

Development for sale

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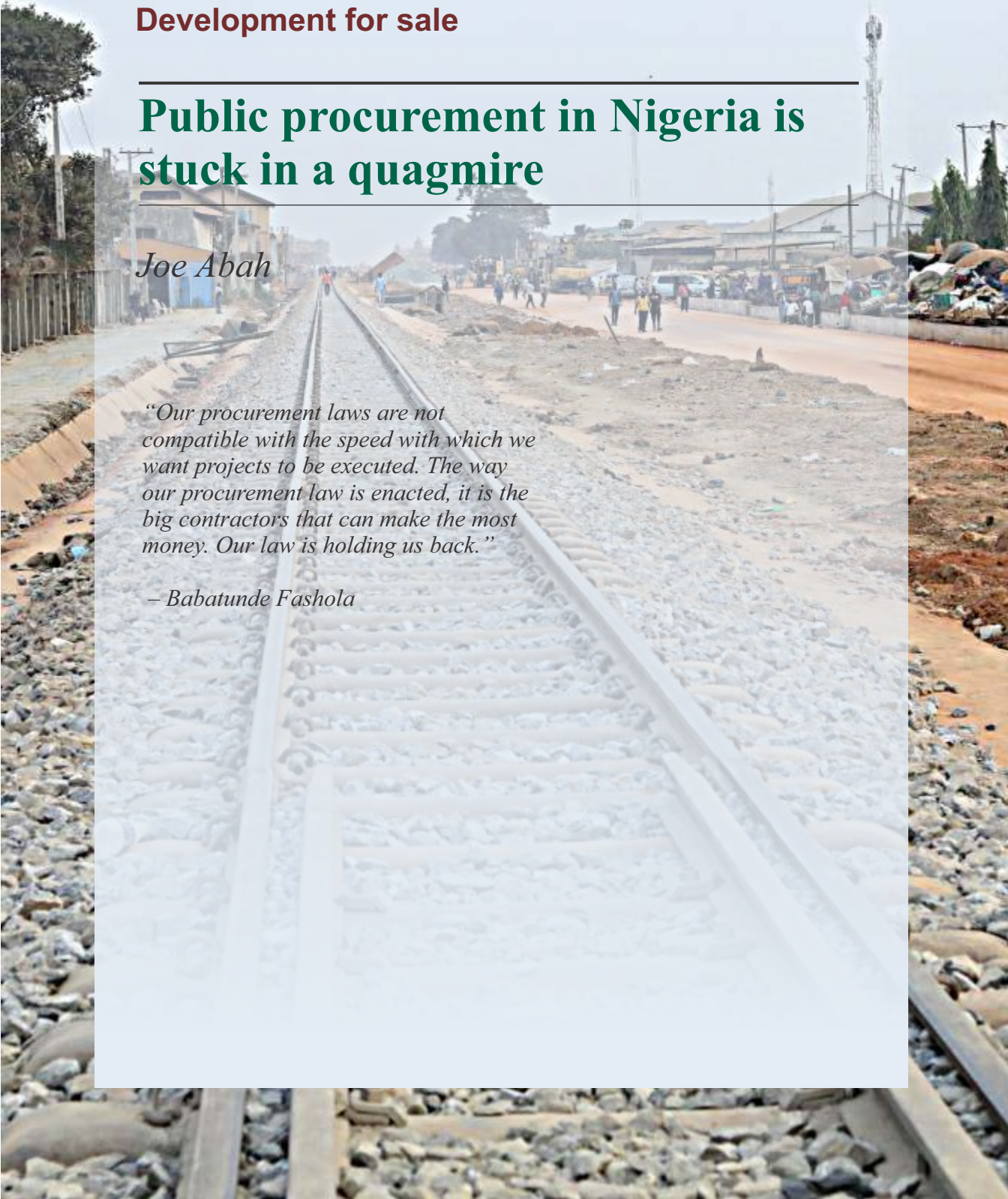
## Public procurement in Nigeria is stuck in a quagmire

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*Joe Abah*

*“Our procurement laws are not compatible with the speed with which we want projects to be executed. The way our procurement law is enacted, it is the big contractors that can make the most money. Our law is holding us back.”*

*– Babatunde Fashola*



## Key Recommendations

- Nigeria must review and update the Public Procurement Act 2007 to bring it up to date with current realities with a sharper focus on supporting economic growth.
- Full implementation of Open Contracting and adoption of the Open Contracting Data Standards in the public sector is essential.
- Government must expedite efforts to institutionalise both electronic procurement and the National Open Contracting Portal (NOCOPO).
- All branches of government must work more closely with the anticorruption agencies to ensure that infractions against the Public Procurement Act are speedily prosecuted.

