
The Antecedents and the Prospects of Public Procurement Regulation in Ghana

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Abstract

The development of Public Procurement regulation in Ghana culminating into the promulgation of the Public Procurement Act 663 has been traced in this paper. In 2003, Ghana promulgated the Act 663 to tackle public procurement corruption among other objectives. By means of a content analysis, a critical analysis of the Act 663 has been offered and a few changes have been suggested to improve its comprehensiveness, its capacity to ensure Transparency; its properties for Good management; its capacity to prevent misconduct, enable compliance and monitoring and its capacity to ensure Accountability, control and anti-corruption properties.

Keywords: Public Procurement Reform, Public Procurement Regulation, Crown Agents

1. Introduction

The need for some form of regulations to provide guidance on the procurement for the public sector of the country now known as Ghana has been recognised since the colonial era as clearly indicated by the historical analysis provided in this paper. In this review, the story has been told of the attempts at public procurement regulation in Ghana, the challenges associated with those attempts and the events leading up to the promulgation of the Public Procurement Act 663 (PPL). Some criticisms have been offered against the PPL whilst some recommendations have been proffered to improve it.

2. The Pre-Independence Public Procurement System

In the period before independence in 1957, the public procurement system of Ghana (then known as Gold Coast) followed the British colonial order in which the procurement of Goods, Works and Services in the colonies was under the thumb of Crown Agents (World Bank 2003a). Under that system, the Crown Agents were the sole agents for the procurement of goods, works and services for the British Colonial governors and administrators in the territories, protectorates, dependencies, mandates, and Crown Colonies then jointly known as the British Empire (Sunderland 2004).

The British Colonial Governors and Administrators were stationed long distances from the British Empire headquarters, London, in an era when the modern-day information and communication technology such as cellular phone, facsimiles and internet facilities were unknown. It therefore became convenient to appoint representatives to conduct the colonial business in London on their behalf. In those days the colonies were maintained in part with grants and the agents were authorised to receive and account for British Treasury grants to the colonies they acted for (Crown Agency 2011).

Later, the agency arrangements were legitimised through a formal appointment by the Crown, hence the assumption of the unofficial title of Crown Agents by the agents (Crown Agency 2011). The same agency arrangement empowered them to undertake financial transactions on behalf of such colonies. The Crown Agents were later restructured into a British public corporation. In this form and capacity, it was used by the colonial officials to handle the construction of infrastructural projects like ports, railways, roads and bridges under the colonialist's overseas development programmes (Sunderland 2007). In some cases, the Crown Agents arranged financing through loans, procured the services of consulting engineers for the design work, procured and shipped the required materials and machinery, and supervised the works as project managers on behalf of the colonial administration (Crown Agency 2011).

It is important to note that during these developments the colonial administrator had set up the Public Works Department (PWD) to which some of the responsibilities for procuring maintenance works had been delegated

(World Bank 2003a). Some procurement of maintenance works is still handled by the Public Works Department (PWD) under the auspices of the Ministry of Water Resources, Works and Housing.

With the Crown Agents in the saddle of public procurement, there was little wonder then that the formal procurement sector comprising suppliers, contractors, architects, quantity surveyors, engineers and related professionals were British dominated. In actual fact, in the pre-independence era, local procurement capacity particularly as regards Works was virtually absent. Consequently, according to Ahadzie (2010) the sector was almost totally in the hands of British companies during that period.

3. Post Independence Public Procurement Regime

The Crown Agents continued to provide its traditional procurement services in the post-independent Ghana particularly in the procurement of goods and services (Public Procurement Bill 2003). Indeed in the 1960s and 1970s its activities were expanded to include engineering consultancy, turnkey project management, and credit finance and fund management. The importance of the Crown Agents still resonates in the procurement system of Ghana as, according to Mr A. B. Adjei, a former Chief Executive Officer of Public Procurement Authority (PPA), they provide consultancy services for the PPA including the development of curricula and modules for training of procurement officials.

When Kwame Nkrumah was placed in charge of Government Business in 1951 he naturally attempted to address the lopsidedness identified by Ahadzie (2010). Eventually he formed the Ghana National Construction Corporation (GNCC) and charged it with the implementation and execution of public works as a mandatory requirement (World Bank 2003a). The GNCC was later rechristened as the State Construction Corporation (SCC) (Ahadzie 2010). Largely as a result of the indigenisation policy of Nkrumah's government at the time, the SCC blossomed and competed very well with foreign firms such that it successfully completed many major projects throughout Ghana (Ahadzie 2010). In its heydays the SCC could boast of its involvement in about 60 per cent of the public projects in Ghana which they had won through competition (Ahadzie 2010).

Later, the Ministry of Works and Housing became the source of qualification of contractors for works through a registration and classification system which critics now see as too general and obsolete. Despite this criticism, this classification system has post-dated the PPL as it is still a qualification requirement for contractors seeking to perform public works.

The Architectural and Engineering Services Corporation (AESC) was created in 1975 to deal with consultancy services. Until recently, the AESC, now incorporated under the Companies' code as Architectural and Engineering Services Limited (AESL) (1996), had the monopoly of providing the architectural consultancy and project supervision services for projects funded by the public as a mandatory requirement (World Bank 2003a).

In line with the indigenisation policy, Government reduced its dependence on the Crown Agents for procurement of goods gradually replacing it with a system of direct procurement through the Ghana Supply Commission (GSC) and later the MDAs (World Bank 2003a). The GSC was established in 1960 with the mandate to procure goods in bulk for all public institutions thereby effectively taking over the functions of the Crown Agents with regards to the procurement of goods (World Bank 2003a). The GSC became the Ghana Supply Company under the PNDCL 245 in 1990.

