ROLLING BACK THE GAINS OF UPSTREAM OPEN CONTRACTING;

THE CASE OF REVENUE MISMANAGEMENT

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Abstract

The dialogue about upstream open contracting has taken momentum globally. Using case studies, this paper tries to establish a correlation between upstream open contracting and value realization in the form of increased revenue. The paper suggests to policy makers that upstream open contracting, and effective and efficient revenue management are complementary. It finds that there remain revenue management challenges that could undermine the gains to African governments from upstream open contracting if proper governance principles are not put in place. By using case studies from Ghana, the challenges of open contracting in petroleum revenue utilization are identified and recommendations made to strengthen petroleum revenue management efforts in Africa.

Key words:
open contracting, upstream, petroleum revenue, procurement, revenue utilization.

Content:

List of Abbreviations

AMV	Africa Mining Vision
CCSRP	College de Controle et de Surveillance des Revenu Petrolier
ECA	Economic Commission for Africa
FCCL	Funds Common des Collectives
FSDEA	Fundo Soberano de Angola
RMAFC	Revenue Mobilization Allocation and Fiscal Commission
SWF	Sovereign Wealth Fund

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PART ONE

INTRODUCTION

The Africa Mining Vision (AMV) sees Africa's abundant natural resource wealth as a window of opportunity to transform the African economy through industrialization, diversification, and ways that sustain growth, development, and poverty eradication (ECA, 2009). Natural resource exploitation in Africa must therefore lead to positive development outcomes. However, the AMV also recognizes that in the absence of good natural resource governance laws and practices, it is impossible to turn the initial factor endowment into a platform to build successful clusters and diversified economies.

1.1 Realizing the vision of the AMV: the role of upstream open contracting

The concept of good governance of natural resources is complex and detailed. It involves, but not limited to, resource and fiscal management principles, interwoven with transparency initiatives at every stage of the extractive decision chain. Contract transparency in upstream oil and gas is one aspect of good governance practices that has gained global momentum over the years for the perceived value addition of providing the public with relevant information that engenders demand for government accountability and better future deals. It is very important because, considering that the terms of upstream oil and gas agreements have long term implications for the economic health and wellbeing of African countries and the African people, citizens must be given an opportunity to appreciate and contribute to how the outcome of contracting decisions should affect their lives.

There is however a growing realization that the mere disclosure of a contract document is not enough if optimal outcomes are expected from the deals that governments strike with extractive companies (Hayman & Pitman, 2016). . A better option is the broader concept of open contracting where information about the formation, award, execution, performance and completion of upstream contracts are publicly disclosed to allow the public to actively participate in oversight of the entire contracting process. The Open Contracting Partnership (2013) has developed global principles on affirmative disclosure as well as on participation, monitoring, and oversight for open contracting. The list includes, among other things, the requirement in law and practice that the contracting process be explained in publicly disclosed rules to ensure that contracts are awarded in a transparent and equitable manner; the criteria for evaluation and selection be publicly disclosed; license applicants, the winning bidder, beneficial owners, and signed licenses and contracts with extractive companies be published; information related to performance and completion of public contracts (including subcontracts) be made public; and open data systems be developed in accordance with Open Contracting Data Standards. Citizens must also be consulted for their feedback, and dialogue and consultations between contracting parties and civil society organizations should be encouraged to ensure that quality of contracting outcomes is improved.

Should open contracting principles be adopted by oil-rich African countries, the gains of upstream open contracting could be enormous to facilitate realization of the objectives of the Africa Mining Vision. It can *"safeguard against inefficient, ineffective, or corrupt use of public funds; facilitate a level playing field for the private sector; ensure that citizens receive value for money and full benefit of the deal;* and lead to improved service delivery and development outcome"

(Matchessault, 2013). The opposite is true, and Nigeria is a classic illustration.

The weaknesses of open contracting in Nigeria largely contributes to the huge revenue losses and missed development opportunities the country has sustained through corruption in upstream oil and gas sector. The NRGI's 2017 Resource Governance Index (RGI), page 7, reveals that in terms of both policy and practice, Nigeria is weak in the governance of allocating extraction rights, exploration, production, environmental protection, revenue collection, and state-owned enterprises. Meanwhile, the Petroleum Industry Bill which seeks to reform Nigeria's oil and gas sector and repeal all existing laws has stalled since its introduction to the National Assembly some sixteen (16) years ago (KPMG, 2017).

Case study 1:

Open contracting deficiencies and the problem of corruption in Nigeria's upstream oil and gas industry.

Corruption flourishes in Nigeria's upstream oil and gas sector because no rule requires that the licensing authority be independent of the state-owned enterprise (SOE). There is also no law that requires the licensing authority to set a minimum predefined criteria by which companies become qualified to participate in the licensing process. The licensing authority is not required to publicly disclose the rules governing the licensing process, such as auction or negotiation rules, and there appears to be no rules requiring disclosure of license applicants and winning bidders. Moreover, while beneficial ownership information has not been disclosed in any known cases, senior public officials are not required to publicly disclose their financial holdings in extractive companies, although they are required to disclose their financial holdings to a government authority. The government is also not required to publicly disclose all signed licenses/ contracts with extractive companies.[2]

On Friday, 14th July 2017, a civil law suit was filed at the U.S Department of Justice for the forfeiture and recovery of US$144 million in assets that was allegedly laundered in and through the U.S by two Nigerian businessmen: Kolawole Akanni Aluko and Olajide Omokore. It is alleged that the laundered amount was the proceeds from oil blocks that were acquired between 2011 and 2015 by the duo through bribery of Nigeria's former Minister for Petroleum Resources, Diezani Alison-Madueke who oversaw the Nigerian National Petroleum Corporation (NNPC).

During that period, Aluko, Omokore and others allegedly bought four homes in and around London worth £11.5 million for Alison-Madueke and her family members, and renovated and furnished these homes with millions of dollars in furniture, artwork, and other luxury items at the direction of Alison-Madueke. In one instance, a £3.75 million London home was purchased for Alison-Madueke only a day after Aluko met with Nigerian officials to discuss the first oil contract.

In exchange it is alleged that Alison-Madueke used her influence to direct a subsidiary of the NNPC to award Strategic Alliance Agreements (SAAs) to Atlantic Energy Drilling Concepts Nigeria Ltd. and Atlantic Energy Brass Development Ltd; the two shell companies created by Aluko and Omokore

[1] Source: Office of Pubic Affairs, The United States Department of Justice (2017), Reuters (2017), Kazeem (2017)

[2] These are data from the RGI Data Explorer, which were converted into scores for ranking. Available at http://www.resourcegovernanceindex.org/about/downloads

and registered in British Virgin Islands, Abuja, and the United Kingdom. These shell companies were required under the SAAs to finance the exploration and production operations of eight on-shore oil and gas blocks in return for a portion of oil and gas produced.

