technical and managerial skills to be competitive in the tendering process (ODPP Annual Report, 2007). The office of the Director of Public Procurement of Malawi in its 2006/2007 Annual report outlined the following factors, among others, impeding the operation of the procurement law in Malawi: shortage of qualified

personnel, lack of adequate financial resources, lack of adequate office space, non-compliance with some provisions of the law, poor records management by entities and overpricing of goods, works and services by bidders.

These and other challenges appear to be common in the country's procurement environment as in many other developing countries and therefore this paper set out to proffer and catalogue the challenges that exist, and find solutions towards the effective management of Ghana's procurement system.

## RESEARCH APPROACH

A multiple research approach which includes the review of pertinent literature, exploratory interviews, administering of survey questionnaires and analyses of documents (evaluation of reports and contract files) available at the procurement entities studied. The literature review helped to position the study within its theoretical context whilst preliminary exploratory interviews helped to elicit relevant information from the respondents, to compliment the main questionnaire survey. The survey involved data collection through questionnaires and structured and targeted interviews to address ambiguous responses. Data for the study was collected in 2008.

The research was limited to Metropolitan, Municipal and District Assemblies (MMDAs) in the Ashanti and Brong Ahafo Regions of Ghana. The two regions are amongst the most populated regions in Ghana, according to 2000 and 2010 national population and housing survey report and have highest number of MMDA's (Ghana Statistical Service, 2005 & 2011). The researchers also purposively targeted and obtained comprehensive coverage of all personnel involved in procurement process in a given entity. In all, the total number of MMDA's in these regions, amounting to 49 (27 from Ashanti and 22 Brong Ahafo), were purposively sampled from the total number of 130 MMDA's in Ghana, for the administration of structured questionnaires. All focal persons directly concerned in the procurement cycle in the study entities were contacted, with each respondent answering the respective questions in the questionnaire based on their area of speciality. The questions were intertwined with face-to-face unstructured interviews which helped in putting down peripheral comments that aided the discussion of the results in this study. This mode of administering the questionnaire created an atmosphere that promoted transparency and hence enhanced high credibility and reliability of the data.

## RESULTS AND DISCUSSIONS

### Respondents Profile

The breakdown of the procurement entities surveyed include, one Metropolitan Assembly, 13 Municipal Assemblies and 35 District Assemblies. The main respondents were the procurement officers and district engineers who are responsible for the procurement of goods, works and services within these entities.

### Implementation of procurement methods

Referencing table 1, a review of 205 goods contracts revealed that 33% were procured via Sole Sourcing (SS), 62% by Request for Quotation (RFQ) and 4% by National Competitive

Tendering (NCT). Further, 22% and 46% of the respondents had engaged in Sole Sourcing (SS) and Request for Quotation (RFQ) respectively. It was found that none of the sole sourcing procurements was supported with approval from the Public Procurement Authority. The low use of NCT is a clear contravention of section 35 of the Ghana Public Procurement Law (Act 663), which advocates that all contracts are to be procured through NCT. Restricted Tendering and Sole Sourcing are only justifiable on the grounds that they provide greater economy and efficiency but subject to the approval of the Public Procurement Authority (sections 38 and 40).