Also, the Ghana National Procurement Agency (GNPA) was established in 1976 by the SMCD 55 and was later incorporated under the Companies' code in 1995 as the GNPA Limited. It was established primarily for the purpose of importing "designated commodities" (Ghana National Procurement Agency Decree 1976), what in those days of scarcity were popularly called "essential commodities" in large quantities. It is important to note that the designated commodities were essentially consumer goods. The GNPA had the power to procure the designated commodities from any part of the world by direct purchase from producers or by means of the services of agents and advisers. These were then resold to Ghanaian consumers at controlled prices. The GNPA also procured bulk goods and supplies for the Ministries, Departments and Agencies (MDAs) and held buffer stock for national food security. By the authority of section 4 (3) of that Decree, the Agency was to "normally make purchases after the issue of invitations for competitive tenders and where it accepts any tender other than the lowest, it shall submit particulars thereof and reasons thereof to the Commissioner" (Ghana National Procurement Agency Decree 1976). Thus the GNPA law made a weak effort at introducing competition in the procurement for the public sector of Ghana. The effort was weak because it fell short of laying the ground rules for serious transparent and fair

competition, leaving a gaping room for the discretion of the Commissioner.

It is pertinent to note that the GSC and GNPA operated in accordance with a purchasing manual prepared for their use (World Bank 2003b). In addition, it is worth-mentioning that public institutions were required to use GSC, GNPA, GNCC and AESC, as the case might be, for public contracts (World Bank 2003a).

Earlier in 1967, the District, Regional and Central Tender Boards had been established as procurement advisory bodies to assist the political heads at the district, regional and the ministerial levels in carrying out their mandate as final decision makers on public procurement (World Bank 2003a). Then in 1996 the responsibilities of these boards were expanded to include approvals and award of contracts. In the Districts, this was given a legal backing by L.I. 1606 of 1995 which established the District Tender Board for each District to deal with procurement of works at the district level (Local Government (District Tender Boards) (Established) Regulations 1995; Parliament of Ghana 2003). A very interesting provision of the L.I. 1606 worth-noting is that which required members of the District Tender Boards to declare their assets on appointment and on the cessation of appointment (Regulation 4). This provision is interesting because it carried accountability in the public procurement system to a higher level unprecedented in the public procurement regulation in Ghana. Equally interesting is the fact that later attempts at regulation, even in the case of the PPL, never found the need to retain this all important anti-corruption requirement.

By and large public procurement placed overarching emphasis on developmental efforts to the almost exclusion of anti-corruption measures. This reinforces the widely held belief that, in the period immediately before the promulgation of the PPL, the public procurement environment in Ghana was polluted with several challenges accentuated by unmitigated corruption. Strangely enough, until Ghana was prompted by the World Bank to carry out reforms in 1996, no serious attempt had been made to do a comprehensive reform of the public procurement system that could checkmate corruption. There appeared to be neither the urgency nor policy priority for streamlining the public procurement system in Ghana.

4. The Era of Public Procurement Reforms in Ghana

4.1. What is Public Procurement Reform?

Public procurement reform is the systematic restructuring and reorganisation of the institutional and administrative processes for acquiring works, goods and services for the public sector using public policy, the law and regulation. Reform itself implies that what had been in existence did not meet the procurement goals and philosophy of the nation. Reforms therefore are designed to look at existing wrongs and weaknesses in the systems in the light of changing circumstances and come out with changes that are responsive to the new challenges. Public procurement reform means a change in which the past ways of doing procurement give way to a new and better system. The major focus is organizational, institutional and legal structures with the emphasis on changing from tradition to more efficient, effective, modernised and simplified processes, organizations, institutions and legal structures for doing the procurement business (Basheka 2009). Reforms mean changing the general features of the systems and making them responsive to modern needs and philosophy.

During reforms, systems with opacity are changed to allow for transparent ones, those lacking integrity are transformed to enhance integrity, where in the past responsibility for procurement actions could not be pin-pointed, clear principles of accountability now become the vogue, where there had been corruption, honesty now prevails and generally wrongdoing and weaknesses become exceptions rather than the rule. Public procurement reform is not a single activity. It is a process, implying continuous assessment and reviews.

4.2. The Need for Public Procurement Reforms

All over the globe and over the years, nations and international bodies have been concerned with how to modernise, simplify and improve public procurement practices using public policy and legal reforms (Schooner *et al.* 2008). The target of nations reforming public procurement systems has been to reap the associated reward of improved competition with the attendant efficiency and lowered contract costs (Bovis 2010; Elliott 2004). In particular, since the 1990's there has been a wave of reforms initiated in developing and developed nations alike in response to the plodding of such international bodies as the EU, the World Trade Organisation-Agreement on Government Procurement (WTO/GPA) of 1994, and its revised version, the World Bank and the Organisation for Economic Co-operation and Development (OECD) (Evenett & Hoekman 2003). Having linked the fight against

corruption in public procurement to economic development, these organisations have been encouraging reforms in public procurement systems, particularly in developing nations.