The complaint in the civil suit disclosed that the shell companies did not only fail to meet some obligations under the SAAs, including the payment of $120 million entry fee. They also either provided only a fraction of, or failed entirely to provide, the requisite agreed financing. That notwithstanding, the companies were permitted to lift and sell more than $1.5 billion worth of Nigerian crude oil. The lifting and sale of the barrels of oil happened at the watch of the Department of Petroleum Resources; the licensing authority that monitors companies' compliance with contractual obligations on behalf of the Ministry of Petroleum Resources.

The shell companies then used a series of intermediaries to launder a portion of the total proceeds of these arrangements into and through the U.S, purchasing various assets, being the subject of forfeiture and seizure, including a $50 million condominium located in Manhattan's most expensive buildings -157 W. 57th Street – and the Galactica Star, an $80 million yacht.

At the benchmarked exchange rate of N305 to $1 in Nigeria's 2017 budget, the Naira equivalent of the $1.5 billion worth of crude oil is N457.5 billion. But for corruption, this amount could fund Nigeria's total 2017 budgeted expenditure for the health sector (N404.9 billion) and capital expenditure for the education sector (N50 billion).[3]

Nigeria's experiences show that in the absence of adequate open contracting best practices in upstream oil and gas, African countries risk huge revenue losses through bribery and corruption. Unlike Nigeria, Ghana has made satisfactory progress in the quality of resource governance in the upstream sector per the NRGI's 2017 RGI.[4] Ghana's licensing authority (Petroleum Commission or PC) is independent of the state-owned enterprise. There is a legal requirement for the PC to set the minimum predefined criteria by which companies become qualified to participate in a licensing process. In all known cases, the PC actually publicly disclosed such minimum pre-defined criteria in each licensing process. Also, although not required by law to disclose winning bidder and awarded blocks the PC publishes lists of licensees on its website, and has published blocks awarded in 2015.

Ghana is however deficient in contract disclosure requirements as the government has not shown any strong commitment to this. In 2015, three (3) contracts were signed but not publicly disclosed. All the contracts government has so far disclosed were due to public pressure. Other areas that need improvement are beneficial ownership disclosure, disclosure of rules governing the allocation process, including public disclosure of evaluation and decision criteria, and disclosure of the list of biddable and negotiable terms, among others. [5]

By blocking the chances of revenue leakages (Ofori & Lujala, 2015) and ensuring that value for money is secured, upstream open contracting could positively correlate value realization in the form of improved revenue outcomes for countries. However, the gains of upstream open contracting could be lost if the ensuing revenues are mismanaged. Good revenue management measures are complementary to upstream open contracting measures.

[3] BudgIT (2016) review of 2017 proposed budget, available at http://yourbudgit.com/wp-content/uploads/2016/12/2017-Publication-BUDGET.pdf
[4] Ghana scored 65 for value realization compared to Nigeria's score of 50.
[5] ibid

1.2 Relevance of this paper

The discourse around the need for open contracting in the oil and gas arena has been targeted at the upstream sector. But the question of whether or not African countries are ready to absorb the benefits of upstream contracting still lingers. Assuming that all African countries adopted upstream open contracting and secured its gains, poor revenue management framework and practices could roll back the gains. This paper therefore seeks to draw the attention of policy makers to the complementarity of upstream open contracting and good governance of petroleum revenues. This is achieved by evaluating the laws and practices of selected African countries against good petroleum revenue management principles generally, and open contracting at the petroleum revenue expenditure stage in particular, using Ghana as a case study. The paper goes on to make recommendations that should put African countries in a better position to effectively utilize the gains from upstream open contracting even as countries strive to adopt and implement the concept of upstream open contracting.

1.3 Structure of the paper

In part two of the paper, the nature of good petroleum revenue governance is discussed in the first section. The section following evaluates the revenue management efforts of selected African countries within the framework and dataset of the NRGI's Resource Governance Index (RGI). The third and final part of the paper focuses on open contracting in oil revenue expenditure using open contracting global principles as benchmark to assess Ghana's efforts, and proffers recommendations that will improve petroleum revenue utilization to justify the gains of upstream open contracting.

PART TWO

PETROLEUM RESOURCE REVENUE GOVERNANCE IN SELECTED AFRICAN COUNTRIES

Africa is considered the last frontier for resource discovery. [6] That new oil and gas discoveries have been made in recent years and exploration activities are currently on-going reinforce this assertion. Sierra Leone, for instance, will soon join the league of oil producing African countries when production begins from the three fields that were discovered by Anadarko in 2009, 2010 and 2012. In August 2017, Tullow Oil also started exploring for oil and gas in Zambia. While African countries practice open contracting at the upstream level to realize optimum value from exploitation of the resource, any African economy that is dependent on, or benefits from, the resources is doomed to fail if petroleum resource revenues are mishandled. There is therefore the need to establish and strengthen good governance principles around petroleum revenue management.

2.1 Overview of good governance principles in petroleum revenue management

One of the fundamentals of petroleum revenue management is fiscal management, supported by a fund for stabilization, savings, and precautionary motives, against the risks and uncertainties of revenue flows (Daniel, Unknown). It calls for wise revenue allocation and utilization decisions, be they the creation of new assets or treatment of the revenue as part of normal government income, or creation of a nonrenewable resource funds to better promote capital spending or economic diversification (ibid), whichever best fits country contexts. Petroleum revenue management also involves fair distribution that simultaneously balances all interests and synchs with a country's development priorities. Sound principles must therefore govern the decision to spend, invest, and save petroleum revenues at all times.

Existing literature suggest that in a properly governed petroleum revenue management system, responsibilities for the management of petroleum revenues, and punishment for breaches, are clearly defined by law among relevant sector ministries and government agencies at the national and sub-national levels. Theoretically, it is prudent that petroleum resource revenues are separated from government revenues from other sources to allow for efficient investment (Drysdale, 2008). This is particularly important due to the volatile nature of natural resource revenues and the need to ensure that investments can be properly monitored to achieve lasting, meaningful impacts. There is also minimum room for discretion and ambiguity about allocation, disbursement, and use of revenues to ensure efficiency. For example, revenues are allocated, disbursed, and used in accordance with set formula, fiscal rules, development plans, and medium term budget frameworks as a means of prioritizing competing alternative uses.[7] Revenues must be utilized with future generations in mind, and the entire management process must be transparent.

[6] Collier, P. (2011). Plunder or plenty: Africa poised for resource bonanza. Available at http://www.scotsman.com/news/paul-collier-plunder-or-plenty-africa-poised-for-resource-bonanza-1-1503004

[7] Revenue management in the extractives sector. (2016). A key note speech. Available at http://www.cabri-sbo.org/uploads/files/Documents/keynote_paper_2016_revenue_management_cabri_revenue_management_in_the_extractives_sector_in_africa_english.pdf

2.2 Petroleum revenue management efforts of selected African countries: evidence from the NRGI's 2017 Resource Governance Index

Oil and gas revenue management among the selected African countries is discussed in this section under three headings: National budgeting, subnational revenue transfer, and Sovereign Wealth Funds (SWF).

