

# The FOIA and Public Procurement: Enhancing Accountability and Public Participation in Nigeria

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## Abstract

This paper focuses on the impact of the Freedom of information Act (FOIA) enacted in 2011 on public procurement in Nigeria in terms of accountability and participation. As such, it employs the principal-agent methodology and concludes that the agency problems inherent in public procurement and some of the attendant consequences such as government failures and market failures can be addressed with the enforcement of the FOIA 2011. These corrective measures include (but not limited to) providing access to information, choice, fair market price, and the ability to enforce contracts; as well as electronic reporting, protection of whistle blowers, oversight functions, private public partnership, citizens report card, and efficient participation of the media and civil society organizations.

**Keywords:** Adverse selection, Agency problem, Asymmetric information, FOIA, Market failure, Moral hazard, Principal-Agent methodology, Procurement.

## 1. Introduction and Rationale

Nigeria has been bedeviled mainly by corruption and weak institutions that have failed to address the attendant negative externalities. The public procurement process is a typical example of a process mired in an agency problem that has stifled economic growth and development. Specifically, the agency problem is a situation where an individual's interest is in conflict with the society's interest. As a result, the negative consequences (agency costs or negative externalities) extend to the society in general. In response to this problem, the Nigerian authorities have embarked on good governance reforms such as the adoption of the Public Procurement Act (PPA) 2007 and the Freedom of Information Act (FOIA) 2011, respectively.

Thus, the objective of this paper is to examine the FOIA 2011 and PPA 2007 with respect to enhancing accountability and public participation in government spending. Clearly, some of the fundamentals to attaining a viable economy include the need for accountability and participation in government spending. Hence, transparency – results from widely understood and clearly enforced rules coupled with transactions involving these rules should be clear and unambiguous (Pralhad 2006). The fundamental questions utilized herein are twofold: 1) What explains failure in government spending; and 2) What might be needed for success? The paper further attempts to address these questions by utilizing the principal-agent methodology and recommends ways forward. The rest of the paper is as follows: section 2 captures overview of the FOIA 2011 and salient features of the PPA 2007, section 3 briefly narrates the related literature, section 4 presents the theoretical underpinnings and stylized facts, section 5 analyzes the FOIA and public procurement in the context of accountability and public participation in government spending in Nigeria, while section 6 concludes followed by references.

## 2. Overview

In accordance with the FOIA (2011) document, the FOIA Nigeria basically is designed:

“To make public records and information more freely available, provide for public access to public records and information, protect public records and information to the extent consistent with the public interest and the protection of personal privacy, protect serving public officers from adverse consequences for disclosing certain kinds of official information without authorization and establish procedures for the achievement of those purposes and; for related matters.”

The provisions contained in the FOIA 2011 are summarized below:

- Right of access to records is a legal right of any citizen.
- Information about public institutions comprising the three branches of government together with all corporations established by law and any organization that utilizes public funds has to be recorded and kept in a manner that facilitates public access to such information.

- Request or an application for access to records is in line with section 1 of the FOIA. Thus, any information that is in print or otherwise used by the government or public institution shall be deemed a record under the control of government or public institution and shall be made available to any citizen upon request. However if access is wrongfully denied, the culprit is liable to a fine of five hundred thousand naira.
- Fees are not to exceed standard charges for document duplication and transcription if necessary.
- Destruction or falsification of records is deemed a criminal offence punishable on conviction by a Court with a minimum of one year imprisonment.
- Exemption of International Affairs and Defense in any matter that may be detrimental to the conduct of international affairs and defense of the nation.
- Exemption of law enforcement and investigation in matters concerning law enforcement purposes or internal matters of a public institution to the extent that disclosure would potentially jeopardize fairness and due process.
- Training of officials on the right to information and on the effective implementation of this Act.
- Exemption of personal information with respect to clients, patients, residents, students, or persons receiving services directly or indirectly from public institutions. Conversely, disclosure is allowed given the consent of the individual concerned and where the information is available to the public as well as if the public interest in the disclosure significantly outweighs the protection of personal privacy.
- Exemption of third party information in matters relating to trade secrets and commercial or financial information obtained from a person or business where such information is proprietary, privileged or confidential or injurious to the third party. Nonetheless, disclosure may be denied in cases involving environmental information that is in the public interest with respect to public health, safety, or protection of the environment.
- Exemption of professional or other privileges conferred by law include: attorney-client, doctor-patient, journalism confidentiality, and any course or research materials prepared by faculty as well as other professional privileges.
- Exempted materials include: published material or material available for purchase by the public, library or museum material, or non-public section of the national archive on behalf of any person or organization other than the public sector.
- Judicial review for denial of access to information can be sought through a court review of the matter within 30 days after denial and said application shall be heard and determined summarily by the court.
- Access to information by the Court is granted for examination of information under the control of a public institution to which this Act applies. However, the Court should avoid unnecessary or illegal disclosure.
- Burden of proof in any proceeding before the Court for denial of access rests with the public institution and the Court reserves the right to decide in favor or against.
- Protection of public officers for the disclosure of information in good faith.
- Documents under classification are not necessarily exempted from disclosure.
- Submission of reports to the Attorney General (AG) is on or before February 1 of each year which covers the preceding fiscal year and shall include among other matters the number of denials and reasons, appeals by individuals, number of pending applications, the time period for processing applications, processing fees, and personnel involved. Furthermore, the AG would follow through with an annual report to the legislature on or before April 1 of each year.
- Complimentary procedures imply that this Act complements all other existing procedures before it and not intended to limit their accessibility or availability.
- Interpretations of terms within the provisions are as cited in the FOIA 2011.