Consequently, they are united in their resolve to spearhead the establishment of internationally shared public procurement norms and guidelines and encouraging nations to set up appropriate legal framework reflecting best practices. Mainly due to the pressure, conditionalities and advocacy of these bodies, many countries have undertaken sweeping public procurement reforms in recent times. For example, arising out of the Uruguay round trade talks in 1995 the WTO now requires the inclusion of the WTO/GPA in the public procurement systems of member countries. Procurement reforms reflecting this have been made part of the conditions for membership of the WTO/GPA. Indeed, the EU requires public procurement reforms as a pre-requisite for being admitted into its membership (Trybus 2006).

Countries from East-Central Europe to the Balkans (Grødeland 2005), from Turkey (Alyanak 2007) to China (Fuguo 2006; 2007), from Sierra Leone to Uganda and from Morocco to the Republic of South Africa (Basheka 2009), have embarked on procurement reforms with the old order giving way to new regimes. Countries at varying levels of development, economies in transition, the middle income nations, developing world and even the rich nations are all pushing for reforms for various reasons but all are geared towards the need to improve public expenditure framework (Hunja 2003). Even the “Communist” China commenced the implementation of her first national law on tendering procedures in 1999 ahead of the implementation of the Chinese Government Procurement Law in 2003 (Wang 2008), became a member of the WTO in 2001 and although in expectation of formidable challenges (Wang 2007, 2009) has sought accession to the WTO/GPA (Osei-Lah 2010).

All these nations have varying justification for reforming their public procurement systems. The literature indicates differences in justification according to the characteristics of the nation carrying out the reforms. Hunja (2003) has identified and grouped countries that are reforming procurement systems into four categories using their levels of economic development as the basis. These are, economies in transition which have reformed to replace the largely centrally controlled, undemocratic, opaque procurement systems with a liberalised, market-based modernized transparent system; the middle income nations, whose reforms are part of the process of modernisation, accountability and efficiency; the industrialised nations who reform to account for such modern trends as the Public Private Partnership (PPP), the e-procurement and value for money concepts (Hunja 2003) and the developing countries

Ghana happened to belong to Hunja’s (2003) developing countries, at the point of public procurement reforms. At the inception of reforms, the procurement systems in the developing countries were largely similar to those bequeathed to them by colonial legacy. The developing countries had found out, mainly through the influence of development partners that it is essential to properly manage public expenditures judiciously. To do this, corruption in public procurement should be checked by means of reforms targeted at modernization. It is known, for example that Ghana saw the need to reform public procurement systems largely on the plodding of the World Bank in 1995 to improve its public expenditure systems. It is also a matter of fact that the momentous interest of donors (including the World Bank) in public procurement reforms in developing countries witnessed in recent years, is largely explained by their insistence on such reforms as conditions for development aid (Agaba and Shipman 2007). Indeed, they realized that the pre-reform systems were not appropriate for effective utilization of such aid.

The nature of public procurement systems in developing countries, making them particularly the subject of reforms has been discussed by Basheka (2009) who identified several areas of weaknesses in the public procurement systems of these countries that gave rise to the need for reforms. These included absence of rules governing the conduct of public procurement, lack of accountability, inappropriate institutional and administrative structures and arrangements, inadequate human resource capacity and lack of transparency. The net effect of all these weaknesses is uncontrollable public procurement corruption (Basheka 2009) leading to a situation where, the cost of public works, goods or services can be exaggerated beyond normal (Arnaiz 2009). Because of the threat posed by corruption to societies, reducing it has engaged the attention of all concerned including governments, international bodies, civil society organisations, trade associations and business organisations as a matter of priority (Sanyal 2005). Not even the advanced countries are spared. Consequently, a concerned OECD has declared that public procurement is a major risk area in the fight against corruption in the governments of its member states (OECD 2005; 2007; 2009).

It is pertinent to state that corruption had been cited as endemic and blameworthy for bad governance in many developing nations in general, and Ghana in particular (World Bank 2003a). Some Companies as much as individuals have claimed to have had various encounters with corrupt officials in Ghana who demand bribes for performing the jobs they are paid to do. Moreover, Ghana's performance on the Transparency International's who is who in corruption as measured by its Corruption Perception Index (CPI) for 2002-2004 is a testimony of a country that required anti-corruption therapy. Ghana managed a CPI score of 3.6, 3.3 and 3.9 in 2002, 2003 and 2004 respectively. She ranked 50th out of 102 in 2002, 70th out of 133 in 2003 and 64th out of 145 countries ranked in 2004.

A CPI score measures the degree of corruption as perceived by selected analysts and business people. The scores range between 10 (very clean) and 0 (very corrupt). The poor ranking could be a reflection of bad public procurement practices. Therefore, it was necessary that the Government, policy makers and academics took a keen interest in the issue of corruption in public procurement practices and its effect on economic development in Ghana. The natural course of action then was to reform the public procurement system and that culminated in the enactment of the PPL in 2003.

4.3. The Specific Challenges in the Public Procurement System of Ghana Which Made Reforms Imperative

At the point of the inauguration of the PPL a properly working public procurement system was considered very essential for the health of public finance in Ghana for real and good reasons.

From the year 1996 series of financial management and budget reforms were started under the Public Financial Management Reform Program (PUFMARP). The PUFMARP aimed at improving financial management through assurance of fiscal sustainability, discipline in public spending and the maximum utilisation of resources towards sustainability and financial discipline (Quist 2010). It was also to ensure transparency and accountability in public financial management and the public procurement reform was one of its major components (Alhassan 2006).

