

## **Pre-Action Notice in the Administrative Review of Procurement Proceedings in Nigeria: A Comment on *Etudo v Bureau of Public Procurement***

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### **Abstract**

*This paper analyses the decision of the Nigerian Court of Appeal in *Etudo v Bureau of Public Procurement* which affirms the decision of the Federal High Court that an aggrieved bidder must give a 30-day pre-action notice to the Bureau of Public Procurement (Bureau) before it could appeal against the decision of the Bureau. It examines the implications of this decision on the bidders' right to access courts for a review of procurement proceedings. It submits that the decision would impede the access of aggrieved bidders to courts for the review of procurement proceedings. The paper recommends that the Public Procurement Act of 2007 should be amended to expressly provide that the service of a pre-action notice is not a condition precedent for aggrieved bidders to appeal against the decision of the Bureau.*

**Keywords:** *Administrative review, aggrieved bidders, procurement proceedings*

### **1 Introduction**

The administrative review of procurement proceedings is one of the measures put in place to ensure that only qualified and competent bidders win contracts.<sup>1</sup> It provides an avenue for bidders who are dissatisfied with the conduct of procurement proceedings to seek interventions and remedies from appropriate authorities. It also allows for a retrospective assessment of procurement proceedings with a view to correcting any irregularities that might have taken place in the proceedings. Thus, the review of procurement proceedings is key to promoting transparency and accountability in the procurement process.<sup>2</sup> In recognition of the vital role that administrative review of procurement proceedings can play in ensuring that prescribed procedures are followed,<sup>3</sup> the United Nations Commission on International Trade Law Model Law on Public Procurement (UNCITRAL Model Law) obligates States to provide for administrative review of procurement proceedings in their procurement laws.<sup>4</sup> In addition, UNCITRAL Model Law provides that the decision taken by the review bodies should be subject to appeal to the court.<sup>5</sup> Similarly, the United Nations Convention against Corruption obligates States Parties to provide an effective system of domestic review of procurement

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<sup>1</sup> Gordon Daniel 'Bid Protests: The Costs are Real, But the Benefits Outweigh Them' (2013) *Public Contract Law Journal* 490.

<sup>2</sup> Nicholas Caroline & Arrowsmith Sue 'The Challenges of Constructing a Supplier Review System for Urgent Procurement: An Analysis in the Context of the UNCITRAL Framework' in Arrowsmith Sue *et al* (eds) *Public Procurement Regulation in (a) Crisis? Global Lessons from the COVID-19 Pandemic* (Oxford: Hart 2021)225.

<sup>3</sup> Engelbert Annika & Reit Nina (2014) 'Effective Corruption Control: Implementing Review Mechanisms in Public Procurement in Kenya, Tanzania and Uganda'. A Paper presented at the 5th European Conference on African Studies (*Centro de Estudos Internacionais do Instituto Universitário de Lisboa 2014*) 808.

<sup>4</sup> Article 64(1) (2) of UNCITRAL Model Law; Nicholas & Arrowsmith (n 2) 227.

<sup>5</sup> Section 64(2) of the UNCITRAL Model Law.

proceedings, including an effective system of appeal to their procurement systems.<sup>6</sup> The purpose of the effective system of appeal is to provide legal recourse and remedies where stipulated rules or procedures are not followed.<sup>7</sup> This suggests that the decision of the review body must be subject to a formal appeal in a court.<sup>8</sup>

In line with global best practices, the PPA also provides for administrative review of procurement proceedings. An aggrieved bidder must first submit its complaint to the accounting officer of a procuring entity.<sup>9</sup> If it is not satisfied with the decision of the accounting, the bidder may submit its complaint to the Bureau. Furthermore, if the aggrieved bidder is not satisfied with the decision of the Bureau, it may seek the intervention of the court by filing an appeal. However, the decision of the Court of Appeal in *Etudo v Bureau of Public Procurement*<sup>10</sup> appears to impede the access of aggrieved bidders to seek redress in court. This paper reviews the decision of the court, focusing on its impact on bidders' right of access to courts. The paper is organised as follows. The next paper of this paper examines provisions of the PPA on administrative review of procurement proceedings. Thereafter, it analyses the decision of the Court of Appeal in *Etudo v Bureau of Public Procurement*. The last part of this paper contains the conclusion and recommendations.