Table 1: Selected countries' score and ranking in petroleum revenue management

COUNTRY	RANKING/55	SCORE/100	SCORE INTERPRETATION
Ghana	8	65	Satisfactory: country has some strong governance procedures and practices, but some areas need improvement.
Nigeria	26	44	Poor: country has established some minimal procedures and practices to govern resources, but mist elements necessary to ensure society benefits are missing.
Chad	28	43	Poor: country has established some minimal procedures and practices to govern resources, but mist elements necessary to ensure society benefits are missing.
Algeria	47	25	Failing: country has almost no governance framework to ensure extraction benefits society. It is highly likely that benefits flow only to some companies and elites.
Angola	39	31	Poor: country has established some minimal procedures and practices to govern resources, but mist elements necessary to ensure society benefits are missing.

Source: 2017 RGI

2.2.1 National budgeting

One of the key fundamentals for citizens to identify what benefits they derive from their natural resources is to have access to data regarding reserves, production, exports, revenues, and utilization of revenues realized from those resources. Disclosure of such data in the national budget is a sign of transparency and good governance of resource revenue.

2.2.1.1 Evidence from Algeria, Chad, and Ghana

In Algeria, citizens do not have full and timely access to information about petroleum reserve, production, and resource export. There is no dedicated data portal by the government for this purpose. The latest update by the National Oil Company (NOC) happened as far back as 2012. The government disclosed information about extractive revenue projections for 2016 fiscal year, as well as actual resource revenue receipt and total government expenditure for the 2015 fiscal year. There is however no fiscal rule to guide government expenditure. Although the correlation between lack of fiscal rule and corruption does not mean much because of lack of data to establish any linear relation, extractive and general revenues are exposed to the risk of corruption and gross mismanagement;

Algeria ranked 108th among 176 countries on the 2016 Corruption Perceptions Index.[8] The full picture of Algeria's debt situation is not known because the government has only disclosed the level of national debt for up to 2014.

In Chad, the management of oil revenues is regulated by a revenue management law: The Law n°001/PR/1999 of January 11, 1999. This law has been modified twice (2006 and 2014). The law provides that direct revenues (royalties and dividends) from petroleum should be transferred to an off-shore escrow account which will then be conveyed into the special accounts of the Public treasury under CEMAC's foreign exchange regulations.[9] In the meantime, indirect revenues (dues and taxes, customs fees related to oil exploitation) should be transmitted directly into the Public Treasury Account. Direct and indirect revenues are integral part of the general national budget. The revenue management law pre-determines specific rules governing the use and distribution of this income:

a. 50% of royalties and 50% of dividends are earmarked for investments in seven priority sectors: education, health, infrastructure, rural
b. 45% of royalties and 50% of dividends are allocated to cover state's operational expenditures,
c. 5% of the dividends is to benefit the oil producing region.

The Chadian government does not have a publicly accessible online data portal where the centralized data can be found. There is no evidence that government publicly discloses projections of expected future resource revenues. This information is also not publicly revealed on websites of Finance's Ministry or Petroleum's Ministry. The report accompanying the initial budget law could have contained projections of expected future resource revenues because these projections are used by budget authorities to elaborate the initial budget law. Unfortunately, these reports are not available on website of Ministry of Finance. However, the initial 2016 Budget Law provides only data on resource revenues related to current fiscal year.

Additionally, the Chadian government has not publicly released the total resource revenue received for the most recently completed fiscal year. This information is likely to be included in the Finance settlement law. This document notices the actual revenues of government. The last Finance settlement is related to 2013 fiscal year. However, this document does not provide information on actual amount of total resource revenues received. Also, it is not available on website of finance ministry. By the same token, information regarding the total government expenditures for the most recently completed fiscal year has not been publicly disclosed on website of finance ministry; although the last Finance settlement law related to 2013 fiscal year provides data on the total of public expenditures.

In Ghana, the national budget for any fiscal year is always disclosed in the last quarter of the previous year. The budget provides details of the sources of petroleum revenue and expenditure areas. It however fails to provide trackable details about specific expenditure areas. This does not allow for participatory monitoring by the public to ensure that petroleum revenues are actually disbursed and used for the purposes for which disbursements are made. Akin to the inadequate value addition of contract transparency, citizens and civil society organizations only have the privilege to do post mortem value-for-money evaluation of projects funded with petroleum revenues.

[8] see https://www.transparency.org/news/feature/corruption_perceptions_index_2016
[9] Communaute Economique et Monetaire d'Afrique Centrale

Case study 2:

How a seemingly good law has led to petroleum revenue mismanagement in Ghana[10]

Petroleum revenues in Ghana are earmarked within the budget per sections 16 and 21(1) of the Petroleum Revenue Management (Amendment) Act, 2011 (Act 815), also called the PRMA. But the PRMA which clearly sets out the formula for oil revenue distribution with well-intended objectives for Ghana's development has loopholes that make it a self-defeating legislation.

Section 21(3) of the PRMA lists about 12 areas from which the Minister of Finance may, in the absence of a long term development plan and in accordance with section 21(5), prioritize programmes and activities relating to not more than 4 areas. The purpose of the prioritization is to maximize the impact of the use of petroleum revenue. The 12 areas listed in section 21(3) for oil revenue investment is non-restrictive. While the non-restrictive clause has the advantage of allowing some flexibility in oil revenue investment to meet national demands, it has also allowed for abuse.

Between 2011 and 2016, the Government of Ghana prioritized the following four areas for oil revenue investments: expenditure and amortization of loans for oil and gas infrastructure, roads and other infrastructure, capacity building, and agriculture modernization. The first three areas were created by the Minister in accordance with the discretion granted him within the meaning of section 21(3) and (5) of the PRMA. The couching of the last two of the first three areas allowed the government to invest in a wide range of areas including education, energy, health, works and housing, security, among others – beyond the supposed limit imposed by law. This led to the thin spread of petroleum revenues on many projects, thereby defeating the fundamental purpose of the prioritization. The Ministry of Finance has persistently flouted section 48(2) b of the PRMA as it is unable to account for the implementation and completion status of the many projects it has disbursed oil revenues to support. Some projects have been abandoned by contractors due to lack of funds, leading to time and cost overruns.