The Country Procurement Assessment Report (CPAR) carried out by the World Bank in 1996 had identified very serious deficiencies in the public procurement system to include "loose legal framework, lack of codified procedures and regulations, weak capacity of procurement staff, and unclear institutional and organizational arrangements for processing procurement and decision-making in award of contracts" (World Bank 2003a and Parliament of Ghana 2003).

Moreover, when a joint team of World Bank staff and consultants and the MOFEP conducted a Country Portfolio Performance Review (CPPR) in 2002, among its findings were, the absence of a clear public procurement policy, inadequate procurement planning, lack of transparent procurement procedures and defective contract management practices (World Bank 2003a). Furthermore, the CPAR of 2003 confirmed that as a result of systemic inefficiency, public procurement did not achieve value for money. The report also claimed that an improved procurement system could at least save for the country an estimated 25 % of the cost of procurement. The implications of this for the optimal utilisation of public funds for a developing country can be quite enormous. It is not surprising therefore that the government joined the increasing number of world leaders who were giving attention to the reforms of their public procurement laws and practices.

It is pertinent to note that in 2001 Ghana was a highly indebted poor country (HIPC) and that qualified the country to obtain various debt cancellations. Relieves obtained from cancelled debts were to be channelled through various poverty reduction programmes, which emphasised economic growth, investment in the public sector, infrastructure development, strengthening of governance and capacity building. All these could not be achieved under the old order of public procurement system. Government therefore needed reforms to provide a properly working public procurement system, aimed at strengthening procedures, empowered by a modernized regulatory framework and supervised by a well-resourced oversight body to render meaning and focus to its efforts in that direction.

The challenges, deficiencies and organizational weaknesses inherent in the public procurement system of Ghana, providing the justification and basis for reforms and the eventual promulgation of the PPL, succinctly stated in the memorandum accompanying the Public Procurement bill submitted to Parliament in 2003 and very well articulated in the Parliamentary debates which followed the laying of the Bill in Parliament (World Bank 2003b and Public Procurement Bill 2003), clearly confirmed the CPARs of 1996 and 2003. Indeed, both the memorandum and the debates recognised the PPL as an integral part of the PUFMARP initiated by the

Government in 1996 to correct identified shortfalls in the public financial management system in Ghana (World Bank 2003a and Parliament of Ghana 2003).

Specifically, the following areas of concern were clearly identified.

(i) Absence of a Uniform Public Procurement Institutional Framework

There was no institutional framework designed to carry public procurement business in an orderly, consistent and controlled manner. As a result, several procurement practices proliferated and blossomed. Moreover, no serious effort had been made to provide a comprehensive guidance on the scope and procedures of public procurement in Ghana. Procurement activities funded through the Government of Ghana budgetary allocations were regulated by the Ministry of Finance by means of circulars and these circulars complemented procedures (established through conventions) used to control procurement by the Ministry (Anvuur and Kumaraswamy 2006). Agencies partly funded by Government appeared to enjoy liberties with the choice of procurement practices they adopted. On the other hand projects under the World Bank and donor regimes used the World Bank and the donor-specific procurement guidelines and procedures respectively. With the array of partly funded Agencies, donors and development partners in the country this situation led to series of uncoordinated public procurement practices organised under loose structures.

(ii) The Absence of a Public Procurement Policy

The absence of a comprehensive and principles-based public procurement policy offered a serious setback for the procurement system (World Bank 2003b). To a large extent this was due to the absence of a central body with the appropriate capability and technical and professional expertise to assist in the development of a consistent public procurement policy (Public Procurement Bill 2003). As a result of this, uniform rules and regulations required to guide and monitor public procurement were generally not available.

(iii) Public Procurement Human Resource Capacity Gap

There existed a vast shortage of trained procurement professionals and this reflected in the general lack of professional input in the public procurement and contracting process. In the MDAs, projects were sometimes being managed by personnel who were not necessarily procurement professionals and therefore did not have requisite skills and expertise (Anvuur and Kumaraswamy 2006). Up to date, a major challenge in the public procurement system of Ghana is the absence of a capable procurement professional class in sufficient numbers to ensure efficiency in the procurement function.

(iv) Absence of a Comprehensive Public Procurement Regulatory and Legal Framework

There was no comprehensive legal and professional framework to regulate public procurement. Without a regulatory framework, rules and standards in the award and execution of public procurement contracts, the process could be abused. In the face of this omission, corruption in public procurement could not be effectively managed. Abuses had been alleged in rumours of inflation of contract costs and diversion of public funds through all kinds of alleged manipulations of the contract system. In some cases, as alleged, the abuses had found expression in the proliferation of white-elephant projects which were sometimes abandoned after huge amounts of public funds had been paid to contractors for mobilisation. In the midst of bad contract management practices corruption in public procurement was suspected to have thrived to a crescendo.

(v) Roles and Responsibilities of Public Procurement Stakeholders were not Defined

The absence of a comprehensive procurement law worsened by the non-existent professional set up to clearly define the roles and responsibilities of the participants in the public procurement system made it difficult to trace responsibilities and apportion blame for inefficiency and wrongdoing (Public Procurement Bill 2003). Where wrongdoing was suspected, there was neither an authoritative protest mechanism nor the basis to deal with complaints and grievances. In the absence of such a process, complainants, whistle blowers and aggrieved stakeholders had no means of receiving attention, redress or possible corrective remedies.

