



Redeemer's University Nigeria, Journal of Jurisprudence & International Law (RUNJJIL) Volume 4(1) 2024

An Appraisal of Exclusion as an Anti-Corruption Measure in Nigeria's Public Procurement Act of 2007

Dare Joseph Ayinde

LL. B (Ibadan), LL.M, LL. D (UWC).

Faculty of Law, Oyo State

Ajayi Crowther University

Email: ayindamilare72@yahoo.com

Abstract

The Public Procurement Act (PPA) empowers procuring entities and the Bureau of Public Procurement (Bureau) to exclude erring bidders from participating in procurement proceedings. Furthermore, it states seven grounds on which bidders may be excluded from participating in a procurement proceeding. Using doctrinal and comparative research methodologies, this paper analyses all these grounds, with emphasis on those that relate to corruption. It identifies the weaknesses in the provisions of the PPA on exclusion, one of which is that the power of the Bureau and procuring entities to exclude bidders from participating in procurement proceedings is discretionary, making it susceptible to abuse. In contrast, the United Nations Commission on International Trade Law Model Law on Public Procurement, which the PPA is modelled after, mandates procuring entities to exclude erring bidders from participating in a procurement proceeding. To make exclusion an effective anti-corruption policy in Nigeria, this paper recommends, inter alia, that the grounds for exclusion should be divided into two categories: mandatory and discretionary. The exclusion of bidders on corruption-related grounds should be mandatory, while the exclusion of bidders on the grounds that are not related to corruption should continue to be discretionary.

Keywords: Bureau, conflicts of interests, corruption, exclusion, procurement

1. Introduction

Corruption is a systemic problem in Nigeria and is, arguably, the main factor undermining the effectiveness of its procurement system.¹ According to the Independent Corrupt Practices and Other Related Offences Commission, procurement-related corruption accounts for 60 per cent of corruption in the public sector.² Corruption in public procurement undermines good governance and leads to the wastage of public funds.³ One administrative sanction that is used to deter bidders from engaging in corruption is exclusion.⁴ This anti-corruption measure is provided for in the Public Procurement Act of 2007 (PPA), the legal framework for procurement at the federal level of government in Nigeria. The PPA empowers procuring entities,⁵ and the Bureau of Public Procurement (the Bureau), one of the procurement regulatory bodies established by the PPA,⁶ to exclude bidders from participating in procurement proceedings on certain grounds. These grounds include those that relate to corruption and those that are not.

Nevertheless, corruption continues to ravage Nigeria's procurement system. Bribery, collusion, conflicts of interest, and other corrupt practices are still being perpetrated by contractors during the procurement process. These raise questions about the effectiveness of this measure in preventing and combating corruption in the procurement process. It is against this background that this article examines the provisions of the PPA on exclusion with a view to identifying its flaws and the factors responsible for its perceived ineffectiveness.

This paper is divided into four parts. The first part examines the meaning of exclusion and its objectives. The second part examines the provisions of the United Nations Commission on International Trade Law Model Law on Public Procurement (the Model Law) on exclusion. The third part of this paper explores the provisions of the PPA on exclusion. Specifically, it analyses

¹ Williams-Elegbe S “Systemic Corruption and Public Procurement in Developing Countries: Are There Any Solution?” (2018) 17 *Journal of Public Procurement* 132.

² <https://businessday.ng/uncategorized/article/60-of-corruption-cases-are-procurement-related-icpc/>

³ <https://www.vanguardngr.com/2023/08/70-procurement-fraud-reason-for-growing-poverty-in-nigeria-csos-efcc-others/>

⁴ See article 21 of the United Nations Commission on International Trade Law Model Law on Public Procurement.

⁵ A procuring entity “means anybody engaged in procurement and includes a ministry, extra-ministerial office, government agency, parastatal and corporation”. See section 60 of the PPA.

⁶ Section 3 of the PPA.

the grounds on which bidders may be excluded from participating in procurement proceedings and assesses how these provisions fare with those of the Model Law. Furthermore, it identifies their strengths and weaknesses. The last part of this paper contains the conclusion and recommendations on how to make exclusion an effective anti-corruption measure in Nigeria.