## 2 Administrative Review of Procurement Proceedings in the PPA

The PPA provides a three-level review system. The reviewer at the first level is the accounting officer of a procuring entity,<sup>11</sup> while the reviewer at the second level is the Bureau,<sup>12</sup> the reviewer at the third level is the Federal High Court.<sup>13</sup> If any of the parties is dissatisfied with the decision of the Federal High Court, it may be appeal to the Court Appeal, and from the Court of Appeal, a litigant may appeal to the Supreme Court.<sup>14</sup> A bidder that seeks a review of a procurement proceeding must submit a complaint to the accounting officer of a procuring entity.<sup>15</sup> The accounting officer is the person charged with the supervision of procurement processes in a procuring entity.<sup>16</sup> For example, the accounting officer of a ministry is its Permanent Secretary.<sup>17</sup> Thus, where a bidder has a complaint in relation to the conduct of a procurement proceeding carried out by a ministry, the bidder must submit its complaint to the

<sup>6</sup> Article 9(1) (d) of UNCAC; Carloni Erinco, Polinori Paolo & David Daniele 'Public Procurement and Corruption: Perspectives, Rules, Experience' in Carloni Erinco & Gnaldi Michela *Understanding and Fighting Corruption in Europe: From Repression to Prevention* (Switzerland: Springer 2021) 137.

<sup>7</sup>Article 9(1) (d) of UNCAC.

<sup>8</sup>UNODC *Guidebook on Anti-Corruption in Public Procurement and the Management of Public Finances: Good Practices in Ensuring Compliance with Article 9 of the United Nations Convention against Corruption* (Vienna: UNODC Publishing 2013) 11.

<sup>9</sup>Section 54 (2) of the PPA.

<sup>10</sup>*Chief Ebubechukwu Lota Etudo (Doing Business under the Name and Style of Etudo & Company) v Bureau of Public Procurement* (2022) LPELR-58503 (CA).

<sup>11</sup>Section 54(2) of the PPA.

<sup>12</sup>Section 54(3) of the PPA.

<sup>13</sup>Section 54(7) of the PPA.

<sup>14</sup> Sections 241(1) & 233(2) of the Nigerian Constitution, as amended; Willaims Sope 'Nigeria' in Williams Sope and Tillingman Jessica (eds) *Routledge Handbook of Public Procurement* Routledge (2024) 430-431.

<sup>15</sup> Section 54(2) of the PPA.

<sup>16</sup> Section 60 of the PPA.

<sup>17</sup> See 20 (1) of the PPA & Section 65 of the Finance Act of 2020.

permanent secretary of that ministry.<sup>18</sup> However, the bidder must do so within 15 working days 'from the date the bidder first became aware of the circumstances giving rise to the complaint or should have become aware of the circumstances, whichever is earlier'.<sup>19</sup> A bidder who does not submit his complaint within the stipulated time will lose the right of action. To avoid this, a bidder need not wait until a procurement proceeding has been concluded before it files its complaint. The right to file a complaint arises from the moment a procuring entity breaches the provisions of the PPA or Procurement Regulations and guidelines, and it lapses 15 days after the breach or omission occurred.

The accounting officer must review the complaint and make its decision on the compliant known in writing within 15 days of receiving the complaint.<sup>20</sup> If the accounting officer fails to make any decision on the complaint within the stipulated period, the aggrieved bidder may submit the complaint to the Bureau. Similarly, if the accounting officer makes decision on the complaint which the aggrieved bidder is not satisfied with it, the bidder may submit the appeal to the Bureau.<sup>21</sup> However, the appeal or complaint must be submitted not later than 10 working days after the accounting officer has communicated his decision to the aggrieved bidder or was supposed to have communicated his decision to the aggrieved bidder.<sup>22</sup> The period within which an aggrieved may file complaints about any irregularity in the procurement process, as well as the period within which the accounting officer or the Bureau must reply, is strictly regulated by the PPA. This strict regulation of time is to ensure that the procurement proceedings and the award of or of contracts are not unduly delayed.<sup>23</sup>

After Bureau has received the complaint, the Bureau must immediately notify the procuring entity whose procurement proceeding is the subject of the complaint.<sup>24</sup> Additionally, the Bureau must notify all bidders that participated in the procurement proceedings that a complaint has been submitted and must consider the views expressed by these bidders and the procuring entity before it decides on the complaint.<sup>25</sup> Upon receiving the complaint, the Bureau must order a temporary suspension of the proceedings until the complaint has been resolved.<sup>26</sup> Unless the Bureau dismisses the complaint, it must restrict the procuring entity from taking any further steps in relation to the procurement.<sup>27</sup> The purport of this, arguably, is to ensure that, in the event the Bureau finds merit in the complaint, its decision could still be enforced,<sup>28</sup> failing which the review of procurement proceedings by the Bureau or the court would be a mere academic exercise. If the Bureau does not dismiss the complaint, it may cancel in whole or in

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<sup>18</sup> Section 54 (2) (a) of the PPA.

