

Due Process Compliance in Capital Projects Execution In Tertiary Institutions In Southwest Nigeria

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Abstract

The study is an exploratory study of Project execution within tertiary institutions in the southwest part of Nigeria. It specifically has as its focus the role of due process in projects handling in the selected educational institutions. Part of the concern of this study is to bring to the fore the roles being played by the due process mechanism in the timely completion and abandonment of capital projects in educational institutions since the inception of due process in the award of construction projects in the country. A total of 15 tertiary educational institutions that are under the control of the federal and state governments in Nigeria were considered for this study. From these institutions, 74 completed, on-going and abandoned building projects were studied. The findings revealed that though due process mechanisms were observed in the award process, many of the projects were either completed off time schedule and above cost estimate or abandoned out rightly due to lack of promptness in bid evaluation, contract award and certificate honouring, lack of compliance with due process provisions on advance payment deduction form valuations, fraudulence and corrupt practices in bid analysis and evaluation among others. The paper concludes by stressing the need for sincerity in the implementation of due process mechanisms by all concerned.

Keywords: Due process, construction cost, practical completion, building project, tertiary institution

Introduction

In Nigeria, the relatively long period of military rule had almost eroded the basic economic structures that had been developed since independence. Consequently, the Obasanjo administration was faced with the task of seeking ways of reversing the trend of decadence in the nation. At the inception of his government in 1999, the president emphasized that his administration had adopted transparency, equity, justice and accountability as its guiding principles and policy imperatives. These principles are to ensure commitment to public policies and good governance (Nwankwo, 2004). This is premised on the fact that the country has gone through all the phases of business cycle-decline over the years such as depression (recession), recovery and boom. In the case of the boom, each of such booms came and disappeared without being linked to the real sector, no significant restructuring and transformation of the economy took place since then and none of the benefits associated with the booms was maximized.

Nigeria, especially since the early 80s has been confronted with a magnitude of economic problems. These economic problems, in brief, include stagnant growth, rising inflation, unemployment, food shortage and mounting external debt. Nigeria therefore like most other nations, has been battling with how to achieve its major economic objectives of full employment for the citizenry, price stability, economic growth and healthy balance of payments. Series of factors have been identified as responsible for the inability of Nigeria as a nation in realizing the above objectives. These factors include (1) Poor Performance of the preferred sectors (Agriculture and Manufacturing sectors). These sectors are not doing well because of the following reasons (a) Unwillingness of investors to invest in our manufacturing sector due to political instability (b) Misplacement of Priorities (c) Shortage of Basic infrastructural amenities and utilities (d) Problems of raw Materials. Other factors responsible for realization of major economic objectives in the country are (2) Over dependence of Nigerian Economy on a single commodity i.e. oil (3) Management problems (4) Social problems (5) Inadequate statistical data for policy formulation (6) Inadequate infrastructural amenities (7) Gaps in the judicial and law enforcement agents (8) Lack of effective implementation policy (9) Lack of enabling environment. Corruption was equally noted as constituting the base of these problems. Prior to 1999, Nigeria had practically institutionalized corruption as the foundation of governance. Hence institutions of society easily decayed to unprecedented proportions as opportunities were privatized by the powerful. This process was accompanied, as to be expected, by the intimidation of the judiciary, the subversion of due process, the manipulation of existing laws and regulations, the suffocation of civil society, and the containment of democratic values and institutions. Power became nothing but a means of accumulation and subversion as productive initiatives were abandoned for purely administrative and transactional activities. The legitimacy and stability of the state became compromised as citizens began to devise extra-legal and informal ways of survival (Obasanjo, 2004). The need to address these ugly trends underscores an urgent call for Procurement Reforms and enthronement of Due Process in the Nigerian public Sector. In 2001, the Federal Government issued New Policy Guidelines for procurement and award of contracts in Government Ministries/Parastatals. Public Procurement as a business process within a given political system has capacity to ensure distinct considerations of integrity, accountability, national interest

and effectiveness. These business operations of government, as controlled by public procurement, usually affect many different elements of society. The procuring entities for instance have needs for material support like roads, hospitals, etc. to help in fulfilling their designated national mission (Ekpenkhio, 2003). The business communities of actual or potential suppliers on the other hand need to satisfy government procurement requirement. There are also other interested parties like professional bodies, various agencies, interested public, etc who are all affected or influenced in one way or the other by public procurement.