2 Meaning and objectives of exclusion

Exclusion is the process by which an entity is disqualified from participating in a particular procurement process because of corruption, fraudulent misrepresentation, unethical practices or any other ground that is provided in procurement laws and regulations.⁷ There are certain terms that are used interchangeably with exclusion because they also refer to the disqualification of firms from participating in procurement proceedings because of corruption, fraud, conflicts of interest and other similar misconduct.⁸ These terms include disqualification, debarment, suspension, rejection and blacklisting.⁹ Depending on the jurisdiction, the terms may or may not be synonymous.¹⁰ Of these terms, the two that are contained in the PPA are exclusion and debarment.¹¹ However, these terms, as used in the PPA, are not the same.¹²

The main difference is that the debarment of an entity in the PPA makes it ineligible to participate in procurement proceedings for a minimum of five years.¹³ In contrast, exclusion makes an entity ineligible to participate in a procurement proceeding.¹⁴ The primary purpose of exclusion is to deter erring and other bidders from engaging in corruption in the procurement process.¹⁵ This means that the deterrence effects of exclusion are both specific and general.¹⁶ The

⁷ Yukins C & Nicholas C (2022) "The UNCITRAL Model Law on Public Procurement: Potential Next Steps" Goerge Washington Law Faculty Publications 13; Arrowsmith S (2022) *Constructing Rules on Exclusions (Debarment) under a Post-Brexit Regime on Public Procurement: A Preliminary Analysis* Working Paper 3.

⁸ Williams-Elegbe Sope *Fighting Corruption in Public Procurement: A Comparative Analysis of Disqualification or Debarment Measures* (Great Britain, Hart Publishing, 2012) 31.

⁹ Wibowo R (2017) "Strengthening the Effectiveness of Exclusion Mechanism in Public Procurement: A Comparative Legal Study Between Indonesia and the Netherlands" in Thai K (ed) *Global Public Procurement: Theories and Practices* (Florida: Springer, 2017) 215; Williams-Elegbe (n 9) 69.

¹⁰ Williams-Elegbe (n 9) 31.

¹¹ Sections 18 (8) and 58 (6) (a) of the PPA.

¹² Wibowo (n 10) 215.

¹³ Section 58 of the PPA.

¹⁴ Williams-Elegbe (n 9) 31.

¹⁵ Williams-Elegbe (n 9) 34.

specific deterrence relates to the contractor who is excluded from participating in a procurement process. Its disqualification from the procurement proceeding is meant to punish and dissuade it from engaging in corruption in future procurements.¹⁷ The general deterrence relates to the symbolic effect of exclusion: the exclusion of bidders from participating in procurement proceedings would dissuade other bidders from engaging in corruption.¹⁸ Other bidders would want to avoid engaging in anything that may make them lose future contract opportunities.¹⁹

The next part of this paper examines the provisions of the Model Law on exclusion. The essence of this is to establish global standards on exclusion.

2. An analysis of the provisions of the Model Law on exclusion

The United Nations Commission on International Trade Law (UNCITRAL), which was established on 17 December 1966,²⁰ is charged with the responsibility of harmonising, unifying and developing international Trade Law.²¹ In order to promote international trade, UNCITRAL developed the Model Law on Procurement of Goods, Construction and Services, which was adopted in 1994. The 1994 Model Law was reviewed and replaced with the 2011 Model Law.²² The Model Law is an international instrument on public procurement, and its provisions are regarded as global standards on public procurement.²³ Several States, including Nigeria,²⁴ have incorporated its provisions into their respective procurement laws. The only administrative sanction provided in the Model Law is exclusion. The Model Law mandates procuring entities to exclude a contractor from participating in procurement proceedings on certain grounds.²⁵ The next part of this paper examines these grounds.

¹⁶ Dixon O "The Efficacy of Australia Adopting a Debarment Regime in Public Procurement" (2021) 49 *Federal Law Review* 126.

¹⁷ Town A "Ours is to Reason Why: Exploring Motivating Principles for Debarment Systems" 50 (2021) *Public Contracts Law Journal* 523.

¹⁸ Shaw S & Totman J (2015) *Suspension & Debarment: Strengthening Integrity in International Defence Contracting* (London: Transparency International) 13.

¹⁹ Shaw & Totman (n 19) 13.

²⁰ See the United Nations resolution 2205 (XXI) of 17 December 1966.

²¹ UNCITRAL *A Guide to UNCITRAL: Basic Facts about the United National Commission on International Trade Law* (Vienna, UNCITRAL, 2013) 2.

²² UNCITRAL *Guide to the Enactment of the Model Law* (Vienna, UNCITRAL, 2014) 2.

²³ Williams-Elegbe S "The Changes to the World Bank's Pronouncement Policy and the Implications for African borrowers" (2014) *African Public Procurement Law* 35.

²⁴ Williams -Elegbe S "The Reform and Regulation of Public Procurement in Nigeria" (2012) *Public Contract Law Journal* 346. However, Nigeria has not ratified the 2011 Model Law.

²⁵ Article 21 of Model Law.