<sup>19</sup> *Ibid.*

<sup>20</sup> Section 54(2) (b) of the PPA.

<sup>21</sup> Section 54(3) of the PPA

<sup>22</sup> *Ibid.*

<sup>23</sup> Nicholas & Arrowsmith (note 2).

<sup>24</sup> Section 54(4)(a) of the PPA.

<sup>25</sup> Section 54(5) of the PPA.

<sup>26</sup> Section 54(4)(a) of the PPA.

<sup>27</sup> Section 54(4)(b)(i) of the PPA.

<sup>28</sup> Lusby Keith 'Improving the Effectiveness of State Bid Protest Forums: Going above and Beyond the Agreement on Government Procurement and Adopting the ABA's Model Procurement Code' (2013) *Public Procurement Law Journal* 64.

part any illegal decision that a procuring entity has taken.<sup>29</sup> The Bureau may also substitute such a decision with its own decision,<sup>30</sup> or make a declaration on the rules or principles that regulate the goods, works or services that are to be procured.<sup>31</sup> The Bureau is required to review the complaint or appeal and make its decision known within 21 working days after it has received the complaint.<sup>32</sup> In addition, the Bureau must state the reasons for its decision and state any remedy that it grants in favour of the aggrieved bidder.<sup>33</sup>

However, if the aggrieved bidder is not satisfied with the decision of the Bureau, it can file an appeal at a Federal High Court.<sup>34</sup> Similarly, if the Bureau, for one reason or the other, fails to decide the complaint within the stipulated period, the aggrieved bidder may file an appeal at the Federal High Court. Where the bidder is dissatisfied with the decision of the Bureau, aggrieved bidder must file the appeal within 30 days of receiving a copy of the Bureau's decision.<sup>35</sup> Similarly, if the Bureau fails to make a decision on the complaint within the stipulated period,<sup>36</sup> the aggrieved bidder must file the appeal within 30 days after the stipulated period within which the Bureau ought to have decided the complaint.<sup>37</sup>

### **3 Analysis of the Decision of the Court of Appeal in *Etudo v Bureau of Public Procurement***

#### **3.1 The Facts of the Case**

The appellant at different times submitted twenty-one bids in response to invitation to bids for contracts that were advertised by different procuring entities. These procuring entities included ministries, departments and agencies of the Federal Government. However, the appellant was not awarded any of the contracts. In line with the provision of the PPA, the appellant submitted complaints to the accounting officers of the affected procuring entities. The appellant contended that it was qualified to be awarded these contracts but was wrongfully denied the contracts. It subsequently filed appeals against the Bureau in relation to the complaints at the Federal High Court. The Court consolidated the twenty-one suits and dismissed the suit on the ground that the appellant failed to serve pre-action notice on the Bureau before the appellant commenced the action against Bureau, as required by the PPA.

The plaintiff was dissatisfied with the decision of the Federal High Court and thus it appealed against it at the Court of Appeal. The main issue that was determined by the Court of Appeal was on "Whether or not the Federal High Court was right in its decision with regard to its interpretation of Section 14 (1) of the PPA and the dismissal of the suit of the Appellant".

Section 14(1) of the PPA states that:

Subject to the provisions of this Act, no suit shall be commenced against the Bureau before the expiration of 30 days after written notice of an intention to commence

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<sup>29</sup>Section 54(4)(b)(ii) of the PPA.

<sup>30</sup>Section 54(4)(b)(iv) of the PPA.

<sup>31</sup>Section 54(4)(b)(iii) of the PPA.

<sup>32</sup>Section 54(6) of the PPA.

<sup>33</sup>*Ibid.*

<sup>34</sup>Section 57(7) of the PPA.

<sup>35</sup>Section 54(7) of the PPA.

<sup>36</sup>*Ibid.*

<sup>37</sup>*Ibid.*

the suit shall have been served upon the Bureau by, the intending plaintiff or his agent; and the notice shall clearly and explicitly state.

- (a) the cause of action;
- (b) the particulars of the claim;
- (c) the name and address of legal practitioner of the intending plaintiff; and
- (d) the relief being sought.

Similarly, section 54(7) of the PPA states that:

Where the Bureau fails to render its decision within the stipulated time, or the bidder is not satisfied with decision of the Bureau, the bidder may appeal to the Federal-High Court within 30 days after the receipt of the decision of the Bureau, or expiration of the time stipulated for the Bureau to deliver a decision.