**D**uring his screening by the Nigerian Senate on 29 July 2019, Babatunde Fashola, the previous Minister of Power, Works and Housing and current Minister of Works and Housing, blamed Nigeria's Public Procurement Act for impeding the speed of the country's development. In January 2018, he had announced that the Power, Works and Housing Ministry had not executed any projects in 2017 as a result of the late passage of the budget and bottlenecks caused by Nigeria's procurement laws and regulations.

Nigeria has a long history of public procurement challenges. A World Bank Country Assessment survey conducted in 2000 suggested that 60 naira (N) out of every 100 naira spent by government was being lost to procurement fraud. This survey formed the basis of the Public Procurement Act 2007. In 2017, the Bureau of Public Procurement (BPP) claimed to have saved the country N825 billion since the introduction of the Act. The savings were calculated as the difference between the contract prices originally submitted to the Bureau for approval and the eventual contract prices following a downward review by the Bureau. Yet impressive as this sounds, the Independent Corrupt Practices Commission still announced in 2016 that 60% of corruption cases in Nigeria were procurement related.

As Nigeria's ratings on the Corruption Perception Index remain unimpressive, it is clear that all is not well with the country's public procurement regime. A cursory reflection on why the Ministry of Power, Works and Housing did not execute any new capital projects in 2017 may help to put the issues in perspective.

### **Hold-ups and red tape**

Nigeria has a tradition of passing its budgets late. The executive often does not submit the budget estimates to the National Assembly until November or December, when the budget is supposed to take effect by 1 January the following year. This does not leave the legislature with enough time to scrutinise what is often a 2 500-page document, particularly if one factors in the various public holidays during that period. It is also not unheard of for the National Assembly to delay the budget until it can extract certain concessions from the executive, including provisions for constituency projects. At other times, it may delay the passage of the budget to frustrate the president. The cumulative effect of this is that the federal budget, which should be implemented from January, is often not passed until June.

Many public servants, like Fashola, blame the late passage of the budget for their inability to execute capital projects. The BPP counters that government departments (referred to in Nigeria as Ministries,

Departments, Agencies and Parastatals, henceforth MDAs) should start their procurement activities while waiting for the budget to be passed. It says that government entities can complete all other procurement activities except issuing contract award letters. That way, once the budget is passed, they can issue contract award letters and immediately launch their capital projects.

In reality, the position of the BPP is impracticable. What is eventually appropriated in the budget is often markedly different from the budget proposals submitted by MDAs. Therefore, many chief executives would not be keen to go through a full, pre-award procurement process when they have no idea of what would be appropriated in the budget. The time and expense required to reconfigure the arrangements after appropriation are simply not appealing. Most would rather wait for the budget to be passed and then plan with what they know they have. Government regulations also state that contracts may not be awarded unless they are backed with cash. In 2017, as in most years, cash was not released to ministries until August. Even then, cash was only released to what the Ministry of Finance termed “priority ministries”. Others did not receive cash releases until much later, if at all. In addition, certain projects are difficult to start in the rainy season, which is often in full swing by the time cash is released to MDAs. Delays in execution are, therefore, not surprising.

The primary purposes of the Public Procurement Act are to minimise procurement fraud and to ensure a level playing field for potential bidders. While these intentions are noble, certain provisions of the Act can cause unnecessary expenses and contribute to delays. For example, for any new projects above N2.5 million the law requires an advertisement in at least two national newspapers. Depending on the size of the advertisement, an MDA may have to spend N2 million to advertise a N2.5 million contract. This is absurd, as it could have been advertised online at virtually no cost, and many newspapers now get their news from online sources. Worse still, the MDA will often not have the funds to pay for the advertisement in the first place because the budget has not been passed and the funds with which to place the advertisement have not been released.

In addition, the law requires that bidders be allowed at least six weeks to bid. Depending on the size and complexity of the bid, another six weeks may be needed to evaluate it. Permanent secretaries and directors-general are “accounting officers” under the law. That means that they are accountable for all procurements during their tenure, for the rest of their lives. Nobody wants to rush and make a mistake. When the evaluation is complete, it is then necessary to conduct due diligence on the preferred bidders to ensure that their tax clearance certificates are genuine, and that they are registered with the Bureau of Public Procurement, the Pensions Commission and the Industrial Training Fund, among others. Acquiring these registrations can be expensive and often has the effect of excluding small companies. This is the point that Fashola was making about the system's favouring big contractors.