3.1 Grounds on which a bidder may be debarred under the Model Law

The first ground on which a procuring entity is obligated to exclude a bidder from participating in a procurement proceeding is if the bidder gives or agrees to give directly or indirectly gratuity to a present or past official or employee of a procuring entity or public institution to influence the act, decision or procedure of a procuring entity in relation to the procurement proceedings. The physical element of the act is the “giving” or “the agreement to give” gratuity, while the mental element is that the gratuity must have been offered with the purpose of influencing the act, decision or procedure of a procuring entity in relation to a procurement proceeding. It is submitted that this provision is detailed.²⁶ Apart from this, its definition of gratuity is broad, covering all forms of inducement. It provides that gratuity could be in the form of an offer of employment, a service or a valuable thing.²⁷ The inclusion of employment of a present or past official or employee of a procuring entity or public institution as a form of inducement shows that this provision is also designed to prevent a revolving door.²⁸

According to the Guide to the Enactment of the Model Law, the exclusion of a bidder on this ground is not dependent on the conviction of such a bidder for bribery.²⁹ This is commendable. It is submitted the effectiveness of this provision would have been undermined if the drafters of the Model Law were to require a conviction by a court before a bidder who offered or agreed to offer a bribe could be excluded from participating in a procurement proceeding.³⁰ Any credible evidence that shows on a balance of probability that a bidder offers or agrees to offer a bribe to a past official or employee of a procuring entity or public institution will suffice.³¹ For example, credible evidence from a whistleblower.

The second ground on which a procuring entity must exclude a bidder from participating in procurement proceedings is subdivided into two. The first one is where a bidder has an unfair

²⁶ Article 21(1) (a) of the Model Law.

²⁷ Article 21(1) (a) of the Model Law.

²⁸ Article 21(1) (a) of the Model Law. See also Maciej B & Alison J “Populism and Public Procurement: An EU Response to Increased Corruption and Collusion Risks in Hungary and Poland” 41 (2022) *Yearbook of European Law* 14.

²⁹ UNCITRAL (n 23) 109.

³⁰ Ahman J “Fact, Evidence and the Burden of Proof in the World Bank Group Sanctions System” (2020) 23 *Journal of International Economic Law* 698.

³¹ Article 21(1) (a) of the Model Law; UNCITRAL (n 29) 109.

competitive advantage over others,³² while the second one is where a bidder violates the prohibition on conflicts of interest, as provided for in the national law of each State.³³ One weakness of this provision is that it does not state the meaning of an unfair competitive advantage or conflicts of interest.³⁴ Rather, it gives States the liberty to define these terminologies in line with their respective laws.³⁵ However, the Guide to the Enactment of the Model Law states that the conflicts of interest in this context are limited to those involving bidders. It does not include those that involve procurement officials and other public officials.³⁶

The purpose of exclusion on the ground of “an unfair advantage” is to prevent a bidder that is privy to certain information about the procurement that other bidders are not aware of from participating, directly or indirectly through its subsidiaries, in the procurement proceedings.³⁷ One instance in which this could happen is if a bidder or its parent or subsidiary company is allowed to bid for a contract in which any of its associate firms had earlier provided consultancy services to the procuring entity on the design and planning of the project.³⁸ Allowing such a bidder to participate in procurement proceedings would give it an unfair advantage over other bidders and undermine competition.

In order to prevent procuring entities from abusing their power in the exclusion of erring bidders, the Model Law provides that the decision of a procuring entity to exclude any bidder from participating in a procurement proceeding and the reasons for such a decision must be stated in the records of the procurement proceedings.³⁹ In addition, without any delay, such a decision must be communicated to the affected bidder.⁴⁰ One flaw in the provisions of the Model Law on exclusion is that it does not state the procedures that procuring entities should follow in the

³² Article 21(1) (b) of the Model Law; Town (n 18) at 534.

³³ Article 21(1) (a) of the Model Law; Town (n 18) 534.

³⁴ UNCITRAL (n 23) 110.

³⁵ UNCITRAL (n 23) 110.

³⁶ UNCITRAL (n 23) 110 & 111.

³⁷ UNCITRAL (n 23) 110 & 111.

³⁸ Yukins C “Addressing Conflicts of Interest in Procurement: First Steps on the World Stage Following the UN Convention against Corruption”. A paper delivered at the 3rd International Public Procurement Conference Proceedings 28 - 30, August 2008: 1189.

³⁹ Article 21(2) of Model Law.

⁴⁰ Article 21(2) of Model Law.

exclusion of erring bidders.⁴¹ It appears the drafters of the Model Law leave this to States to decide in accordance with their respective legal and administrative systems.

The next part of this paper examines the provisions of the PPA on exclusion and assesses the extent to which it complies with the Model Law.

4. Analysis of the provisions of the Public Procurement Act (PPA) on exclusion

The PPA empowers the Bureau and procuring entities to exclude bidders from participating in procurement proceedings on certain grounds.⁴² However, unlike the Model Law, it is not mandatory for procuring entities and the Bureau to exclude erring bidders from participating in procurement proceedings. This is because the PPA uses the words "may" and not "shall".⁴³ This connotes that the procuring entity and the Bureau have discretion in this regard.