The appellant argued that the provision of section 14(1) of the PPA is subject to the provision of section 54(7) of the PPA as the former expressly stated that its provision is subject to the PPA. In line with this, it submitted that a pre-action notice is not required in relation to appeal from the decision of the Bureau to the court. The Court of Appeal rejected the submission of the appellant and held that the service of a pre-action notice is a condition precedent to bringing any action against the Bureau. Since the appellant did not do this, the court lacked the jurisdiction to entertain the matter. Hence, the suit was struck out.

### 3.2 Comments

A pre-action is a notice that a law mandates any person that wants to sue a government agency to serve on such agency intimating the agency of its intention to file an action against it in the court.<sup>38</sup> The purpose of a pre-action notice is to notify a government agency of a complaint against it so that it can consider whether to settle the matter with the complainant or allow the complainant to proceed with the legal action.<sup>39</sup> In *Eze v Okechukwu*,<sup>40</sup> the Supreme Court held *inter alia* that:

The requirement of pre-action notice where it is prescribed by the law is known one rationale. It is to apprise the defendant before hand of the nature of action contemplated and to give him enough time to consider or reconsider his position in the matter as to whether to compromise or contest it.

Similarly, in *Regd. Trustees, A.S.P & M.D. A. v John*,<sup>41</sup> the Court of Appeal held *inter alia* that:

The purpose of serving a pre-action notice on a defendant is to give him the opportunity to settle the dispute amicably without resort to litigation. It also prevents the defendant from being taken by surprise

<sup>38</sup> *Nigerian Ports Plc v Songhai Energy Services Limited* (2016) 17 NWLR (Pt 1541) 191.

<sup>39</sup> *ABUH v Provost Kogi State College of Education, Ankpa & Ors* (2023) LPELR- 59615(CA) 26; *First Registrars (Nig) Ltd v SEC & Anor* (2022) LPELR-56667(CA) 18; *Mobil Producing (Nig) Unltd v LASEPA & Ors* (2002) LPELR-1887(SC) 28.

<sup>40</sup> (2002) 18 NWLR (Pt 799) 348.

<sup>41</sup> (2020) 17 NWLR (Pt 1753) 189.

and gives the defendant adequate time to prepare to deal with the claim in its defence.

From the above decisions of the Supreme Court and the Court of Appeal, it can be deduced that the service of a pre-action seeks to achieve two main purposes. First, it seeks to notify the defendant in advance of the plaintiff's cause of action. Second, it gives the defendant the opportunity to consider whether or not it should amicably resolve the complaint of the plaintiff without court's intervention. It is submitted that these purposes are based on two presumptions. First, the defendant does not know the plaintiff's cause of action. Second, the defendant has not taken a 'final' decision on the matter. In other words, the defendant still has an opportunity to either consider or reconsider the matter. It is submitted that these two presumptions do not apply to appeal from the decision or indecision of the Bureau on the administrative review of a procurement proceeding. This is because the Bureau is already aware of the complaint, as the appeal is from its decision or its failure to decide a complaint that was submitted to it. Based on this, the first purpose that a pre-action notice seeks to achieve does not apply to the Bureau in relation to the review of procurement proceedings.

With regard to the second purpose of a pre-action notice, where the Bureau has made a decision on a complaint, it cannot change its decision upon the service of a pre-action notice on it by the aggrieved bidder. Moreso, the period within which it must make its decision on the complaint would have elapsed. Similarly, if the Bureau had failed to make a decision on a complaint within the prescribed period, the service of pre-action on it will not extend the time within which it could decide the complaint. In view of this, it is submitted that the service of a pre-action notice on the Bureau in relation to the administrative review of procurement proceedings is superfluous and unnecessary. Perhaps, it is in the light of this that the drafters of the PPA makes section 14(1) of the PPA subject to other provisions of the PPA. A literal interpretation of this provision means that section 14(1) of the PPA should not apply in relation to other provisions of the PPA, which we submit, include section 54(7) of the PPA. However, the Court of Appeal did not see these provisions from this perspective. Rather, the court appears to have adopted a restrictive approach to the service of a pre-action notice on the Bureau before an action could be commenced against it.

There is a need to distinguish between when the Bureau is being sued for an issue that relate to its decision on the administrative review of a procurement proceeding, and when it is not. The former is an appeal against the decision of the Bureau,<sup>42</sup> while the latter is not. An example of the latter is where an employee of the Bureau sues it for wrongful termination of his employment contracts.<sup>43</sup> In this instance, such an employee will be required to serve a pre-action notice on the Bureau before it commences an on the wrongful termination of his employment contract in court.<sup>44</sup> However, with respect to the former, it should not the requirement of law that a person who wants to file an appeal must first serve a pre-action notice on the proposed respondent before it can do so. Based on this, it is submitted the decision of the court that provides that the service of a pre-action notice is a condition precedent to

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<sup>42</sup> Section 54(7) of the PPA provides *inter alia* 'the bidder may appeal to the Federal-High Court.'