5. The PPL: A Product of the Public Procurement Reform in Ghana

As stated earlier, in 1996 the CPAR issued by the World Bank had recommended a comprehensive reform of the Ghanaian public procurement regime. The PPL is traceable to the recommendations of the International Procurement Legal Consultant, Gosta Westring, whose draft Public Procurement Bill, the product of a consultancy contract in 1997 following the recommendation of the 1996 CPAR (World Bank 2003a), formed the basic ingredient for the reforms. But the reform itself gathered momentum in 1999 after IDA credit facility under the Public Finance Management Technical Assistance Project was obtained. Thereafter, the Ministry of Finance and Economic Planning (MOFEP) set up a committee, named Public Procurement Oversight Group (PPOG), to oversee the reforms and appointed a team of procurement Consultants to submit a proposal for procurement reforms in Ghana (World Bank 2003a). The report of the consultants, Procurement Reforms Proposal (PRP), was reviewed and approved by the PPOG. The PRP formed the basis for the draft Public Procurement Bill which was subsequently submitted to Parliament in 2003 for enactment.

The PPL, passed in 2003, was an attempt to resolve some of the challenges identified. It brought together all previously existing but isolated public procurement guidelines into an all purpose set of World standard procurement rules, regulations and procedures to be followed in public procurement all over the country.

The PPL represents a legal and institutional framework that can be deployed to infuse integrity into the public procurement system of Ghana despite identified challenges. The OECD has recognized the implementation of this law as a good step in the fight against public procurement corruption in Ghana (Global Advice Network 2011). Almost all the general features and the contents of an effective procurement law, quite consistent with standard legislative framework, are addressed by the PPL. It is a separate body of law, representing a detailed regulatory and legal framework designed to regulate public procurement at the central government, regional and district levels. The law is published and easily accessible to the public at no cost. It appears clear, comprehensive and consistent with almost all the essential features of a standard public procurement law covering such essential topics as scope of application and coverage of the legislative framework, Procurement structures, methods and procedures, Advertising rules and time limit, Rules on participation, Tender documentation and technical specifications, Tender evaluation and award criteria, Submission, receipt and opening of tenders, Complaints, Model tender documents for goods, works, and services, Procedures suitable for contracting for services, General Conditions of Contracts (GCC) for public sector contracts covering goods, works and services consistent with national requirements and, when applicable, international requirements (Osei-Afoakwa 2012).

Despite the glowing tribute to the capabilities of the PPL, its capacity to reduce corruption in procurement has been questioned and debated. Some critics have claimed the law to be inadequate. There still exists suspicion that, participants in procurement processes do not have confidence in the capacity of the law in ensuring integrity and preventing corruption in the public procurement process. Similarly, rumours and allegations rage unabated about corruption in tender processes some years after its promulgation. From anecdotal observations by some critics, they argue that the law is not hard enough on corruption and that it appears not to have been designed with the prevention and detection of corruption in mind. To provide an answer to this, this writer carried out an empirical study in 2011 to find out whether the PPL has the potential to enhance the integrity of the public procurement system of Ghana and can resist public procurement corruption (Osei-Afoakwa 2011-Unpublished Doctoral Thesis).

From the findings of this research, it is now known that, the PPL has public procurement integrity-enhancing and corruption-resisting potential. It exhibits a good number of the properties of legal framework designed to enhance public procurement integrity and resist corruption. It has the capacity to ensure transparency, good management and prevention of misconduct in the public procurement system. It is also designed to ensure compliance with the law and the monitoring of compliance whilst providing for accountability and control. It also provides for specific anti-corruption measures.

6. Some Criticism of the Public Procurement Law of Ghana and the Challenges Ahead

Among the findings of the research referred to, were that, there are still various shortcomings leaving room for improvement in some areas of the PPL.

Some of the criticisms levelled against the PPL are listed below.

- (i) There are difficulties in the application of the provisions of the law to “very low value procurement items” as

participants in the sale of such items are unable or unwilling to satisfy the qualification criteria.

- (ii) Specific financial threshold levels for procurement methods and approval and review of procurement contracts have been provided in the law under Schedule 3. The effect of the inclusion of threshold levels as part of the law is that the only way they can be changed is through amendments to the law in Parliament. But since 2003, when these thresholds were provided for, they have not been changed although the current Ghana Cedi values are shadows of the values of the Ghana Cedis used at the inception of the law. Although section 94 empowers the PPA to review the threshold levels, it should still be laid in Parliament for approval. But the law must not necessarily be amended anytime changes in the value of the Ghana Cedi render the threshold levels unreasonable.
- (iii) The PPL allows sole sourcing and restricted tendering. As they exist in the PPL presently, these sub-competitive methods are perceived to be sources of corrupt practices despite the conditions provided by the law for their use including prior approvals by the PPA. Although on paper, these conditions appear stringent, there seem to be enough loopholes in their implementation to create opportunities for abuse. Indeed they have been cited as avenues for corruption including inflation of prices to facilitate kickbacks and bribery.
- (iv) The PPL does not provide for the use of modern Information and Communication Technology in the practice of public procurement in Ghana.
- (v) The PPL gives too much emphasis to events leading to award of contract to the neglect of pre and post-contract award events.
- (vi) The PPL failed to set out in clear terms the principles of integrity in public procurement.
- (vii) There is the perception that the PPA is not independent enough because it has been placed under the MOFEP, whose procurement activities come under the oversight of the PPA. The PPA should be given the extent of autonomy that will give it the appearance and factual independence. For the PPL to be operationally effective all the implementing agents, including the PPA, should be independent both in form and substance. However, the PPL allows the MOFEP to have an overbearing authority over the PPA. As an agency, the PPA reports to the MOFEP which is its sector Ministry. It has been observed that this arrangement is not good enough. In Ghana, the MOFEP wields a lot of influence in the public procurement system.
- (viii) The PPL does not lay appropriate emphasis on code of ethics and conflict of interest policy in public procurement and fails to provide detailed government-wide ethical standards that define private interests in relation to public interest. Unfortunately, the law only mentions code of ethics in passing and leaves the details to be provided by the PPA without a guide.
- (ix) There are inconsistencies in the rules relating to the timing and mode of advertising the National Competitive Tendering solicitation documents. As the law stands, there is no time provided for the publication of the document neither is there any rules on how to publish it.
- (x) The PPL does not provide any role for civil society and the media in the public procurement process. Given the importance of civil society and the media in monitoring of public activities generally it is inappropriate that the law that has as its main objective to achieve a judicious, economic and efficient use of public funds through fairness, transparency and non-discrimination methods did not assign any specific role to civil society in the procurement process.
- (xi) The PPL provides for a margin of preference for domestic bidders. Under section 60, domestic suppliers and contractors may be given some preferential treatment upon approval by the PPA. But it is feared that giving advantage to local firms could perpetuate inefficiency and increased cost by compromising the principles of open competition and value-for money.
- (xii) The PPL is silent on such emerging public procurement concepts as Public Private Partnership (PPP) and Framework Agreement. Moreover, it does not provide for the identification, detection and treatment of abnormally low tenders.
- (xiii) It is clearly obvious that the PPL has no antidote for the lack of capacity syndrome as to date the public