4.4.1 Grounds for exclusion of bidders in the PPA

Unlike the Model Law, which states two grounds on which an erring bidder must be excluded from participating in a procurement proceeding,⁴⁴ the PPA states seven grounds.⁴⁵ These include those that relate to corruption and those that do not relate to corruption. The next part of this paper analyses these grounds in detail.

4.4.1.1 Inducement of Public Officials

The first ground on which a bidder may be excluded from participating in procurement proceedings is where the bidder offers or promises to offer any illicit benefit to a former or current employee of a procuring entity or the Bureau. Specifically, the PPA provides that a bidder may be excluded from participating in a procurement proceeding if:

there is verifiable evidence that any supplier, contractor or consultant has given or promised a gift of money or any tangible item or has promised, offered or given employment or any other benefit, item or

⁴¹ Yukins & Nicholas (n 8) 14.

⁴² Section 16 (8) of the PPA. However, in the Procurement Manual prepared by the Bureau, only procuring entities can exclude an erring bidder from participating in procurement proceedings. The validity of the Procurement Manual in this regard is doubted, as a manual cannot take away the power that an Act of the National Assembly, the PPA, gives to the Bureau. See *Olowofela & Anor v Taiwo & Ors* (2019) LPELR-49177 (CA) at 40.

⁴³ Section 16 (8) of the PPA.

⁴⁴ Article 21 (1) (a) & (b) of the Model Law.

⁴⁵ Section 16(8) (a) of the PPA. In contrast, Manuel states ten grounds, which include the seven grounds that are contained in the PPA, on which a bidder may be excluded from participating in procurement proceedings. The three other grounds are not contained in the PPA. Again, the validity of the other three grounds is in doubt as the Manual cannot override the provisions of the PPA. See *Olowofela & Anor v Taiwo & Ors* (n 43) 40.

service that can be quantified in monetary terms to a current or former employee of a procuring entity or the Bureau, in an attempt to influence any action, or decision making of any procurement activity.⁴⁶

This provision is essentially the same as that of the Model Law.⁴⁷ Like the Model Law, two things must be established for a bidder to be excluded from participating in procurement proceedings on this ground. First, the procuring entity or the Bureau must establish that the bidder gave or promised to give an illicit a current or former employee of a procuring entity or governmental authority. Second, the procuring entity or the Bureau must establish that the illicit benefit was offered with the purpose of influencing a procurement proceeding, its outcome or the execution of a contract. It also recognises that illicit benefits can be in the form of gifts of money, tangible items, or any form of service that can be quantified, and it also includes employment or any other kind of benefit.

The type of evidence that the PPA requires before a bidder could be excluded on this ground is “verifiable evidence”.⁴⁸ However, neither the PPA nor Procurement Regulations state the meaning of verifiable evidence. It is submitted that verifiable evidence means incontrovertible evidence, that is, evidence that can be confirmed or corroborated. This, in my view, will include a confession by the corrupt bidder or any other person who is involved in a corruption scheme. It could be documentary evidence, such as a bank account statement showing payment of money to officials or former officials of a procuring entity or the Bureau. Verifiable evidence could also be audio-visual evidence disclosure or a report by a whistleblower. Although the conviction of a firm for bribing officials in relation to procurement proceedings will constitute verifiable evidence, a conviction is not necessary.

Another flaw in this provision is that neither the PPA nor Procurement Regulations state the standard of proof that is required for the bidder to be excluded on this ground. This omission may undermine the enforcement of this provision, as procuring entities and the Bureau may not be sure if such an allegation should be proved on a balance of probability or beyond a reasonable doubt. This article recommends that such an allegation be proved on a balance of probability, and this should be stated in the PPA and Procurement Regulations.

⁴⁶ Section 16(8) (a) of the PPA.

⁴⁷ Article 21 (1) (a) of the Model Law.

⁴⁸ Section 16(8) (a) of the PPA.

4.4.1.2 Poor performance in previous public contracts

The second ground on which a bidder may be excluded from participating in a procurement proceeding is where it failed to perform or exercise due care in any public contract awarded to it in the past three years before the present procurement proceedings.⁴⁹ Also, a bidder may be excluded from participating in a procurement proceeding if it did not exhibit due care in the performance of any public contract in the past three years prior to the procurement process under consideration.⁵⁰ Failure to exercise due care in the execution of the contract could mean that the previous contracts were poorly or negligently executed.⁵¹ It could be because the bidder used inferior materials in the execution of the contract.⁵² Also, it could be because the bidder failed to perform the contract within the time stipulated by the terms of the contract, especially in contracts where time is of the essence.⁵³