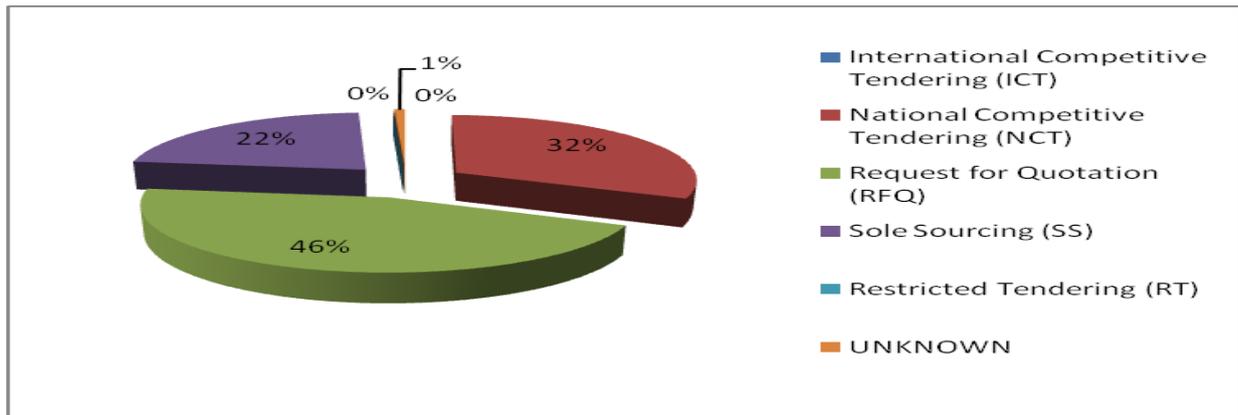
Further interview to establish why Sole Sourcing and Request for Quotation seem to be the preferred options for goods procurement reveal that lack of funds and the uncooperativeness of suppliers were behind the high inclination towards Sole Sourcing. Some respondents indicated that suppliers refuse to respond to requests to submit quotations because they had failed to win previous bids using this procurement process.

**Table 1 - Contracts and the procurement methods adopted**

Procurement Method	Procurement Category					
	Goods	Percentage	Works	Percentage	Total	Percentage
<b>International Competitive Tendering (ICT)</b>	0	0	0	0	0	0
<b>National Competitive Tendering (NCT)</b>	8	4	113	63	121	32
<b>Request for Quotation (RFQ)</b>	128	62	47	26	175	46
<b>Sole Sourcing</b>	68	33	17	9	85	22
<b>Restricted Tendering</b>	0	0	0	0	0	0
<b>Unknown</b>	1	0	2	1	3	1
<b>Total</b>	205	100	179	100	384	100

From table 1, works procurement showed an improved adherence to provisions within the Public Procurement Law. Out of 179 work contracts surveyed, 62% were procured through National Competitive Tendering, 26% through RFQ with the remaining 9% being procured using the Sole Sourcing method. Comparatively, works contracts recorded higher competition than goods procurement. This could be attributed to the low level or lack of knowledge of the goods suppliers in the preparation of documents for bids.

Aggregating all the contracts surveyed, totaling 384 contracts (goods and works), 32% were procured using the National Competitive Tendering (advertised in two national dailies of wide circulation i.e. Daily Graphic and The Ghanaian Times) whilst 22% and 46% used RFQ and SS respectively (see figure 1). This trend is not good enough since the Public Procurement Law aims at ensuring greater competition in all contracts. It was also observed from contract files that most of the contracts which could have been aggregated to attract competition were split into smaller lots that allowed for the use of RFQs.



**Figure 1- distribution of methods employed for the procurement of goods and works**

This is inconsistent with the provisions of the Public Procurement Law which prescribes procedures for the sizing of tender packages, soliciting and evaluating tenders for contract award. Section 21(5) states that: A procurement entity shall not divide a procurement order into parts or lower the value of a procurement order to avoid the application of the procedures for public procurement in this Act. Procurement staff and entities, in circumventing the law, have misapplied the section 21(5) under the pretence of lack of funds and therefore procure goods in smaller quantities. This splitting of the contracts allow for the use of RFQs which is believed to be relatively more susceptible to manipulation by procurement officers (Ameyaw, Mensah & Osei-Tutu, 2012).

Further investigations to confirm the use of procurement methods on service contracts found that 40% of such services were procured using Sole Sourcing, while the remaining 60% were procured by methods alien to the Public Procurement Law. Respondents indicated the use of RFQs and NCTs for 72% and 28% respectively for service contracts. This clearly reveals challenges with the implementation of procurement procedures prescribed in the Public Procurement Law by the Local Government entities in Ghana. The survey results also indicate that for the 384 contracts reviewed, there were a total of 1005 bidders. 23% of these contracts had only one bidder per lot, 65% had 2 to 3 bidders per lot, and 10% had 4 or more bidders per lot. The remaining 2% had unknown number of bidders per lot. Therefore, an average of 2.6 bidders per lot/contract was observed. It was found out that averagely 2.3 bidders per lot emerged responsive. These responsive bidders are those that met all the substantial requirements of a given bid. The results show a generally low level of competition in the bidding for contracts.