<sup>43</sup> *Ojo v National Pension Commission* (2019) 14 NWLR (Pt 1693) 547.

<sup>44</sup> *Ibid.*

appealing against the decision of the Bureau on the administrative review of a procurement proceedings is misplaced.

One implication of this decision is that it will undermine the right of aggrieved bidders to seek redress in court when they are dissatisfied with the decision of the Bureau. On the one hand, a bidder who is aggrieved by the decision of the Bureau must appeal to the court within 30 days after the Bureau has made its decision.<sup>45</sup> On the other hand, the bidder must give a 30-day pre-action notice to the Bureau before it can seek a review of the decision of the Bureau in court.<sup>46</sup> If the bidder who is dissatisfied with the decision of the Bureau gives a 30-day pre-action notice to the Bureau before seeking a review of the decision before the court, it will not be able to appeal the decision within the 30 days stipulated for it to do so.<sup>47</sup> In the light of this, it is submitted that contrary to the general principle of law that the “law does not command the impossible”,<sup>48</sup> the provisions of sections 14 and 54(1) of PPA seem to require aggrieved bidders to do the impossible.

While courts have held that that the requirement for the service of pre-action notice on a statutory agency before a legal action could be commenced against it only regulates the right of access to court,<sup>49</sup> in relation to the review of procurement proceedings, it does not. Rather, it impedes it. Furthermore, it is submitted that the provision of the PPA on administrative review as it relates to the right to appeal to court does not comply with the provisions of UNCAC, which stipulate that state parties should have an ‘effective system of domestic review, including an effective system of appeal’.<sup>50</sup> By inadvertently blocking the access of aggrieved bidders to seek the review of procurement proceeding in the court, it submitted that there is no “effective system of domestic review” in the PPA.

The dissenting opinion of Pats-Acholonu, J.C.A (as he then was) in the case of *N.N.P.C v Fawehinmi*<sup>51</sup> aptly illustrated the difficulty that the requirement of pre-action notice could cause in cases such as this. He stated *inter alia* that:

Consider for example a situation where a corporate body set up by a statute has done, is or on the verge of doing an act that is considered inimical to the interest of the other citizen, the situation being such that ordinarily an injunction *quia timet* of *ex parte* nature might be taken to avert the looming imminent danger. If there is a provision that there should be a notice of 1 month or 3 months as the case may be, then some harm perhaps of irremediable nature might have been done.

He stated further that:

Following from all these it could seem to me that we should not allow old crusted procedure by which a potential litigant has to give some

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<sup>45</sup> Section 54(7) of the PPA.

<sup>46</sup> Section 14(1) of the PPA.

<sup>47</sup> Sections 14(1) & 54(7) of the PPA.

<sup>48</sup> *Airtel Networks Ltd. v. Plus Ltd* (2020) 15 NWLR (Pt. 1747) 235.

<sup>49</sup> *N.N.P.C v Fawehinmi* (1998) 7 NWLR (Pt. 559) 598.

<sup>50</sup> Article 9(1)(d) of UNCAC.

<sup>51</sup> (1998) 7 NWLR (Pt. 559) 598.

months notice before instituting an action to continue to adorn our statute book.

In order to remove the restriction placed on the right of complainants to seek redress in court, this paper recommend that the PPA should be amended to expressly state that the provision of the PPA on the service of a pre-action notice does not apply to the administrative review of procurement proceedings. Specifically, the provision of 14(1) of the PPA should be amended as follows:

Except in relation to the provision of section 54(7) of the Act, no suit shall be commenced against the Bureau before the expiration of 30 days after written notice of an intention to commence the suit shall have been served upon the Bureau by, the intending plaintiff or his agent; and the notice shall clearly and explicitly state.

#### **4 Conclusion**

This paper argues that the decision of the Court of Appeal in *Etudo v Bureau of Public Procurement* that aggrieved bidders must serve a pre-action notice on the Bureau before it can seek a review of its decision on procurement proceedings is superfluous and unnecessary. It submits that this decision would impede the right of aggrieved bidders to access court for the review procurement proceedings. In order to remove any ambiguity on the application or non-application of pre-action notice to administrative review of procurement proceedings, this paper suggests that the provision of section 14(1) of the PPA should be amended.