Through consistent advocacy by Civil Society Organizations against the thin spread of oil revenues, the current government's choice of priority areas for the period 2017 to 2020 is very clear and focused. However, the couching of "road, rail, and other critical infrastructure development" may achieve similar inefficient investments as happened in the past years. ***"Other critical infrastructure development"*** *must be carefully and narrowly defined.*

Ghana's example contradicts Witter & Outhred's (2015) view that earmarking petroleum revenues within the budget may be a way of improving the quality of spending decisions. In an attempt to improve budgetary flexibility – an aspiration which Welham, Hedger & Krause (2015) are skeptical about – Ghana has resorted to entrusting wide discretionary powers without proper checks in practice.

There is no single dedicated government portal where information about reserves, production, and exports are shared with the public. These information are available on various platforms including reconciliation reports on the petroleum holding fund by the Ministry of Finance, the national oil company's annual reports, annual budgets, and the website of the independent oil and gas information resource centre (IOGIRC). Information are detailed and timely. The reports are

[10] Source: ACEP (2017)

not easily relatable to the ordinary Ghanaian. They are quite technical and targeted at experts and industry players.

2.2.2 Subnational revenue transfer

According to Iwerks and Toroskainen (2017), the decision to transfer resource revenues to subnational governments is a difficult one for policy makers because it involves a lot of considerations. These include promoting national cohesion, interregional equity, effective national fiscal management, and optimizing resource exploitation over time and space.[11] Data from the 2017 RGI tend to show that the basis for subnational revenue transfer in Sub-Saharan Africa is more about compensating communities that host the resource. This confirms Collier's (2017) assertion that petroleum revenue transfer is a public resource allocation decision that is based on the tension of natural resource ownership between the State and host communities. This has called for balancing various interests through revenue split between oil producing communities who directly bear the social and environmental consequences of oil and gas exploitation, and the State.

2.2.2.1 Evidence from Nigeria, Chad, Ghana and Algeria

Nigeria's oil producing states are, by law, to receive no less than 13 percent of revenues from the oil extracted from their states. Monies are paid into the treasury of each state. Section 162 (subsection 2, paragraph 2) of Nigeria's 1999 constitution explicitly establishes this 'derivation principle'. The Allocation of Revenue Act 1982 (section 1) affirms this principle and further stipulates that the Federal, State, and Local governments will respectively receive 56, 24, and 20 percent of the remainder of post-derivation extractive proceeds. The Nigeria's constitution (Article 162.2) specifies that population, the equality of states, internal revenue generation, and land mass must all be taken into account when deciding on the formula for oil revenue sharing. The Constitution (Article 162.2) empowers the Revenue Mobilization Allocation and Fiscal Commission (RMAFC) to determine and review the revenue allocation formula between central and sub-national government. The government also discloses allocation to subnational governments. The latest report was published in 2016.

The Allocation of Revenue (Federation Account, etc.) Act (section 9) requires that the Accountant General of The Federation presents an annual report of revenue allocation to state governments before both houses of the National Assembly 'not later than ninety days following the end of each financial year.' There is however no evidence that the National Assembly audited revenue transfer.

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In Chad, 5% of the dividends is to benefit the oil producing regions. Apart from benefiting from public investments, the other regions do not get any fraction of oil revenues. There is not a regional allocation criterion of these public investments; they depend on the discretionary power of the government. The amount of 5% of oil direct revenues transferred to the oil producing regions are not publicly disclosed by the government. Only the last report published by the CCSRP[12] (external audit) in 2013 indicates that the Region of Logone Oriental where oil is exploited has received 12.967.904.193 FCFA (about Million $27,232,600). CCSRP is required to provide half-yearly and annual reports.

The Government of Ghana does not transfer resource revenues to subnational government. Instead, revenues are utilized through the national budget with the objective to ensure balanced development of the regions. Whether or not petroleum revenue utilizations have attempted to achieve this objective is a question of fact. Amidst a looming probability for onshore oil

[11] Iwerks, R. and Toroskainen, Kaisa. (2017). Subnational Revenue Sharing in the DRC after Découpage: Four Recommendations for Better Governance. Available at https://resourcegovernance.org/sites/default/files/documents/subnational-revenue-sharing-in-the-drc-after-decoupage-four-recommendations-for-better-governance.pdf
[12] Collège de Contrôle et de Surveillance des Revenus Pétroliers: an independent institution whose objective is to ensure transparency in the management of oil resources.

exploration and development in the Voltaian Basin, Ghana risks community agitation in the absence of any legal commitment that caters for the wellbeing and development of host communities (Andrews & Okpanachi, 2012).

In Algeria, there is no formula for resource revenue transfer and sharing from central government to the subnational level. All extractive resource revenues belong to the central state and are distributed to local districts from the national budget through the local government common fund (Fonds Commun des Collectivités Locales or FCCL). Oil production regions do not get to receive larger share of extractive revenue by mere reason of hosting the resources. There is however effort by the government to, through general revenue distribution, address the problem of regional inequalities. This is done through a general legislation; not a legislation specific to the extractive sector.

2.2.3 Sovereign Wealth Fund (SWF)

Sovereign Wealth Fund (SWF) may be used to postpone spending from the present to the future to build and invest savings balances for the long term, as well as to provide stabilization funds to help manage short-term volatility in an attempt to counter the adverse effects of boom-bust cycles on government spending and the national economy.[13] There are important criteria and indexes used by the NRGI to track the transparency of governments regarding efficient and effective management of SWF. Among others is public disclosure of financial reports on SWF, periodic and timely audits, existence of management rules, amongst others.

2.2.3.1 Evidence from Algeria, Angola, and Chad

Sovereign Wealth Fund (SWF) governance in Algeria is very weak in terms of accountability. There are no rules regarding withdrawal although rules exist and are followed on deposits. This, coupled with the absence of auditing and legislative review exposes the fund to arbitrary use. Lack of reporting requirement and timeliness of information prevent transparency and public scrutiny. The situation is same for Angola.

Case study 3:

Conflict of interest in the management of Angola's Sovereign Wealth Fund [14]

Angola's Sovereign Wealth Fund (SWF), Fundo Soberano de Angola (FSDEA), was officially established in 2012 with a $5 million seed fund. The purpose of the fund is to promote growth, prosperity, and social and economic development across Angola through the sustainable long term financial return it will generate. [15]

Jean-Claud Bastos de Morais, a friend to the President's son, is currently the manager of Angola's SWF. He is also the owner and manager of a port facility which is currently under construction on the coast of Cabinda. Upon investing his personal resources to the tune of about $70 million in the port project, Mr. Bastos has now partnered with the SWF of Angola to invest in the next phases of the project.

Meanwhile Quantum Global Investments Africa Management, the company that manages about 85% of the money in Angola's SWF, is owned by Mr. Bastos. Selection of Quantum Global was not based on competitive tendering; its selection is reported to have been based on its track record

[13] ibid

[14] Meisel, H. and Grossman, D. (2017). Tycoon made $41 million from 'people's fund'. BBC News. Published on 7 November 2017. Available at http://www.bbc.com/news/world-africa-41906123

of successfully managing investments for the government.