There seems to be a deliberate effort by some procurement entities to limit competition by refusing to provide more opportunities for competitors in any given bid. This contravenes section 49 (1) of the law that provides for tender documents to be supplied to all prospective bidders who may want to submit a bid on any contract. Crown Agents (1998) and Westring (1997) both reported that there are many instances of a single contractor buying and pricing all the bidding documents, and the contractor/supplier, processing the documents under different contracting proposals. It is obvious that this phenomenon exists for contracts with an average of 3 bidders per lot and 2 bidders responsive rate.

The survey results reveal that only 5% of the 49 entities had procurement staff with qualifications in procurement while 95% lacked procurement qualifications. The low capacity of procurement staff has long been identified as one of the paramount factors that inhibit the successful implementation of procurement reforms. This finding therefore corroborates the ODPP Annual Report (2007) on the situation in Malawi. The ODPP Annual report had suggested that low capacity of procurement staff hampers procurement reforms in developing countries.

Section 65(9) of the Public Procurement Law requires that procurement entities communicate the results of any procurement exercise to unsuccessful bidders. The survey reveals that in 87% of the cases, this aspect of the Law was not implemented. This is a worrying trend. Shielding the results of tendering processes from unsuccessful tenderers affects the credibility of procurement entities which in turn affects the level of competition on future tenders. The survey found that 45% of the entities had no formal correspondence with the PPA, whilst 55% have had some communication with the PPA. If there was a good flow of information from the PPA to the entities and vice versa, there could have been better information on the lapses in the implementation process, which could have shaped/improved policy directions. Adequate communication could help the entities to build their capacity in the law and to seek assistance of any kind from the PPA, especially in the areas of capacity development and clarification of any section of the law.

## CONCLUSION

This paper surveyed 49 procurement entities in Ghana, and reviewed data on 384 goods and works contracts and 30 services contracts. The study set out to identify various implementation bottlenecks to the Ghana Public Procurement Law 2003 (Act 663). The research found that, there is high inclination towards the use of less competitive procurement methods for procuring goods, works and service contracts in Ghana. This could be attributed to the low capacity of suppliers involved in the procurement processes. The study also found that, most of the procurement officers in the entities surveyed were not proficient in procurement, thus using procurement methods which are inappropriate for some contracts especially services contracts.

There is a deliberate effort by procurement officials to split procurement contracts into smaller packages. This is possible because there is not enough interaction between most of the procurement entities and the Public Procurement Authority. This permits breaches of some of the provisions of the law including not communicating procurement results to unsuccessful bidders.

In summary, the challenges in the implementation of the Public Procurement Law in Ghana are the result of low capacity of procurement professionals, low interaction between procurement entities and the PPA, deliberate controlling of competition, non compliance with provisions of the law, splitting of contracts into smaller lots, lack of funds and non-cooperation of suppliers.

The challenges as identified in this study have some dire consequences on the economy and the integrity of the procurement process in the country. The high adoption of less competitive procurement methods, low capacity of procurement officers, low interaction between procurement entities and the PPA, splitting of contracts into smaller packages and non-

cooperation of suppliers means high cost of procurement to the state. It has long been established by researchers that competition is the recipe for achieving competitive pricing and for that matter, value for money (Tadelis and Bajari, 2006). It can therefore be inferred that the state would save a lot of money if procurement entities and the respective procurement officers are trained to enable them appreciate the importance of embracing competitive procurement methods in all procurements as long as it is practicable.

Further, foreign investors would be unwilling to invest in Ghana economy especially where they would have to deal with public procurement entities whose procurement processes are at variance with norms, standards and practices. It is therefore imperative that steps be taken by the PPA to sanitize the procurement process by training both procurement officers and suppliers, contractors and consultants to understand the procurement processes and to enable them apply the law to the letter. Punitive measures should also be put in place to deter officers who would deliberately abuse the procurement process.

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