It is instructive that poor past performance is not limited to contracts awarded to the bidder by the procuring entity only. It also relates to the past performance of a bidder in the execution of any public procurement.⁵⁴ In the past three years, allowing a bidder who did not execute the previous contracts awarded to it well or did not execute it at all to bid for another contract and possibly obtain the contract will reward inefficiency and encourage wastage of public funds.⁵⁵ Thus, the exclusion of such bidders is meant to ensure that only competent firms are allowed to participate in a procurement proceeding.⁵⁶ It is important to state that the fact that the bidder had been prosecuted and sanctioned for its failure to execute past contracts may not prevent its exclusion on this ground. The focal point is its bad reputation for shoddy execution of contracts and the possibility that it might not execute the present contract at all or very well if it were allowed to participate in the procurement proceedings.⁵⁷

⁴⁹ Section 16(8)(b) of the PPA.

⁵⁰ Section 16(8)(b) of the PPA.

⁵¹ Swan and Manka "Risky Business: Does Debarring Poor Performers Mitigate Future Performance Risk"? in Quinot and Williams-Elegbe (eds) *Public Procurement in Africa: Development in Uncertain Times* (South Africa, LexisNexis, 2020) 135.

⁵² Swan and Manka (n 54) 135.

⁵³ Swan and Manka (n 54) 135.

⁵⁴ However, poor performance in public contracts funded by state or local governments and the poor performance of a bidder in private contracts will not suffice. See section 60 of the PPA.

⁵⁵ Bianchi W "Equality in Exclusion: Empowering Individuals in the Suspension and Debarment System" *Public Contract Law Journal* (2015) 81.

⁵⁶ Swan and Manka (n 54) 129 & 130.

⁵⁷ Town (n 18) 526.

One weakness in this provision is that it does not state the basis on which a procuring entity or the Bureau can conclude that a bidder has defaulted in its obligation in the performance of previous contracts.⁵⁸ In my view, a procuring entity cannot on its own determine that a contractor failed to perform a previous contract well, except the contract was awarded by the procuring entity. This article submits that in determining whether a bidder had failed to perform its obligations under previous public contracts, a procuring entity or the Bureau could rely on the audit reports on the contracts. This could be the audit report of the Bureau, the auditor-general of the federation or any of the anti-corruption agencies on the contract.

4.3.1.3 A bidder that has been sentenced for procurement corruption or other financial crimes

Another ground on which a bidder may be excluded from participating in a procurement proceeding is where “the bidder has been validly sentenced for a crime committed in connection with a procurement proceeding, or any other crime committed to gain financial profit”.⁵⁹ The exclusion of a bidder based on this ground can be divided into two. First, a bidder could be excluded from participating in a procurement proceeding if it had been validly sentenced for procurement-related offences.⁶⁰ Instructively, there is no restriction that the bidder must have been sentenced for a crime under the PPA. This means that a bidder who has been sentenced for any procurement-related crime under any other law can be excluded from participating in a procurement proceeding. Also, there is no requirement that the conviction be related to public procurement; the conviction could be related to crimes committed either in public or private procurement.

Second, a bidder may be excluded from participating in a procurement proceeding if he has been sentenced for any offence that was committed for the purpose of obtaining financial gain.⁶¹ Crimes that are committed for the purpose of obtaining financial gains are many. They include money laundering, human trafficking, drug trafficking and illegal oil bunkering.⁶² While some crimes, such as fraud and corruption, that are committed for the purpose of obtaining financial

⁵⁸ Swan and Manka (n 54) 135.

⁵⁹ Section 16(8) (d) of the PPA.

⁶⁰ Section 16(8) (d) of the PPA.

⁶¹ Section 16(8) (d) of the PPA.

⁶² See section 46 of the Economic and Financial Crimes Commission (Establishment, Etc.) Act of 2004. Williams-Elegbe (n 9) 31.

gains are closely connected with public procurement, especially because they involve dishonesty, others are not. It is difficult to establish any connection between human trafficking or drug trafficking and public procurement, although these crimes are also committed for the purpose of obtaining illicit profit. It appears the exclusion of a bidder on this ground is meant to reinforce the government's broader goal of fighting economic crimes.⁶³ This is in line with global best practices.⁶⁴ Apart from this, the participation of firms that have been convicted of economic crimes in the procurement process will undermine public trust in the integrity of the process.⁶⁵ It is submitted that the exclusion of such firms will engender public trust in the procurement process.⁶⁶

It is instructive that it is not sufficient for a bidder to have been convicted for any of the offences mentioned above; the bidder must have been sentenced. However, the type of sentence, custodial or non-custodial, that a court imposes on the convicted bidder is not relevant. However, the Bureau or a procuring entity must ascertain that such a bidder has been validly sentenced. This connotes that the criminal proceedings that culminated in the imposition of the sentence must not be defective. In other words, the trial court must have had jurisdiction to try and sentence the bidder. If the sentence imposed on a convict is *ultra vires* the court's jurisdiction, it cannot be the basis for excluding a bidder from participating in procurement proceedings. However, this article submits that the requirement of a sentence in this context instead of a conviction is superfluous since exclusion on this ground does not depend on the type of sentence that a court imposes on the convicted bidder. In line with global best practices,⁶⁷ this article recommends that the PPA should be amended to empower the Bureau or a procuring entity to exclude a bidder upon a conviction by a court.