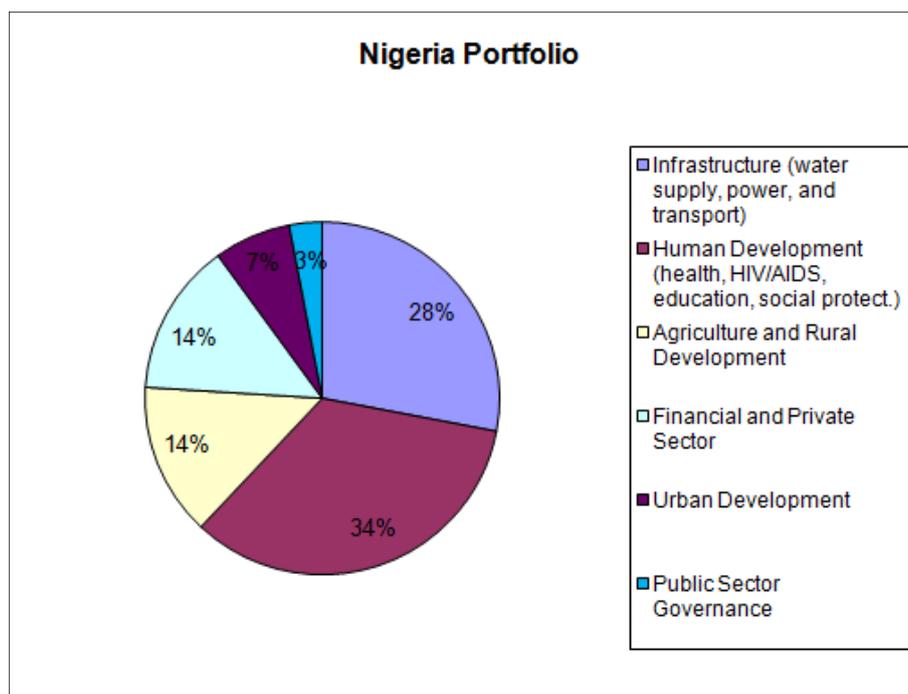
The PPA 2007 under Act No. 14 generally stated in the document (PPA, 2007):

“An Act to establish the National Council on Public Procurement and the Bureau of Public Procurement as the regulatory authorities responsible for the monitoring and oversight of public procurement, harmonizing the existing government policies and practices by regulating, setting standards and developing the legal framework and professional capacity for public procurement in Nigeria, and for related matters.”

Some of the relevant features of the PPA 2007 within the context of the aforementioned topic include the scope of application, fundamental principles for procurement, organization of procurements, and procurement methods.

- First, the scope of the application stipulates that the provisions of Act No. 15 shall apply to all procurement of goods, works, and services carried out by the federal government and all procurement entities; all others that derive a minimum of 35% appropriation from the federation; and shall not apply to the procurement of special goods, works, and services involving national defense or security unless approved by the President.
- Second, the fundamental principles include but not limited to the following: economy (utility maximization), efficiency (full employment of resources and full production), equity (fairness or economic justice), transparency (clear rules and regulations), accountability (probity), and ethics (standards of morality).
- Third, organization of procurements consists of approving authority, planning, implementation, accounting officer, planning committee, tenders board, pre-qualification of bidders, and open competitive bidding.
- Fourth, procurement methods encompass invitations to bid, bid security, submission of bids, rejection of bids, validity periods of bids and modifications as well as withdrawal of tenders, bid opening, examination of bids, acceptance of bids, domestic preferences, mobilization fees, contract performance guarantee, interest on delayed payments, and record of procurement proceedings.