Mr. Bastos has been named in the trending Paradise Papers. Documents seen by the BBC as part of the Paradise Papers investigations show that the fund paid management fees of more than $90 million (£67.5 million) to Mr. Bastos' Mauritius-based QG Investment Africa Management. This occurred over a 20-month period between May 2014 and the end of 2015. In 2014, during which only two of the funds were active for 7 months, Quantum received management fees of $29 million. For the same period, $13 milion appears to have been paid in dividends to QG Investment Ltd, a company incorporated in the British Virgin Islands and owned by Bastos. Mr. Bastos is also cited to have recommended to the Fund the investment of tens of millions to a deal with another of his companies, Afrique Imo Corporation, to build a hotel, office, and a retail complex in the Angolan capital, Luanda, although the project was assessed and declared economically unviable for the fund.

Mr. Bastos is able to influence investment of fund's cash because by article 4 of the Presidential Decree No. 89/3, the FSDEA can invest in domestic assets and needs no budgetary approval to do so. The Fund is also not prohibited from investment in any asset class, there are no rules governing the size of deposits into, and withdrawals from the SWF, and there exists no evidence that withdrawals passed through the normal national budget process.

Case study 4:

Chad has no plan for future generations as funds dry up amidst possible mismanagement

There was one fund (10% of oil revenues) for future generations established by article 9 of Law n°00/PR/1999 of January 11, 1999. This fund has been abolished by the Law n°002/PR/2006 of January 11, 2006. The government insisted that reasons for abolishing the future generation fund were that it needed the funds urgently to help fix a fiscal crisis and tackle lingering instability. However, opposition members protested the decision saying that Chad's problem is not a lack of resources but rather a problem of waste and mismanagement of resources.[16]

The Chadian government has established one natural resource fund maintained by revenues from exploitation of Doba oil areas. There is no evidence that the fund is abolished but its balance is null according to last CCSRP's report published in 2014. Also, no numeric rules were set to govern the size of withdrawals from the natural resource fund nor the size of deposits into the fund.

2.3 Key findings and recommendations

Huge revenue management gaps remain among selected African countries.

1. The lack of fiscal rules and efficient public financial management systems are a bane to effective fiscal management.
2. Transparency through timely and consistent reporting, especially on SWF governance, remains a challenge. Citizens become less involved in

[15] Fund Soberano de Angola (2017) Nurturing our future. Available at http://www.fundosoberano.ao/about-fsdea/
[16] See http://www.irinnews.org/news/2005/12/30/parliament-defies-world-bank-scraps-%E2%80%98future-generations%E2%80%99-oil-fund

budgeting and resource allocation decisions to provide the needed oversight due to absence of adequate data. These loopholes provide the breeding ground for corruption and investments that bring little to no value-add.

3. Ghana, a country that appears to perform better than the other African countries has a petroleum law that gives room for mismanagement.

To improve on revenue management,

1. Countries should adopt fiscal rules and public financial management laws if not existent.
2. Countries should strengthen transparency through information sharing systems that are readily accessible and user-friendly to citizens.
3. Countries must institute strong oversight systems in revenue management. This involves removing opportunities for conflict of interest and wide discretionary powers.

PART THREE

THE IMPORTANCE OF OPEN CONTRACTING IN PETROLEUM REVENUE UTILIZATION: THE CASE OF GHANA

Globally, contract spending amounts to over $9.5 trillion each year which translates to about 15% of global GDP. The 2013 Eurobarometer survey reported that, more than 30% of companies participating in the EU public procurement say corruption prevented them from winning a contract. Also, the OECD Anti-Bribery Convention reported that 57% of foreign bribery cases involved bribes to obtain public contracts (Open Contracting Partnership, 2017). Generally, public procurement presents opportunity for corruption in the absence of proper checks. The risk could be higher in petroleum revenue expenditure where the amounts involved in public procurement (not being the tax payers' money) are huge. Open contracting principles are more than ever needed to increase disclosure, make contracting more competitive and fair, curtail secrecy and corruption and ultimately ensure development outcomes. Drawing from Ghana's experiences, this paper sets the tone for future research on how oil-producing African countries have legislated and practiced open contracting in oil revenue expenditure to prevent revenue losses and ensure value for money. But before that, public procurement laws of Uganda, Nigeria and Ghana are compared to identify their strengths and weaknesses.

3.1 Overview of open contracting principles in public procurement in Ghana

The Public Procurement Act, 2003 (Act 663) and the Public Financial Management Act, 2016 (Act 921) govern Ghana's procurement scheme. These Acts give oversight and regulatory roles to the Public Procurement Authority although each government ministry, agency and department is tasked with fulfilling its own procurement operations at both subnational and national levels. It also sets out the legal, institutional and regulatory frameworks for securing fiscal transparency and public accountability

Although there is a commitment on the part of government of Ghana and the Procurement Authority to implement open contracting there still remain some challenges to effective and efficient conduct of sound procurement policy. A major global contracting principle that relates to disclosure is the right of the public to access information relating to public contracts. This bill of right is clearly stipulated in the constitution and meant to ensure enhanced transparency in the governance process, yet the right to information bill is struggling to pass in the Ghanaian parliament since 2013. How to get access to important and vital information remains a challenge to the citizens. The current government which took office in January 2017 gave assurance of its commitment to pass the bill to combat corruption through overpricing. Implementation of procurement procedures and rules have on many occasions not been transparent and equitable. A review of 205 contracts for goods showed that 33% were procured through sole sourcing and only 4% was procured through National Competitive Tendering (Ameyaw, 2012). Even, those contracts that were procured through sole sourcing were found to have had no approval by the Public Procurement Authority. The Procurement law recommends that all contracts are to be procured through the National Competitive Tendering. So, its low usage shows a big loophole that has been exploited over the years by corrupt public officials. Sometimes in any given

bid/auction, there seems to be a conscious effort by some procurement entities to limit competition by not providing enough opportunities for other competitors.