procurement system of Ghana does not have capable procurement professional class in sufficient quantities to ensure efficiency in the procurement function. In the MDAs, project management are still assigned to officers who are not necessarily trained in procurement (Anvuur and Kumaraswamy 2006).

7. The Future of the PPL

The implication of all the above criticisms is that there is a case for further review of the PPL. In other words, the legal framework for doing procurement business for the government of Ghana will benefit from some legislative boosters and changes aimed at improving its capacity to protect the integrity of the system and resist corruption.

Possible changes to strengthen the PPL and thereby enable it live up to the task of achieving its lofty objectives include a review to improve the following properties of the PPL.

7.1. To Improve the Comprehensiveness of the Legislative Framework

- (i) Section 21 should be amended to give due recognition and emphasis to the need assessment and contract management stages respectively, making provisions to properly regulate those stages (Osei-Afoakwa 2012).
- (ii) A provision should be included to state the general principles constituting the basis of the national legislation on public procurement that will reflect the objectives of the PPL.
- (iii) As recommended by Osei-Afoakwa (2012), it should be necessary to make provision authorise and regulate the use of framework agreement and PPP.

7.2. To Improve Transparency

- (i) As identified in Osei-Afoakwa (2012) the NCTs are not covered by the sufficient time provisions for advertisement and means for publication of public procurement opportunities. This omission should be rectified by defining the time allowed for adverts for all the procurement methods allowed and clearly providing how the NCTs are to be publicized.
- (ii) Sufficient emphasis should be given to the use of ICT, particularly, e-Procurement methods, in public procurement processes in Ghana.
- (iii) A provision should be made requiring appropriate debriefing of all participants at the end of a procurement process (Osei-Afoakwa 2012).

7.3. To Improve Good Management

All the implementing agents, including the PPA, should be independent both in form and substance. The law should make provisions to insulate public procurement officials from direct or indirect pressure from politicians and superiors.

Some changes to enable the independence of the procurement officials and structures are:

- (i) Section 4 on the membership of the PPA should be amended to include a definition for “experience in procurement” by specifying more objective determinants for experience required to become the Chief Executive. The Chief Executive must be required to have rigid and objectively determinable professional and experiential qualifications in public procurement.
- (ii) The PPA should be removed from the supervision of the Minister of Finance and Economic Planning and placed directly under the Presidency. It can even be made more independent by being given similar status as the Auditor General.
- (iii) Membership of tender committees and review boards should be reviewed and revised to ensure their competence and independence both in appearance and mind. No member should come under the direct control or influence of an entity head or spending officer whose decisions the board may review.
- (iv) To make them more independent, the Chairpersons of the review boards should be appointed by the PPA

and not the Minister or the Regional Coordinating Council whose decisions are supposed to be reviewed by the boards.

- (v) There should be a clear statement in the law declaring that in the performance of their functions, the entity tender committees and review boards are not subject to the control of any spending authority.
- (vi) There should be specific provision in the law recognising public procurement as a profession with a set of standards and ethics.
- (vii) It should be required that public procurement officials are selected or appointed on the basis of demonstrated competence and merit. It should be made obligatory that the procurement and contract management units are manned by officers trained in public procurement with requisite experience, skills and expertise to enable them perform the full complement of procurement functions within the respective entities.

In addition to the independence-related recommendations:

- (viii) The PPL as it stands has no provision on contract performance enforcement. A rigorous contract performance enforcement rules should be included in the law to make it expensive to renege on performance standards.
- (ix) There should be put in place a certification process undertaken by a competent body operating with rigorous, strict and transparent criteria. Certificates from such bodies should be required of a supplier, contractor or consultant tendering for contracts valued beyond specified thresholds as a qualification.