Due Process implies that governmental activities and businesses can be carried out openly, economically and transparently without favouritism and corruptible tendencies (Ezekwesilli, 2004a). The essence of this is to ensure that rules and procedures for procurement are made in such a way as to be implementable and enforceable. It is hoped that this Due Process should put an end to “the Business as Usual Syndrome” in Nigeria. Due Process is a mechanism that certifies for public funding only those projects that have passed the test of proper implementation packaging and that adhere stringently to the international competitive bid approach in the award process (Ezekwesilli, 2005; Obasanjo, 2003). The expectation is that improved Public Procurement systems would have a beneficial effect on economic condition of the nation (Ezekwesilli, 2005).

Due process is a new reform or policy in procurement or bid for government contracts to restore openness, transparency, competence, best practices, efficiency and value for money. Before Nigerian attained democracy in 1999, there was no hard rules in awarding contracts at any level both local, state and federal government levels. There was low productivity in the construction industry. Also, micro-economic policies had been highly circumscribed by inefficiency, highly volatile and unsustainable public sector spending. However, to prevent or to eliminate favoritism, nepotism, corruption and to encourage hard work, productivity and innovation, the government has transformed the process by which companies have to bid for government contracts. The Budget Monitoring and Price Intelligence Unit (BMPIU) now Bureau of Public Procurement (BPP) was created in 2001 to implement public procurement Reforms as one of the transparency pillars in the overall Federal government economic reform programmes. From all available records and statistics, the management of the nation’s abundant resources was shrouded in mystery and secrecy, the nation has the years witnessed corruption, conflicts, misrule and misery. People were kept in the dark on the issues that naturally would have concerned them. This made it impossible for Nigerians (182 millions people) to benefit from their natural resources towards the development and growth of their economy. The people lost confidence in government activities for they were done in secretary and this brings corruption according to transparency international sources is a major cause of poverty.

Esenwa (2004) highlighted eight (8) major defects of previous procurement systems which include (a) Lack of efficient and effective project monitoring aimed at ascertaining compliance with original project plans and target; (b) Budget proposals from ministries/parastatals are unrelated to justifiable needs; (c) Budgetary processes lacked up to date plans, in-fact it was simply wish list officials; (d) There is lack/or absence of economic cost/benefit analysis of projects; (e) There is lack of competition and transparency in project procurement leading to high cost of projects and where advertisement was made, the applicable rules were titled in favour of a predetermined winner; (f) Projects were not prioritized and harmonized, consequently several ministries were pursuing supposed needs simultaneously; (g) Unjustifiable gap exit between budget and actual fund release leading to underfunding thereby leading to delayed completion, price fluctuation and project abandonment; (h) Preference for new projects at the expertise for refurbishment and completion of existing projects.

The idea behind the creation of the BMPIU popularly called “Due Process” was aimed at curbing open abuses of rules and procedures in the award and execution of public contracts at all levels of government. These abuses were evidence in inflation of cost, award of contracts to friends, relations and associates with little or no regards to merit, competence, effective completion and other public priorities. Public funds were diverted to private pockets through proliferation of white elephant projects and creation of ghost contracts. This situation was a source of poor image for the country which also created all kinds of credibility problems for mode of awarding contracts.

The budget monitoring and price intelligence unit in the last few years have pursued aggressively a robust procurement reform programme designed to restore the nation to a business friendly environment where only the best in term of quality, cost and prompt services as regards the completion period/practical completion in all procurements are good enough.