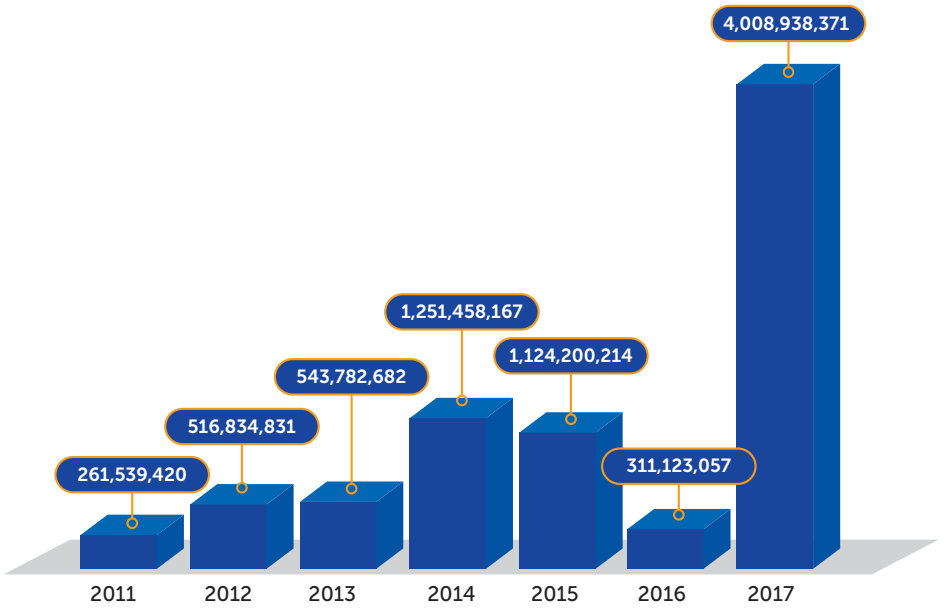
The Public Procurement Law section 65 requires the communication of the results of any procurement exercise to all bidders whether they were successful or not by the procurement entities. The results of a survey reveals that the law was not followed and implemented in about 87% of all cases (Ameyaw, 2012). The flouting of this law is very worrying as preventing results from being seen by unsuccessful bidders affects the transparency and credibility of the future bids.

The Ghanaian government in partnership with the World Bank has developed and adopted the e-procurement to replace the traditional process which faces many challenges such as delays in procurement processes, high costs, corruption etc. The traditional procurement process involved huge quantities of paper work in its operations which were very important in communicating with tenderers. In this age of information technology and the advent of the internet, a lot has changed in the way governments and public authorities conduct business. The adoption of the e-procurement process is the way to go as it reduces cost, has a wider reach, fast and efficient (Baily, 2008). The e-procurement platform also presents an opportunity for engagement on open contracting principles and improves the credibility, accessibility and transparency of tender opportunities in procurement procedures (Buasà Peris, 2013).

3.2 The practice of open contracting in Ghana within the context of petroleum revenue utilization

Petroleum revenues are earmarked in Ghana's national budget for specific purposes through the Annual Budget Funding Amount (ABFA). By the end of 2016, a total of a little over GH4 billion (figure 1) was transferred to the ABFA and spent in the 4 priority areas (table 2).

Figure 1: Petroleum revenue disbursement to ABFA from 2011 to 2016



Source: ACEP (2017) based on data from Annual Report on the Petroleum Holding Fund and Reconciliation Reports on the Petroleum Holding Fund (2012-2016), PIAC (2013).

Apart from expenditure and amortization of loans for oil and gas infrastructure, the government of Ghana has spent close to GHC 3.2 billion in public procurement for hundreds of capital infrastructure and goods and services in various sectors of the Ghanaian economy. The education sector alone, which was not a clearly stated priority area but absorbed about 8.09% of total ABFA, saw the procurement of over 310 projects. Out of these 285 were infrastructure related and the rest were goods and services (ACEP, 2017).

Table 2: Actual ABFA utilization in the 4 priority areas (2011-2016)

PRIORITY AREA	2011 (GHC)	2012 (GHC)	2013 (GHC)	2014 (GHC)	2015 (GHC)	2016 (GHC)
Expenditure & Amortization of Loans for Oil & Gas Infrastructure	20,000,000	100,000,000	137,970,847	163,084,574	439,234,363.92	-
Roads & Other Infrastructure	227,641,768	232,403,269	372,074,147	215,691,357	483,347,384	199,447,942.13
Agriculture Modernization	13,147,652	72,471,824	13,604,328	170,624,180	59,544,174.03	27,671,280.88
Capacity Building	750,000	11,959,738	20,183,359	-	142,074,292.19	83,037,283.71
Total	261,539,420	516,834,831	543,782,682	549,400,109.40**	1,124,200,214.14	311,123,056.92

Source: ACEP (2017) based on data from PIAC (2013), Reconciliation Reports on Petroleum Holding Fund (2013-2015), 2016 Annual Report on Petroleum Holding Fund.

**The total ABFA in 2014 was GHC 1,215,458,167, but the Bank of Ghana swept GHC 666,058,058 which was meant for, but not disbursed to, the CDB facility.

3.2.1 Challenges of open contracting in petroleum revenue utilization in Ghana

The year 2015 was a financially difficult year for Ghana. Oil production was highest in that year compared to previous years but average price achieved per barrel was just about half the average price in 2014; the lowest in the history of oil production in Ghana at the time. The 2015 petroleum receipts was US$396,172,909 compared to the previous year's US$978,891,564. The budget cut by mid-year necessitated transfer of funds from the Ghana Stabilization Fund to cushion the economy. In spite of the fiscal challenges, about GHC1.1 billion was disbursed to the ABFA and utilized in 2015 compared to GHC1.2 billion disbursement to ABFA. 2015 was also the year for the highest number of procurement compared to other years.

Case study 5:

The case of flawed procurement for rebranding of 116 MRT buses by Smarttys Management and Productions Limited [17]

According to the 2015 Reconciliation Report on Petroleum Holding Fund, the Ministry of Finance disbursed an amount of GHC3,649,044.75 for the payment of the rebranding of 116 MRT buses under the transport infrastructure heading within the "roads and other infrastructure" priority area. The Ministry of Transport had responsibility for the procurement of the services of a contractor. Smarttys was contracted by a sole-sourcing without prior approval of the Public Procurement Authority (PPA) contrary to provisions in the Procurement Act. It was reported that the Chief Director of Transport at the time, signing on behalf of the Transport Minister, sought approval from the PPA two months after Smattys had completed the bus rebranding, and cited emergency as one of four reasons for going by the sole-sourcing arrangement. The PPA approved within 24 hours.

Ghanaians became agitated when the news broke. Following the Attorney-General's failure to supply documents covering the Smarttys transaction upon formal request by a pressure group called OccupyGhana, the lattter sued the Attorney-General on 18 February 2016 in exercise of constitutional right to information. The pressure group succeeded in the suit and the Attorney General delivered the requested document in compliance with court order. The transaction was reviewed by the Attorney –General and Smarttys Management and Production Limited, by the directive of the Chief of Staff, refunded GHC1.5 million. The government later announced the full refunding of the GHC3.6 million to the Petroleum Fund. The Transport Minister resigned.

The Smarttys case is only one example of possibly many public procurements involving petroleum revenues that have been shrouded in secrecy. The case also illustrates that citizens' access to information is very important for government accountability in the use of petroleum revenues. However, access to information could be expensive and deter the public from monitoring the contracting process in the absence of a Right to Information Law.

Case study 6:

Case of procurement for, and monitoring of, the rehabilitation of science resource centre at Nalerigu Senior High School – A value for money concern.