7.4. To Improve Prevention of misconduct, compliance and monitoring

- (i) Current provisions on audits and internal controls should be reviewed to make them more effective and result oriented. This should consist of a mixture of random regularity audit throughout procurement cycles and timely independent ex-post procurement audits.
- (ii) Procurement audit should be a regular mandatory affair with appropriate definition of “regular” provided.
- (iii) For procurement entities implementing procurement budgets beyond established thresholds there should be appointed a “Regulation Enforcement Manager” with the sole duty of ensuring that the rules are observed throughout the year.
- (iv) Section 86 should be amended to make the compilation of the code of conduct to be observed by all stakeholders in the procurement system (officials of procurement entity, the PPA, members of the Tender Review Boards, suppliers, contractors and consultants) to be based on principles and broad guidelines provided in the law.
- (v) The monitoring department of the PPA should be given the status of a strong anti-corruption body with the power to monitor the performance of procurement entities with respect to adherence to regulations and efficiency and also to investigate and prosecute offenders of the PPL.
- (vi) Ways should be found to minimise abuse of allowable sub-competitive methods. Provision should be made to make “creative” emergency situations (where entities intentionally create emergency situations to justify the use of sub-competitive procurement methods) offensive under the law. Appropriate punishment should be provided for emergency creators. Pricing for contracts awarded on the basis of sub-competitive methods should be reviewed by a panel of experts.
- (vii) Minimum expenditure threshold must be established for which entities can procure small value items without resort to strict competitive procurement methods.

7.5. To Improve Accountability, Control and Anti-corruption measures

- (i) The law should address conflict of interest and unethical practices, how they can be identified and how procurement entities can address them in the tender documents.

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- (ii) Where sanctions are applied they should be publicized (name and shame).
 - (iii) In the case of tender committees and review boards members must be made to declare their assets on appointment and at the point of exit.
 - (iv) The law should require the establishment of hotlines (and other secure means) for reporting suspected or actual wrongdoing by procurement officials, tenderers, suppliers, contractors and consultants.
 - (v) A strict system for disciplining errant officials must be provided for.
 - (vi) The media and civil society organizations, particularly, those with anti-corruption interests must be included in the monitoring of the award and implementation of public procurement contracts.
 - (vii) The law must provide a mechanism for specific communities to monitor and report on the impact of projects and possible non-compliance.
 - (viii) The law should include periodic forensic procurement audits for effective accountability and control.

7.6. Miscellaneous

- (i) The various anti-corruption agencies should be given the impetus to make them more effective. There is the need for the promulgation of the freedom of information law.
- (ii) The PPL should make it easier and faster to adjust the procurement thresholds values without recourse to parliament. The fixing of thresholds should be left out of the law itself and made an administrative function of the PPA so that they will be adjusted anytime the need arises. Parliament should be informed after the adjustments.

8. Conclusion

From the events of historical setting narrated here, it is clear that the policy direction of the colonialist and, to a large extent, the Nkrumah regime towards public procurement was developmental rather than corruption prevention. The suspicion of and the actual incidence of corrupt practices and other challenges in the public procurement systems before and after independence made it imperative to reform the system and clear the way for integrity, promotion of good governance, improved accountability, value for money, transparency, efficiency and the judicious use of public funds in the public procurement system. This led to the promulgation of the PPL.

However, the PPL cannot be effective unless changes are made to improve such properties as:

- (i) The comprehensiveness of legislative framework;
- (ii) Transparency;
- (iii) Good management;
- (iv) Prevention of misconduct, compliance and monitoring and
- (v) Accountability, control and specific anti-corruption measures.

References

- Adusei, L.A. (2009). "Corruption in Africa: A cancer that won't go away". *American Chronicle*, May 08, 2009, [Online] Available at: <http://www.americanchronicle.com/articles/view/101817>. Accessed on 01/12/2012.
- Agaba, E. and Shipman, N. (2007). "Public Procurement Reform in Developing Countries: The Ugandan Experience." Chapter 16 in G. Piga and K. V. Thai (eds.), *Advancing Public Procurement: Practices, Innovation and Knowledge-Sharing* (pp. 373-391). Boca Raton, FL: PrAcademics Press.
- Ahadzie, D.K. (2010). "A Synthesis of the Historical Development of the Ghanaian Construction Industry", [Online] Available at: <http://.ghanaweb.com/GhanaHomePage/features/artikel.php?ID=>. Accessed on 8/8/2010.

Alyanak, S. (2007). "An Overview of the Legal Rules Government Public Procurement in Turkey", *Public Procurement Law Review*, 2, 125-143.

Anvuur A. and Kumaraswamy, M. (2006). "Taking Forward Public Procurement Reforms in Ghana". *Construction in Developing Economies International Symposium "Construction in Developing Economies: New Issues and Challenges"* January 18th – 20th; 2006 – Santiago, Chile.

Arnaiz, T.M. (2009). "EU Directives as Anticorruption Measures: Excluding Corruption-Convicted Tenderers from Public Procurement Contracts". Chapter 5 in *International Handbook of Public Procurement (Thai, K.V. edition)*,. Boca Raton, Auerbach Publications, 105-130.

Basheka, B. (2009). "Public Procurement Reforms in Africa: A Tool for Effective Governance of the Public Sector and Poverty Reduction". Chapter 6 in *International Handbook of Public Procurement (Thai, K.V. edition)*. Boca Raton, Auerbach Publications, 131-155.

Bovis, C. (2010). "Public Procurement, Public-Private Partnerships and Public Services in the EU". *European Public Private Partnership Law Review*, 2, 85-96.

Crown Agency (2011). [Online] Available at "http://en.wikipedia.org/wiki/Crown_Agency". Retrieved on March 23, 2011.