In spite of all these laudable and robust procurement reform programme of BMPIU, many capital and education tax fund (ETF) projects in various tertiary institutions were still not completed on schedule, within cost estimates or out-rightly abandoned. It is therefore become necessary to investigate the working of the BMPIU on the management of capital and ETF projects in the south western Nigeria which is a good representation of the population of tertiary institutions in the country.

Due Process Mechanism, Objectives and Emergence in Nigeria

The Obasanjo-led administration set up the BMPIU in June 2003 that commenced a process of contract award review, oversight and certification commonly referred to as “Due Process”. It is a simple mechanism that certifies public funding only for those projects that have passed the test of proper project implementation packaging. Such packaging must have adhered stringently to the international competitive approach in the award process. Through the instrument of certification value for money is once again returning as the fundamental premises for public expenditure. The BMPIU is being run as operational independent body. The staff comprises of experts with a bias for project management, building construction and procurement (Olaleye, 2006). The unit was designed to act as the clearing-house for all government contract and procurement of goods and services (Wahab, 2006)

Goal and objectives of BMPIU

The goal of BMPIU is to ensure full compliance with laid down guidelines and procedures for the procurement of capital and minor capital projects as well as associated goods and services. Its objectives include: (i) Harmonization of existing government policies/practices and update same on public procurement (ii) To determine whether or not due process has been observed in the procurement of services and contracts (iii) To introduce more honesty, accountability and transparency into the procurement process (iv) To establish and update pricing standards and benchmarks for all supplies to government (v) To monitor the implementation of projects during execution with a view to providing information on performance, output and compliance with specifications and targets (vi) To ensure that only projects which have been budgeted for are admitted execution.

Implementation Strategies: In the full realization of BMPIU goal and objectives, the organization operates within the specified guidelines, which include (a) Regulatory Functions (b) Certification Functions (c) Monitoring Functions, (d) Bid Evaluation (e) Contract Award (f) Notice of Award (g) Advance Payment (h) Retention. Each of these according to their expectation are hereunder enumerated:

Regulatory Functions: To regulate and set standards, including the enforcement of harmonized bidding and tender documents.

- i. To formulate the general policies and guidelines related to public sector procurement.
- ii. To develop, update and maintain a related system wide database and technology.
- iii. To undertake procurement research and survey in order to determine information needs and project costing.
- iv. To enforce professional ethics and sanction erring officers professionals.

Certification Functions: The unit certifies all federal-wide procurements under the following guidelines:

- i. Resident due process team certification for projects below N50 million.
- ii. Full due process certification for a projects above N500 million at various stages such as “Contract Award Certificate” and “Payment Certificates”

Monitoring Functions: The specific expectations of these functions are:

- a) To supervise the implementation of established policies.
- b) To monitor the prices of tendered items.
- c) To perform procurement audits.
- d) To undertake the monitoring of capital projects that has exceeded 50% of contract sum before release of further funds.
- e) To document all projects at award and completion stages, and publish same in designated journals.

Bid Evaluation: It is required to keep bids valid for a specific period to allow the Procuring Entity to examine and evaluate them, select the lowest evaluation bid, obtain the necessary approval from different authorities. Thus bid evaluation shall be undertake expeditiously leaving ample time to seek all the requisite formal approvals. Hence bids shall be evaluated within the period specified in the agreed time schedule that the Procurement Time Schedule. To enable the procuring entity to award the contract within such bid validity period after carrying out the other procedures, it is required that Technical Evaluation Committee should complete the evaluation report generally within 50% of the bid period.

Where there is a delay in bid evaluation so that above requirement is unlikely to be achieved, the procuring entity with the concurrence of the respective procurement committee shall request the bidders to extend the period of bid validity of their bids. However, when such a request is made in the case of fixed-price bids, bidders have to choose between (a) Refusing to grant extension of bid validity of their bids: and (b) Absorbing any cost increases that might occur during such extension (bidders are not allowed to increase their bid prices as a

condition of extending the validity of their bids). Due to the above reasons a bidder who has submitted a low bid may refuse to extend their bid validity resulting in additional cost to the Procuring Entity. Hence the extension of bid validity should be requested only under exceptional situation.