Another thing worthy of note on this ground of exclusion is that the sentence is not restricted to those imposed by a Nigerian court.⁶⁸ Any firm that has been sentenced for procurement corruption or any other financial crime outside Nigeria can also be excluded from participating in

⁶³ Williams-Elegbe (n 9) 33.

⁶⁴ See article 57(1) (d)-(f) of the Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 (hereafter the Directive).

⁶⁵ Alison J "Combating Corruption and Collusion in UK Public Procurement: Proposals for Post-Brexit Reform" (2021) 84 *The Modern Law Review* 674.

⁶⁶ Dixon (17) 144.

⁶⁷ See article 57 (1) of the Directive.

⁶⁸ See section 16 (6) (e) of the PPA.

public procurement on this ground. Also, what the PPA requires is the sentence of a court and not the decision of an administrative body. Although the PPA does not state the meaning of a sentence, it can be described as “the judgment that a court formally pronounces after finding a criminal defendant guilty”.⁶⁹ In other words, a sentence in this context refers to a punishment that is imposed by a court on a person, natural or juristic, in a criminal case after its conviction. It does not include the decision of an administrative panel set up by a Multilateral Financial Institutions (MFI), such as the World Bank and the African Development Bank. Based on this, a firm that has been debarred by any of these institutions cannot be excluded from participating in procurement proceedings on this ground.

Over the years, a number of Nigerians and Nigerian companies have been debarred by MFIs.⁷⁰ Allowing such debarred entities to bid for public contracts or to be appointed as sub-contractors may cast a shadow on the integrity of the procurement process. Against this background, the article submits that any bidder that has been debarred by any of the MFIs for corruption, particularly in contracts executed in Nigeria, should also be excluded from participating in procurement in Nigeria during the operative period of its debarment by the MFI. This should be included as a ground of exclusion in the PPA.

Another weakness on this ground of exclusion is that it does not put any restriction on the number of years for which a firm may be excluded from participating in procurement proceedings because it had been sentenced for a procurement-related crime or an economic crime.⁷¹ The implication of this is that the bidder may be perpetually excluded from participating in procurement proceedings.⁷² To avoid this presumably unintended consequence, this article recommends that this ground of exclusion should be redrafted to state that a bidder who has been

⁶⁹ Garner *Black's Law Dictionary* (St. Paul, MN: Thomson Reuters, 2009): 1485.

⁷⁰ See “World Bank, AfDB Blacklists over 70 Nigerian Companies” (Africa Launchpad, 10 August 2020) available at [World Bank, AfDB Blacklists Over 70 Nigerian Companies | Africa Launch Pad](#) (visited on 7 May 2021).

⁷¹ Williams Sope “Coordinating Public Procurement to Support EU Objectives – a First Step? The Case of Exclusions for Serious Criminal Offences” in Arrowsmith & Kunzlik (eds) *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions* (Cambridge, Cambridge University Press, 2009) 495.

⁷² Williams (n 72) 495.

sentenced within the last ten years for a procurement-related offence or any other crime may be excluded from participating in a procurement proceeding.⁷³

4.4.1.4 A bidder whose director or owner has been sentenced for either a procurement-related crime or a financial crime

A bidder may also be excluded from participating in procurement proceedings where its owner or any person who is a part of its management has been validly sentenced for committing an offence related to procurement proceedings or for any offence committed for the purpose of obtaining financial gains.⁷⁴ This ground of exclusion is similar to the one discussed above, but it differs from it. On the one hand, this one relates to the sentence imposed by a court on a natural person who owns or manages a firm that submits a bid in a procurement proceeding. On the other hand, the previous one deals with a sentence imposed on a firm and not the person who owns, controls or manages it. It is submitted that the exclusion of a bidder on this ground is to prevent persons convicted of and sentenced for a procurement-related offence or offence related to financial gain from hiding under the identity of a new company to evade the consequences of their crimes.⁷⁵ As an abstract entity, a firm or a company cannot commit a crime without a human agent. It is the owner or management of a firm or a company that can use it as a vehicle for corruption or fraud. Thus, excluding a bidder on this ground is both a proactive and preventive measure.⁷⁶

Just like the previous ground of exclusion, the exclusion of a bidder on this ground can be divided into two. First, a bidder could be excluded from participating in a procurement proceeding if its owner or any of its directors had been validly sentenced for a procurement-related crime. In this instance, there is no requirement that the owner or director of the firm must have been sentenced for a crime under the PPA. This means that a bidder whose owner or director has been sentenced for any procurement-related crime under any other law can be excluded from participating in a procurement proceeding. Also, there is no requirement that the conviction must be related to public procurement. This implies that a bidder may be excluded from participating in a procurement proceeding if its owner or director has been convicted of

⁷³ This is the position in Ghana. See section 22 (1) (e) of the Public Procurement Act, No 633 of Ghana. See also article 9 (2) (f) of the UNCITRAL Model Law.