According to the 2015 Reconciliation Report on Petroleum Holding Fund, the government of Ghana spent 61,006.75 Ghana Cedis on the rehabilitation of the Science Resource Centre at Nalerigu Senior High School. On 11th July, 2017 ACEP embarked on a field visit to conduct value for money analysis on the project. Key findings were as follows:

Between 2015 when ABFA was disbursed to the date of inspection, no rehabilitation works had happened on the science resource center in Nalerigu SHS. The only recent rehabilitation was completed in 2012. The school and the district-level GES were not involved in the decision to renovate the science resource center. Meanwhile the Ministry of Education (Accra) explained that the selection of

the project was done at the national level at a time of emergency.

The Ministry of Education, by a sole sourcing arrangement, awarded the contract in 2011 to Messrs Zidra Fisharies & Enterprise Limited (P.O. Box AN. 16626, Accra-North) to renovate the science resource Centre at a contract sum of about GHC104,659.53. The project was however executed and completed in 2012 by AL RAS ENT, a sub-contractor who is based in Bolgatanga.

The renovation work was completed before the 2012 election was held. Two certificates were raised in all. The first was raised within 3 months after work commenced at a value of GHC 54,865.18. The sub-contractor received GH40,000 two months after the first certificate was raised. The second certificate was raised in October, 2012 at a value of GHC 61,006.75 upon completion. The sub-contractor received GHC50,000 in April 2014; one and half years after the second certificate was raised.

The value of the second certificate of October 2012, out of which AL RAZ received GHc 50,000, was the same value quoted in the 2015 reconciliation report on the petroleum holding fund as having been disbursed to the science resource centre that year.

The sub-contractor purposefully did not go back to site after the defect liability period. He has therefore not been paid his retention fee, but he does not intend to follow up for it. According to him, the process is too frustrating. Thus, a total of GHC90,000 was paid to the sub-contractor (less his retention fee) out of a total contract sum of GHC104,659.53.

Barring any claims for the retention fee which is not up to GHC 61,006.75, it appears that oil revenue was disbursed in 2015 for a project which was completed three years earlier for which the contractor had received full payment.

The Ministry of Education and Ministry of Finance were formally consulted in August, 2017 to clarify the discrepancies. The Ministry of Education as at end of October, 2017 was still verifying information from its Accounts Department.

The science resource center is in bad condition and not in optimum use currently. Respondents from Nalerigu SHS thought that the renovation that took place in 2012 only addressed 20%-40% of the real challenges the resource center suffered at the time. The situation has worsened now.

Source: ACEP (2017)

Table 3: Cost and Time effectiveness at the contract execution stage

EVENT	DATE	REMARKS	EFFECTS
Contract award date	8th November 2010	Agreement between MoE and Contractor signed on 2nd February, 2011	Contract sum was GHC 104, 659.53
Contract Period (3 months)	To end 28th February, 2011	Project not commenced	
Messrs Zidra Subcontracts AL RAZ	May, 2011	AL RAZ shows up at AESL same month; Feasibility study done	Contract sum after feasibility became GHC 118, 488.42

EVENT	DATE	REMARKS	EFFECTS
Work Commenced	October 2011	Delay due to mobilization	
1st Certificate raised	12th January 2012	Certificate Value was GHC 54,865.18	
1st Certificate paid	March, 2012	AL RAZ paid GHC 40,000	
2nd Certificate raised	12th October, 2012	Certificate Value: GHC 61,006.75	
Project completed and handed over to school	17th October, 2012	Contract executed in 1 year	Time overrun 19 months from original deadline (28th February, 2011)
2nd Certificate paid	April 2014 (1.6 years)	AL RAZ paid GHC 50,000	
ABFA Disbursed to Nalerigu	2015	ABFA Value was GHC 61,006.75	2nd Certificate had already been partially paid. No new rehabilitation work had been done two years on.

Source: ACEP Field visit, 2017

a. Time overrun

The project was supposed to have been completed and handed over to the beneficiaries on 28th February, 2011. It was however completed on October 2012. This translates to 19 months of delay.

b. Cost overruns

The project suffered cost overrun. The contract sum at the award stage was GHC 104, 659.53. It came to GHC 118, 488.42 after the feasibility study. At the project completion stage, actual contract price came to GHC 121,104.91. The increase in completion price (difference of GHC 16,445.38) could be due time overrun and the attendant effects of inflation and time value of money.

c. Impact on teaching and learning

i. During the project execution phase, students were not displaced. This is because the resource centre was not always in use. Teachers who used it seldom did. Practical lessons already happened in the classrooms because the lab was out of shape and too small for the larger class size. Normal teaching and learning continued. Empty classes were also available to accommodate every student.

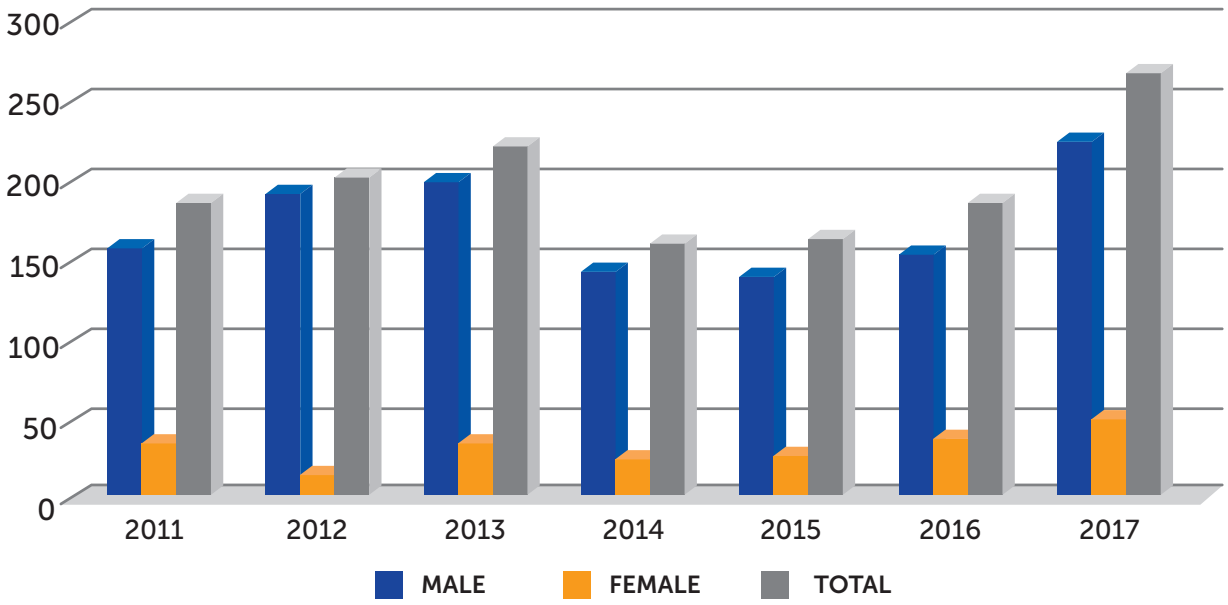
ii. Upon completion, the contractor did not replace fixtures that were removed. The school was misled to believe that new ones would be provided. Some lab equipment got broken. The lab stools and work benches that were removed were also never re-fixed. Students have had to bring in tables from the dining hall as work benches. Carrying benches

to and fro takes a toll on the students. Shelves were also not fixed. The rehabilitation work made students and teachers worse off because it solved about 20% to 40% of the real challenges the Science department faced.