Contract Award: According to BMPIU, a contract shall be awarded to the contractor/tendered whose offer is substantially responsive to the Tender Document and that has been determined to be the lowest evaluated Tender provided that the Tender is determined to be qualified to perform the contract satisfactorily.

Notice of Award: Prior to the expiration of the period of Tender validity the employer shall notify the successful tender, in writing that it's tender has been accepted. Until a formal contract is prepared and executed, the Notice of Award shall constitute a binding contract.

Advance Payment: If so specified in the Special Condition of Contracts (SCC), the employer shall make advance payment on the Contractor in the amounts and by the dates stated in the SCC against provision by the Contractor of an Unconditional Bank Guarantee in a form and by a bank acceptable to the Employer in an amount equal to the advance payment. The Guarantee shall be progressively reduced by the amounts repaid by the Contractor. Interest will not be charged on the advance payment. The Contractor is to use the advance payment only to pay for Equipment, Plant, Materials and mobilization expenses required specifically for the execution of the Contract. The Contractor shall demonstrate that the advance payment has been used in this way by supplying copies of invoices or other documents to the Employer.

The advance payment shall be repaid by deducting proportionate amounts from payments otherwise due to the Contractor, following the schedule of completed percentages of the Works on a payment basis. No account shall be taken of the advance payment or its repayment in assessing valuations of work done, variations of work done, variations, claims or any amount payable due to failure to complete.

Retention: The employer shall retain from each payment due to the contractor the proportion stated in the SCC until the completion of the whole of the works. On completion of the whole of the works, half the total amount retained shall be repaid to the contractor (first moiety), the remaining half (second moiety) when the defects liability period has passed and the Engineer/Architect has certified that all Defects notified by the Engineer/Architect to the contractor before the end of this period have been corrected a certificate of completion of making good all defects issued to the contractor.

Research Methodology

On-going and completed capital projects in tertiary institutions in the Southwest Nigeria viz-a-viz Ekiti Lagos, Ogun, Ondo, Osun, and Oyo states were the focus of the study. On-going and completed capital projects in the past five years since the inception of BMPIU 2003-2006 were investigated through the physical planning units and works and services departments of the selected institutions. The condition of award and due process provision compliance were duly investigated. A total number of 15 tertiary institutions in the selected states were under-studied. Their breakdown is as shown in table 1.

Table 1: States and Number of Institutions Studied

S/N	Location/ State	Ownership Status and Number in the State		Number Studied	Percentage Studied
		Federal	State		
1	Lagos	2	2	3	20.00
2	Ogun	2	1	3	20.00
3	Oyo	1	1	2	13.33
4	Osun	2	1	3	20.00
5	Ekiti	1	1	2	13.33
6	Ondo	1	1	2	13.33
	Total	9	7	15	100.00

A total of one hundred and twenty (120) questionnaires were administered on respondents comprising staff of the physical planning units (45); works and services department of the selected institutions (45), contractors (15) and consultants (15) on the projects. On-going, competed or abandoned projects as at the time of this study were investigated (see table 2). Tender processes that ushered in the contractors handling the projects were scrutinized. The actual cost/completion time of the projects were compared with estimated costs and completion periods. For ethical reasons, no specific issue is being linked or traced to any of the institutions under focus in

this work. At the same time, effort was made not list the names of the tertiary institutions considered within the states of southwest geopolitical zones of Nigeria.

Table 2: Number of projects considered in the studied institutions

S/N	Location/ State	Number of Institutions	Total Number of Projects Executed	Number of Projects Studied
1	Lagos	3	25	12
1	Ogun	3	20	15
3	Oyo	2	15	11
4	Osun	3	22	18
5	Ekiti	2	15	10
6	Ondo	2	12	8
	Total	15	109	74

Results and discussion`

Of all the tertiary institution enumerated almost everyone of them was included as the study site, exempt in Lagos State where only 3 out of the available institutions were considered due to the need for time and resources management. The tertiary institutions in Lagos State have the highest number of projects being executed as at the time of this study, this was followed by Osun and Ogun States (see table 2). However, Osun State has the highest number of projects being considered for study. The main reason behind this is the proximity factor. Ondo State has the least of the number of projects being considered for study.