**Figure 1: Nigeria's Fiscal Portfolio**



Source: Nigeria-Country Brief, World Bank – International Development Agency, 2010

### 3. Related Literature

In a related literature, Longren, Persson, and Weibull (2002) summarized the Nobel prize works of George Akerlof, Michael Spence, and Joseph Stiglitz on asymmetric information and the functioning of markets, particularly contracts. For instance, Akerlof captured how informational asymmetries potentially lead to adverse selection in markets; Spence explained how informed economic agents in imperfect markets may utilize incentives to take observable and expensive actions to credibly signal their private information to uninformed agents, so as to improve their market outcomes; while Stiglitz demonstrated how poorly informed agents can get information from more informed agents through screening process. In a comparative study, Kamil (2007) distinguished between the models of symmetric and asymmetric information and found that the optimal contract

is the result of a tradeoff between optimal risk allocation and optimal incentive mechanisms. Thus, the effort will be less for asymmetric information relative to symmetric information.

#### 4. Theoretical Underpinnings and Stylized Facts

The theoretical underpinnings of public procurements and freedom of information could be stylized from the theory of the Principal-Agent problem. There are two basic examples of this relationship which is constrained by asymmetric information. First is hidden information or adverse selection and second is hidden action or moral hazard. Examples of adverse selection include where an employee typically knows more about his or her ability than the employer and the buyer of an insurance policy knows more about his or her own risk relative to the insurance agency. However, in the case of moral hazard, a classic example is the case of a driver of a car that is insured and does drive recklessly because the car is covered by the insurance company.

Following Ray (1998), an economical powerful entity, namely, the principal that controls scarce resources that give it monopoly or quasi-monopoly power to dictate the terms of the contract or make take-it-or-leave-it offers to one or more individuals called agents. Examples are a government seeking a supplier to provide some public goods like highways, the regulation of public utilities, or a landlord-tenant relationship. Assume the Federal Government of Nigeria (FGN) is the principal and the individual contractor or firm is the agent. The contractor, say firm Z has a reservation utility  $\bar{U}$  – the utility he will obtain by making the best use of its time and resources elsewhere. The contract that FGN (the principal) offers should be such that the utility that firm Z (the agent) gets from this contract job must be at least equal to the utility it could receive from an alternative. This yields the participation constraint.

Assume  $Q$  is the output obtained after work, where  $Q$  denotes two values  $H$  for high and  $L$  for low and depends on effort input  $e$ . All things considered, if there are two levels of effort choices:  $e = 0$  or  $e = 1$ . Thus, when there is no effort or zero effort, chance of high output is  $q$ . Nevertheless, when the higher level of effort is given, there is a greater chance of a high output  $p$ . The higher level of effort involves a cost  $E$  for firm Z. Also, it is assumed that the agent (firm Z) is risk averse and thus  $U = U(w)$  where  $U$  is utility,  $w$  is the money income, and  $U(\bullet)$  is a strictly increasing and concave function implying that

$$(1) \quad \Omega U(w_1) + (1-\Omega)U(w_2) < U(\Omega w_1 + (1-\Omega) w_2)$$

Where  $\Omega$  is any proper fraction and  $w_1$  and  $w_2$  are two respective values of firm Z's monetary income. Equation (1) implies that whenever firm Z encounters risk, its expected utility is lower under asymmetric information than symmetric information. The principal (FGN) is risk neutral. Furthermore, suppose that input of high effort maximizes expected net surplus in line with Pareto efficiency that can be expressed algebraically as:

$$(2) \quad pH + (1 - p)L - E > qH + (1 - q)L$$

Hence, can be re-written as the condition below:

$$(3) \quad (p - q) (H - L) > E$$

Presumably, an efficient allocation of resources; where no one can be made better off without making anyone else worse off. Moreover, if given the choice of effort, the expected net output produced is a sufficient condition to satisfy at least the agent's (firm Z's) reservation utility such that:

$$(4) \quad qH + (1 - q)L \geq \hat{w}$$

Where  $\hat{w}$  is the payment that is at least equal to the reservation utility, expressed as

$$(5) \quad U(\hat{w}) = \bar{U}$$

Equation (5) implies that the marginal cost is equivalent to the marginal benefit – an optimal allocation of resources for both the principal and the agent.

## 5. The FOIA and Public Procurement in Nigeria

In line with the Federal Republic of Nigeria public procurement procedure manual, published by the Bureau of Public Procurement, the main tenets of proficient public procurement are: economy, efficiency, fairness, reliability, transparency, accountability, and ethical standards. Therefore, lack of accountability or probity can lead to inefficient production of goods and services as evidenced in the poor quality of public works, (infrastructure), maintenance, and delivery of services. Essentially, the accountability of procurement officials is critical to the success or failure of a project and by extension the development of the country. One way to verify this issue is to analyze the freedom of information and procurement process in Nigeria in the context of accountability and participation in government spending in light of the deteriorating fiscal portfolio of Nigeria as depicted above in figure 1 – showing that social welfare (protection) allocation by the government is inadequate given a population of about 150 million people where more than thirty-three percent is below the poverty level (Nwafor 2010).