If the contract is above a certain threshold, the procuring entity needs to get a “Certificate of No Objection” from the BPP and, in some cases, the approval of the Federal Executive Council. When one factors in late passage of the budget, the late release of funds, the advertisement requirement, the time needed to evaluate the bids and conduct due diligence, the “No Objection” Certificate from the BPP, consideration by the Federal Executive Council, the rainy season and the various holidays towards the end of the year, it becomes clear why the Ministry of Power, Works and Housing did not execute any new projects in 2017 and why Fashola believes that the law is holding the country back.

Ben Akabueze, the Director-General of the Budget Office of the Federation, agrees with him. At an event in 2019, Akabueze said about the Public Procurement Act: “If relied upon the way it was designed, the law is capable of killing growth in the local economy.” These are very serious allegations, by people who are directly involved in driving development and growth.

### **What is being done**

To address the complaints about the Act and its own operations, the BPP has taken a number of steps. It is in the process of deploying an e-procurement system to reduce the reliance on manual processes, thereby



saving time and money. It has also collaborated with the Efficiency Unit of the Federal Ministry of Finance to put in place a “price checker”. This is intended to eliminate the wide price variations of commonly procured off-the-shelf items that fall within the approval thresholds of the procuring entities that are sometimes subject to abuse or “padding”.

In 2016, Nigeria joined the Open Government Partnership (OGP), a group of 76 countries that have voluntarily committed to seek greater transparency in government activities. Nigeria's OGP National Action Plan 2017-2019 includes a commitment to the “[f]ull implementation of open contracting and adoption of open contracting data standards in the public sector”. Further to these commitments, a National Open Contracting Portal (NOCOPO) has been developed to foster increased disclosure of procurement activities. These efforts won the BPP a global Government Innovation Award in June 2017.

Between 2007 and 2014, the BPP undertook various initiatives to strengthen public procurement. This included the establishment of a

professional procurement cadre within the federal public service, the development of standard bidding documents, the establishment of the Public Procurement Research Centre at the Federal University of Technology, Owerri, and the development of standard price lists for more than 22 000 items. Since 2014, it has built on these initiatives by continuing to build the capacity of procurement officers, establishing two additional Procurement Research Centres at Ahmadu Bello University, Zaria and University of Lagos, and providing advocacy to encourage sub-national governments to pass public procurement laws. To date, 26 states have passed their own versions of the procurement law.

However, challenges remain. The National Council on Procurement provided for in the 2007 Act has still not been set up. This means that the Federal Executive Council continues to usurp the functions of the council. Delays in budget preparation and appropriation continue. There is a distinct lack of enthusiasm by the executive to amend the Public Procurement Act to address the challenges raised by Fashola. That lack of enthusiasm is mirrored by the National Assembly, whose sole interest seems to be to weaken the role of the BPP, thereby making it easier for legislators to bypass the Act. Contract-splitting to keep procurements under certain thresholds is still rife among procurement entities.

### **What can be done?**

Over the next five years, it will be important to take action to ensure that the public procurement regime does not constitute a barrier to national development, while protecting the public against contract fraud. There is a need to expedite action on the “Organic Budget Bill” that is before the National Assembly. The Bill, when passed into law, will set a deadline by which the executive must submit the budget proposal to the National Assembly. It will also set a deadline by which the National Assembly must pass the budget, failing which it automatically becomes law as submitted by the executive. This will go a long way to address the annual problem of late budget preparation and appropriation. There is also an urgent need to amend the Public Procurement Act to focus it more on delivery, not just fraud prevention. Some of the arcane provisions, like advertising in national newspapers, should be revised and updated.

E-procurement and the full implementation of Open Contracting and the Open Contracting Data Standards will go a long way to speed up the procurement process, make it easier for small companies to bid for government contracts and enhance the transparency of government procurement. In order to prevent price inflation, it is important to link the database of prices held by the BPP to the budget template used by the Budget Office of the Federation. That way, a procuring entity only need to select a particular type of vehicle or computer and the BPP Price Checker will supply the approved standard government specification and insert the price into the budget template. This will remove the incidences of “budget padding” and the widely varying prices quoted for the same items in the budget.

Finally, there should be more synergy among the nation's anti-corruption bodies and the BPP must start to see itself as an anti-corruption agency. It is often difficult to engage in large-scale corruption without breaching public procurement laws and regulations. The BPP should work closely with the Office of the Auditor-General for the Federation to ensure that infractions reported in the annual audit reports are pursued and sanctioned. It should also partner with the Independent Corrupt Practices Commission in the “system studies” that the Commission undertakes to identify potential weaknesses in procurement and financial systems in MDAs, with a view to eliminating those weaknesses and risks.

## **Conclusion**

The public procurement regime exists for good reasons. It has to continue to protect the interests of the public. However, care must be taken that, in doing so, it does not become an end in itself, or a clog in the wheel of development that Nigeria sorely needs at the moment.