Table 3: Contract Awards and Tendering Processes

Whether contracts were Awarded under Due process	Yes (%)	No (%)	Total
Whether the contractors were Pre-qualified	120 (100%)	-	120
Whether there was Tender process before Contracts Award	120 (100%)	-	120
Contract Awarded to Lowest bidder	79 (66.2%)	41 (33.8%)	120
Contracts Awarded to lowest bidder within (-) 10%	41 (33.8%)	79 (66.2%)	120
Contracts Awarded too highest bidders	-	120	120

It was observed that the contracts were awarded through due processes of pre-qualification, tendering and analysis. Many of the contracts (66.2%) were awarded to the lowest bidder and (33.8%) were awarded to lowest bidder within - 10% as shown in the table above.

Table 4: Project Cost and Contract Completion

Level of Completion Cost and Duration	Frequency	Percentage
Completed within cost estimate and time schedule	33	27.0
Completed outside cost estimate and time schedule	63	52.7
Abandoned	24	20.3
Total	120	100.0

Majority of the projects (52.7%) according to table 4 were completed after the completion dates and with cost overrun, 27% were completed on schedule and within cost estimate. About 20.3% of the projects were abandoned. The implication of this is that there are still holes in the due process mechanisms. Bid valuation may have been done to favour some of the contractors that were awarded the contracts or their rates were ridiculously low compared with what is generally obtainable from the market this notwithstanding they were awarded the contract because they were the lowest bidder.

Table 5: Source of Project Financing

Source of finance	Frequency	Percentage
Internally generated fund	24	20.3
Education Tax Fund	31	25.7
Capital Grant	65	54.0
Total	120	100.0

Capital grant (54%) formed the major source of project financing in virtually all the institution being studied; this was followed by financial assistance from the Education Tax Fund (25.7%) and internally generated fund (20.3%).

Table 6: Contractors' of Advance Payment for Projects Financing

Contractors' disposition to advance payment	Frequency	Percentage
Collected advance payment before mobilization to site	107	89.0
Mobilization to site without advance payment	13	11.0
Total	120	100.0

Most of the contractors (89%) that handled 74 projects under focus in this study collected advance payment after provision of the advance payment due to guarantee from reputable banks while only 11% of the contractors mobilized to site without any mobilization fee. Those who opted out from being mobilized may have been discourage by unnecessary administrative bottleneck of the banks and mode of deduction of the advance payment by the clients in which 100% of the advanced payment is deducted from the first valuation (see Table 6). Comparing table 4 and 6, some of the contractors who collected advanced payment also end up in abandoning the project due to the latter reason adduced above.

Discussion and Conclusion

Inference from this study revealed that bid evaluation period and the time to obtain necessary approval from different authorities dragged too long despite the fact that due process guidelines were followed in pre-qualification, tender and tender analysis, and award of contracts,. These erode the validity of the rates quoted against most of the key materials in the bid due to inflation. Time lag between tendering and contract award and mobilization to site of the contractors for some of the projects and tender were more than 12 months in many instances.

Information from all sources showed that virtually all the provisions of Bureau of Public Procurement were not adhered with. These include the positions (of the Bureau of public procurement on advance payment), that advance payment shall be repaid by the contractor by deducting proportionate amounts from the payments otherwise due to the contactor; following the schedule of completed percentage of the work on a payment basis; Not taking account of the advance payment or its repayment in assessing valuations of work done; variation of work done, various price adjustments, compensation events, Bonuses or liquidated damages. These provisions were observed not to be followed by most clients as the advance payment is deducted in whole from the first valuation. This tells greatly on the finances and liquidity of the company. Honouring of valuations was not done promptly and this hampered the cash flow of the contractors and unnecessary delay of work on site. In conclusion it is therefore obvious that delay in valuation honouring is a major factor which contributes to the delay of the project duration. This however negated the rationale for prioritization of due process in project initiation, processing and implementation. Failure on the part of the government of the day to look into these anomalies speaks volume of its sincerity about the policy. This revelation therefore affirms poor political will on the part of the government in the sustenance of 'promising' state policies in Nigeria. Going by the popularity the 'due process' policy generated at its onset and the subsequent setbacks like the one revealed in this study, it is obvious that fantastic policies in Nigeria are almost always ideological motives initiated to arrest the populace attention in order to smokescreen certain government agenda that may attract severe criticism from the public.