An application of the principal-agent methodology or framework can shed some light into the accountability of procurement officials with respect to government spending. First, lack of accountability by procurement officials may lead to social costs in the forms of corruption, favoritism or nepotism. Oversight functions by the legislature are not likely to be effective since procurement officials have better information about procurement costs than the legislature – a government failure occurs because of asymmetries of access to information, choice, fair market price, and the ability to enforce contracts. From a private sector perspective, lack of accountability may lead to contractors providing sub-standard goods and services while utilizing government funds. Consequently, distortions due to maladministration and corruption prosper in association with deadweight loss – net loss of both consumer and producer surpluses. This is akin to the moral hazard problem, where agents will change their behavior as a result of a contract. For example, given lack of or inadequate accountability and supervision, suppliers (contractors) will engage in less efficient production of goods or delivery of services. Second, another view of the principal-agent problem in the procurement process is the absence of incentives to internalize costs associated with eliminating corrupt practices since these costs can be externalized to the society. This is similar to the fallacy of composition in that each agent assumes that his/her action is so negligible to be significant to the greater good or service of the entire society. However, the collective actions of these agents over-allocate resources and thus overwhelm the absorptive capacity of the system to maximize the welfare of its citizens. Third, weak institutional arrangements exacerbate the principal-agent problem since bad behavior is likely to go unpunished as exemplified in various scandals such as oil subsidy, pension, capital market, to mention a few. All these inefficiencies culminate in negative externalities (agency costs) to the society and hamper social and economic development.

To address the foregoing government failures in the procurement process emanating from the principal-agent problem, accountability and greater participation in government spending are necessary control measures for effective and efficient production and delivery of goods and services as well as stimulating growth and development. One, the adoption of the FOIA is a step in the right direction to ensuring that accountability and participation in government spending are enhanced. The FOIA provides opportunities for greater accountability, transparency, and efficiency in the procurement process by reducing asymmetric information in access to information, choice, fair market price, and the ability to enforce contracts. Two, contrary to the private sector where procurement agents can be threatened with dismissal, the public procurement officials can sometimes collude with the oversight and monitoring authorities to avoid sanctions or punishments – a case of quid pro quo. In this case, the FOIA can assist in protecting whistle blowers in government whose activities reduce wasteful spending such as the agency problem in the procurement process. Three, government agencies can be effectively monitored by enhancing capacity building in oversight functions of agencies like the Government Accounting Office and the Office of Management and Budget.

Other corrective measures in government spending stem from enhancing participation by the society (people) through electronic government reporting, citizens report card, and public-private partnership in addition to the media and civil society organizations. Electronic government reporting not only provides access to information, it also enhances awareness of government planning, implementation, and control mechanisms and thus improve procurement management. Moreover, greater participation in government spending can be generated via citizens report card – a system devised to hold government accountable by highlighting the poor quality of public service

provision and demand change based on the feedback from users of the services plus grades received by each agency on the quality of services provided (Narayan and Glinkaya 2007). Furthermore, greater participation through collaboration between the public and the private sector in form of public-private partnership (PPP) is helpful in monitoring and evaluating procurement process and government spending. Finally, the role of the media as a watchdog and the pressure exerted from civil society organizations sensitize the public and enhance their participation in government spending not only in public procurement but other fiscal policy matters.

## 6. Conclusion

The findings from an analysis of the FOIA and public procurement via accountability and public participation in government spending utilizing the principal-agent problem framework are quite informative. Firstly, the principal-agent problem lead to government failures and sometimes market failures since agents are likely to subvert their principals' objectives in place of theirs. The results are government failures and some of the negative effects might cause market failures. Secondly, corrective measures include reducing asymmetrical information by providing access to information, choice, fair market price, and the ability to enforce contracts. These could be achieved with the effective utilization of the FOIA 2011. Additional corrections for agency costs spilling out of the principal-agent problem inherent in the procurement process include: oversight functions by the responsible government agencies and protection of whistle blowers through the FOIA; electronic reporting to increase accountability, transparency, and efficiency; encouraging collaboration and participation through PPP; citizens report card for greater participation and accountability; and effective participation of the media (press) as well as civil society organizations in order to enhance public awareness, accountability, and participation in government spending and other public policy matters.

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