⁷⁴ Section 16(8)(f) of the PPA.

⁷⁵ Williams-Sope (2006) at 17.

⁷⁶ Williams-Sope (2006) at 17.

procurement-related or economic crimes committed either in public or private procurement. Second, a bidder may be excluded from participating in a procurement proceeding if its owner or director has been sentenced for any offence that was committed for the purpose of obtaining financial gain.

It is not sufficient for the owner or director of the bidding to have been convicted for any of the offences mentioned above; such a person must have been sentenced. As stated before, the requirement that this person must have been sentenced before his firm could be excluded from participating in procurement proceedings is superfluous. The word 'sentenced' in this provision should be replaced with 'convicted'. Similarly, the sentence is not restricted to those imposed by a Nigerian court.⁷⁷ A bidder may be excluded from participating in a procurement proceeding if its owner or director has been sentenced for procurement corruption or financial crime outside Nigeria. Also, it is important to point out that the PPA requires the sentence of a court and not the decision of a disciplinary body. The decision of an administrative panel set up by an MFI debarring an individual does not apply. Against this background, the article recommends that any firm whose owner or director has been debarred by any of the MFIs for corruption, particularly in contracts executed in Nigeria, should also be excluded from participating in procurement in Nigeria during the operative period of the debarment. This should be included as a ground of exclusion in the PPA.

Again, like the previous ground of exclusion, the PPA does not put any restriction on the number of years for which a firm may be excluded from participating in a procurement proceeding because its owner or director has been sentenced for a procurement-related crime or an economic crime.⁷⁸ The implication of this is that a firm that is owned or controlled by a person who is sentenced for a procurement or financial crime may be perpetually excluded from participating in procurement proceedings.⁷⁹ This provision should be redrafted to state that a bidder whose director or owner has been sentenced within the last ten years for a procurement-related offence or any other crime may be excluded from participating in a procurement proceeding.

⁷⁷ See section 16 (6) (e) of the PPA.

⁷⁸ Williams (n 72) 495.

⁷⁹ Williams (n 72) 495.

4.4.1.5 Failure to submit a statement on potential conflicts of interests

Like the Model Law, a bidder may be excluded from participating in a procurement proceeding on the basis of conflicts of interest. The PPA imposes an obligation on a bidder to disclose to the procuring entity if its subsidiary or parent company is also participating in the procurement proceeding.⁸⁰ Also, a firm with a relationship with the officials of a procuring entity, the Bureau, or any other representative of the procuring entity must disclose such a relationship.⁸¹ Failure to do so makes it liable for exclusion. A bidder may be excluded from participating in procurement proceedings if it fails to disclose any real or likely incidence of conflict of interest between it and other parties in the procurement process.⁸² Apart from this, the PPA also provides that any person who has been engaged in the preparation for a procurement or a part of a procurement proceeding may not bid for the award of the contract, either as a contractor or subcontractor.⁸³ In addition, such a person may not cooperate in any manner with bidders when they are preparing their tenders.⁸⁴ The purpose of these provisions is to prevent conflict of interests.

4.4.1.6 An insolvent bidder or a bidder in receivership

One of the requirements for a firm to participate in a procurement process is that it must have the financial capacity to carry out the contract,⁸⁵ must not be in receivership, insolvent, bankrupt, or must not have made compromises with creditors.⁸⁶ This is important because a bidder in any of these situations will not have the financial capacity to execute a contract.⁸⁷ Moreover, there is a risk that such a firm may use the public funds paid to it to execute a contract to settle its creditors. Hence, in order to avoid this and prevent a delay in the execution of contracts because of the financial incapability of the contractor, the PPA empowers the Bureau or a procuring entity to exclude a bidder that is in receivership or against whom an insolvent proceeding has been brought against in a court.⁸⁸ It is submitted that the exclusion of a bidder on this ground does not have any direct anti-corruption objective.

⁸⁰ Section 16(8)(g) of the PPA.

⁸¹ Section 16 (6)(f) & (8) (g) of the PPA.

⁸² Section 16(8)(g) of the PPA.

⁸³ Section 16(24) of the PPA.

⁸⁴ Section 16(24) of the PPA.

⁸⁵ Section 16(6)(a)(ii) of the PPA.