d. Impact on enrolment and performance levels

There is no link between the project and enrollment rate into the sciences ever since the project was completed. This has been presented in the figure below:

Figure 2: Trend of student enrollment to the Sciences at Nalerigu SHS



Source: Nalerigu SHS Administration

The above figure shows that the number of science students have not generally increased ever since the rehabilitation work was completed in October, 2012. Nalerigu SHS is widely known in the region as having strong leverage in the sciences. Students who choose to study science do so based on the school's reputation and other factors, but definitely not the then rehabilitated science resource centre.

At the time of the research, the centre was barely utilized. Students have passed their WASSCE examinations because of the commitment of science teachers and their ability to improvise to make learning much easier than it ordinarily would have been.

The current students of the school were admitted in the 2015/2016 academic year, when the project had been executed. Out of the 58 students (34 males and 24 females) who filled out the questionnaires, none knew about the project, but all indicated the importance of a well-equipped science laboratory to their success in school. All the teachers confirmed that the renovation did not impact the performance of students in any way. The success of the science students was attributed to the vigilance of the teachers.

In conclusion, it appears in the strictest sense that there existed no project in 2015 for which value for money could be assessed. In a more relaxed sense, there equally existed no value for money for renovation works which was done in 2012 and paid for by 2014.

Case study 7:

Monitoring challenges in Ghana's procurement system: the case of oil revenue investment in goods and services.

Huge sums of money, about 80% of total ABFA allocated to the education sector between 2011 and 2016, was spent on goods and services (25 projects) over the period. The largest spend occurred in 2016, followed by 2015, yet the number of beneficiaries of these investments and their location were not provided to enable value for money assessment. For instance, the 2016 Annual Report says nothing about who benefited from the GHC 83,037,283.91 worth of scholarship claims and at what level of education. Similarly, the reports say nothing about how many students in which schools benefited from progressive free SHS, SHS subsidies, BECE subsidies, and free uniforms, amongst others. This poses difficulties in tracking whether funds have gone to intended beneficiaries in the right regions who face financial barriers in their quest to access quality education. It is not clear how gender gaps have been bridged in promoting equal access to education through the use of the ABFA. Moreover, the completion status of projects remain unreported, contrary to the provision in section 48 (2) b of the PRMA which requires the Minister of Finance to "describe the stage of implementation of the programmed activities funded by, and the expenditures incurred on the activities covered by, the Annual Budget Funding Amount in the financial year of the report." The provision in section 48(2) is consistent with open contracting global practice principles.

Source: ACEP (2017)

3.3 Challenges of open contracting in other African countries

3.3.1 Nigeria

The Bureau of Public Procurement is responsible for regulating, monitoring and overseeing activities of public procurement. This authority was established by the Public Procurement Act 2007 and further responsible for setting standards, developing the legal framework and professional capacity for public procurement and ensuring the application of fair competitive, value-for-money and transparent practices for a sound procurement regime. (http://www.bpp.gov.ng, 2012). In theory Nigeria should have one of the most transparent procurement systems in the sub-Saharan region. This is because it is one of the few countries in the region to pass a Freedom of Information law in 2011 which is supposed to enable the public access certain government information in order to ensure transparency and accountability. This law is undoubtedly a viable tool that civil society groups and the media can use to access information on various procurement contracts. Yet, the biggest challenge is that the Freedom of Information law has been grossly underutilized. A lot of Nigerians are unaware of their rights under this particular law and the sad reality is that the media and civil society groups have by and large failed to harness the opportunity to investigate contracts and other related information.

3.3.2 Uganda

The Public Procurement and disposable of Public Assets Authority(PPDA) was established through the Public Procurement and Disposal

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3.3.2 Uganda

The Public Procurement and disposable of Public Assets Authority(PPDA) was established through the Public Procurement and Disposal of Public Assets Act No. 1 of 2003 and it is responsible for ensuring the application of fair, competitive, transparent non-discriminatory and value for money procurement and disposal standards and practices. It is also responsible for setting standards for public procurement, monitoring compliance of procuring and disposing and building procurement and disposal capacity in Uganda. The PPDA has created a tender portal as part of its reforms, on which all information which includes but not limited to contract awards, prequalified lists, etc. is posted and freely accessed. It has in turn trained Procurement and Disposal Entities (PDEs) on how to use the portal and presently about 77% of them are compliant. Uganda is one of the few countries in the sub-region that guarantees the right to information. The bill of rights which includes the right to information is contained in the Ugandan constitution and therefore the objective of the access to information Act 2005 is to operationalize the right by specifying procedures that gives easy access to information and its management. In fact, the main aim of article 41 in the Ugandan constitution is to force the state to provide all information. The challenge with the act is that, it claims to exclude certain categories of information from the public e.g. Records of committees, cabinet records etc. which in many cases confidentiality clauses are used as pretexts to deny access to information.

3.4 Improving open contracting in petroleum revenue utilization in Ghana and Africa

Examples from Ghana show that a transparent and efficient public procurement process that is also inclusive will go a long way to minimize existing and potential losses. To sanitize public procurement in petroleum revenue utilization,

1. African governments must publicly disclose the list of projects that are earmarked to receive support from petroleum revenues each year. This way, citizens can monitor the contracting process from formation to execution to ensure that revenue leakages are blocked and quality assurance is secured. Prior disclosure of projects to receive funding from petroleum revenues allows for problems to be solved proactively, compared to the post mortem approach.

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2. The capacity of sector Ministries and relevant government agencies should be strengthened in project monitoring and value for money evaluation. This will ensure constant update on project completion status to assure citizens that the petroleum revenues are invested in their favor. Sector Ministries may partner with local authorities to monitor projects and ensuring that projects are properly supervised and delivered in time to achieve value for money.
3. African governments should build online portals where all procurement information can be accessed by everyone. Apart from increasing transparency, such a system will help the government and civil society to detect and solve procurement challenges in time.
4. Governments should enact a right to information law that can bridge communication gap between citizens and the government. Right to Information Law is one approach any government may build or improve its legitimacy with the public by strengthening participatory governance.

NOTES

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