Social and Economic Importance of the Findings

The construction industry in Nigeria today as confirmed by Mshelbwala (2005) is characterized by a wide range of problems including high cost of procurement, substandard products, project collapse and abandonment. The general problem of construction industry in Nigeria have been traced to non-adherence to processes and procedures involved in the procurement system especially in the building industry that are physical in nature and capital intensive (Ayangade, et al., 2009). As a departure to these practices, various methods have emerged and used for procuring projects; some of the procurement methods have been amended and updated to form standards for client who intends to construct (BMPIU, 2005). With enforcement of due process, the current trends include reliance on the experience and advice of relevant professionals in the selection of a procurement method by the client and prevention of dual roles by the professionals on the same project. In the course of this, the clients will equally benefit from the wealth of experience of building contractors (Rowlinson, 1987).

Awareness has been created in the minds of the Nigerian populace about the necessity of Due Process thereby sensitizing, promoting and educating the public on public procurement issues and in area of organizing training and workshops to promote capacity building of public procurement personnel.

Inference into the findings of this study equally pointed out that the Due Process mechanism has the capability of bringing among other things the sanity to public procurement system in the country through the attainment of performance targets, such as ensuring sustainable participation by reputable, competent and reliable contractors; settlement of contract price at near marginal cost; faith by tenders in the tendering mechanism and value for money in projects execution and delivery. The mechanism will also go a long way to strengthen its functions such as regulating and setting standards to enforce harmonized bidding and tender documents; formulation of general policies and guidelines on public sector procurement and upholding professional ethics and reporting erring personnel amongst other statutory functions.

With its in-built mechanism for positive results, adoption of due process mechanism (for the execution of capital project when implemented properly) while complementing the position of Bamisile (2004) will go a long way to assist in the improvement of current procurement systems and by extension assist in improving the products of the industry and the image of the professionals.

It has the ability to infuse the needed fiscal discipline and sound economic principles to ensure transparency, accountability and rebuild public trust in governance by attacking the much abused processes in the past (Ezekwezilli, 2004b). The process therefore has what it takes to help put checks on the huge loss of public fund.

Recommendations

- ✚ Bid evaluation should be definite, prompt and fast tracked, devoid of corruption and fraudulent practice so that the right evaluated contractor could emerge within a reasonable time lag between tender and award.
- ✚ Valuation of progress of work should be carried out as at when due and interim certificate resulting from such valuation honoured without unnecessary delay. It should be made as part of the condition of contract that any employer that delays honouring of interim or final certificate should be made to pay interest on the amount of the valuation at the prevailing interest rate for such a period of delay as contained in the mechanism of due process.
- ✚ If delay in practical completion period of the project is caused by factors that can be attributed to the contractor, Bureau of public procurement recommendation of payment of a certain and calculated damages should be enforced as enshrined in the contract agreement.
- ✚ Advance payment repayment should be spread over the entire valuations of the contractors' duration to improve cash flow contractors.
- ✚ No contractor should be allowed to bid for a new project especially within an organization if such a contractor is yet to complete a project he is currently undertaking.
- ✚ The variation of contracts during the implementations stage cause very high burden on the procurement entity and to the government. It is advisable that the variation is limited to 10% maximum which can be taken care of by contingency provisions.
- ✚ Indigenous contracting firms should have in their teams qualified professionals in the construction industry viz-a-viz, Architects, Builders, Engineers etc before they are awarded contracts. The said professionals physically to discharge their roles in respect of the awarded contracts.

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