⁸⁶ Section 16(6)(c) of the PPA

⁸⁷ Arrowsmith (n 8) 4.

⁸⁸ Section 16(8) (c) of the PPA.

4.4.1.7 Failure to pay tax and other similar charges

A bidder that defaults on paying taxes, charges, pensions, or social insurance contributions may also be excluded from participating in procurement proceedings.⁸⁹ The exclusion of a bidder on this ground relates to the failure of the bidder to meet one of the criteria required for it to participate in a procurement proceeding.⁹⁰ This implies that the PPA is used to ensure contractors comply with laws with respect to tax, pension or social insurance contributions.⁹¹ This is commendable, as a contractor who defaults on its tax obligation should not derive any benefit from public funds by being awarded a contract. However, a defaulting bidder may not be excluded from participating in a procurement proceeding if it obtains a lawful permit from the appropriate authority deference on such overdue payments or permission to pay by instalments.⁹² This paper submits that the exclusion of a bidder on this ground does not have a direct anti-corruption objective.

4.5 Other flaws in the provisions of the PPA on exclusion

Apart from the flaws that have been identified in the analysis of the grounds of exclusion, the provisions of the PPA on exclusion have some other flaws which undermine their effectiveness. One such flaw is that the power of procuring entities and the Bureau to debar erring bidders is discretionary, and the PPA does not provide guidelines on how this discretion should be exercised. This makes it prone to abuse. In most jurisdictions, the grounds on which a bidder may be excluded from participating in procurement proceedings are often divided into two: mandatory and discretionary grounds.⁹³ Procuring entities are mandated to exclude bidders from participating in public procurement for corruption and financial crimes-related grounds,⁹⁴ while exclusion for infractions that are not related to corruption is discretionary.

In light of this, this paper proposes that the grounds on which erring bidders could be excluded from participating in procurement proceedings in the PPA should also be divided into two. It should be mandatory for procuring entities to exclude bidders from participating in procurement

⁸⁹ Section 16(8) (d) of the PPA.

⁹⁰ Section 16 (6) (d) of the PPA.

⁹¹ Williams-Elegbe (n 9) 31.

⁹² Section 16(8)(d) of the PPA.

⁹³ For example, Ghana, Kenya and Sweden. See chapter 12, section 4 of the Swedish Public Procurement Act.

⁹⁴ The bidders can show that it has taken steps to right the wrong and reformed their operations

proceedings for corruption-related issues, while exclusion for grounds not related to corruption should continue to be discretionary. Another flaw in the provisions of the PPA on exclusion is that it does not state the procedure that procuring entities or the Bureau should follow in excluding erring bidders from procurement proceedings. To promote fair hearing and due process in the exclusion of erring bidders, this article advocates that the procedure that procuring entities and the Bureau must follow before a bidder could be excluded from participating in procurement proceedings should be stated in the PPA.

5. Concluding remarks and recommendations

This paper established that the provisions of the PPA on exclusion are, to a large extent, the same as those of the Model Law. It submits that if effectively enforced, they can prevent and combat corruption in the procurement process. Also, it identified the weaknesses in the provisions of the PPA on exclusion, which may hamper its effectiveness. With a view to addressing these weaknesses, this paper makes the following recommendations. First, the grounds of exclusion should be classified into two: mandatory and discretion. In line with the Model Law, it should be mandatory for a procuring entity and the Bureau to exclude bidders on corruption-related grounds, while the exclusion on the grounds that are not directly related to procurement corruption should continue to be discretionary. Specifically, any bidder who offers or promises to give a bribe with a view to manipulating a procurement proceeding should be mandatorily excluded.

Similarly, the conviction of a firm or its director or owner for corruption and financial-related crimes should also be classified under the mandatory grounds of exclusion. However, the disqualification of such a firm should be limited to not more than ten years after its conviction or that of its director or owner. Also, it should be mandatory for the procuring entity and the Bureau to exclude a bidder from participating in procurement on the basis of a conflict of interests, especially if it cannot be resolved. To promote transparency and accountability in the exercise of such discretion, if a procuring entity or the Bureau decides not to exclude the bidder for contravention of discretionary grounds of debarment, the procuring entity or the Bureau must state the reason for doing so in its records.

Second, the provision of the PPA on exclusion should be amended to mandate procuring entities and the Bureau to exclude any firm or a firm whose owner or director has been debarred by MFIs

for contracts executed in Nigeria from participating in procurement proceeding during the operative period of its debarment. Third, the PPA should state that in determining whether a bidder poorly executed previous contracts, the procuring entity and the Bureau may use an audit report prepared by the Bureau or the auditor-general of the federation. Fourth, the procedure that procuring entities or the Bureau must follow in excluding erring bidders should be stated in either the PPA or the Procurement Regulations.