Elliott, F.J. (2004). "Procurement Reform in Sierra Leone: A Public Choice Model of Analysis". *International Public Procurement Conference Proceedings*, 3.

Evenett, S. J., & Hoekman, B. M. (2003). "Transparency in Government Procurement: What can We Expect from International Trade Agreements?". *Public Procurement: The Continuing Revolution in Arrowsmith, S., & Trybus, M. (Eds.)*, (pp. 269-282). The Hague: Kluwer Law International.

Fuguo, C. (2006). "Developments in China: The Regulations Implementing the Chinese Government Procurement Law, and Progress Towards GPA Accession", *Public Procurement Law Review*, 2006, 6, 205-13.

Fuguo, C. (2007). "Government Procurement and Innovation in China: A Review of Recent Developments", *Public Procurement Law Review*, 2007, 6, 163-66.

Ghana National Procurement Agency Decree, 1976, S.M.C.D. 55. (1976), Ghana Publishing Corporation, Accra

Global Advice Network (2011). "Ghana Country Profile: Public Anti-Corruption Initiatives" *The Business Anti-Corruption Portal*. [Online]. Available at:<http://www.business-anti-corruption.com/country-profiles/sub-saharan-africa/ghana/initiatives/public-anti-corruption-initiatives>. Retrieved on 18/12/2012

Grødeland, Å. 2005). "Bulgaria, Czech Republic, Romania and Slovenia: The Use of Contacts and Informal Networks in Public Procurement. Chapter 7 in *Fighting Corruption and Promoting Integrity in Public Procurement*. OECD Publishing: Paris. Pp. 59-76.

Hunja, R. R. (2003), "Obstacles to public procurement reform in developing countries", *Public Procurement: The Continuing Revolution in Arrowsmith, S., & Trybus, M. (Eds.)*, (pp. 13-22). The Hague: Kluwer Law International.

Local Government (District Tender Boards) (Established) Regulations (1995), Ghana Publishing Corporation, Printing Division, Accra, A & O, A943/1,100/12/95.

Organisation for Economic Co-operation and Development (2005). *Fighting Corruption and Promoting Integrity in Public Procurement*, Paris, OECD Publishing.

Organisation for Economic Co-operation and Development (2007). *Integrity in Public Procurement: Good Practice from A to Z*, OECD Publishing.

Organisation for Economic Co-operation and Development (2009). *Principles for Integrity in Public Procurement*. OECD Publishing.

Osei-Afoakwa, K. (2012). "How the Ghanaian Public Procurement Law Ensures Transparency: The Reminiscences from an Empirical Research", *Developing Country Studies*, 2 (11), 51-64. Available at SSRN: <http://ssrn.com/abstract=2194945>

Osei-Lah, K. (2010). "Accession to the GPA: Processes, Procedures and Current State of Play". *Symposium on the Agreement on Government Procurement*, Geneva, Switzerland, February 2010, S5.2, WTO Secretariat. [Online] Available at http://www.wto.org/english/tratop_e/gproc_e/symp_feb10_e/osei_lah_5_e.pdf. Retrieved on October 27, 2010.

Parliament of Ghana (2003). *Parliamentary Debates: Official Reports, Fourth Series*, Vol. 44 No. 6, 29th October, 2003. Accra, Department of Official Report, Parliament House.

Public Procurement Bill (2003). Assembly Press, Accra, GPC/A130/300/2/2003.

Sanyal, R. (2005). "Determinants of Bribery in International Business: The Cultural and Economic Factors". *Journal of Ethics*. 59, 139-145.

Schooner, S.L., Gordon, D.I. and Clark, J.L. (2008). "Public Procurement Systems: Unpacking Stakeholder Aspirations and Expectations". The George Washington University Law School, Public Law Research Paper No. 1133234. [Online]. Available at <http://ssrn.com/abstract=1133234>. Retrieved on November 18, 2010

Sunderland, D. (2004). *Managing the British Empire: The Crown Agents, 1833-1914*. Woodbridge: Boydell.

Sunderland, D. (2007). *Managing British Colonial and Post-Colonial Development: The Crown Agents, 1914-1974*. Woodbridge: Boydell.

Trybus, M. (2006). "The Reform of PPLs in the Western Balkans" in *Khi V. Thai and Gustavo Piga (eds.), Advancing Public Procurement: Practices, Innovation and Knowledge-Sharing*, PrAcademics Press: Boca Raton, 392-412.

Wang, P (2007). "Coverage of the WTO's Agreement on Government Procurement: Challenges of Integrating China and other Countries with a Large State Sector into the Global Trading System". *Journal of International Economic Law*, 10(4), 887-920.

Wang, P (2008). "China's Government Procurement Policy at a Crossroad". Policy Paper on China. [Online] Available at: http://www.nottingham.ac.uk/pprg/documentsarchive/fulltextarticles/ping_wang_-_policy_paper_on_china_s_gpa_accession_dec_2008.pdf Retrieved on November 25, 2012

Wang, P (2009). China's Accession to WTO's Government Procurement: Domestic Challenges and Prospects in Negotiation". *The University of Nottingham, China Policy Institute, Briefing Series- Issue 48*, March 2009.

World Bank (2003a). "Ghana Country Procurement Assessment Report Number 29055", Vol. 2. World Bank, Ghana Country Department, Africa Region.

World Bank (2003b). "Ghana Country Procurement Assessment Report Number 29055", Vol. 1. World Bank, Ghana Country Department, Africa Region.

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