

PROCUREMENT AS PRINCIPLED POWER: REIMAGINING CONTRACTS, COMPLIANCE, AND THE COMMONS.

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Abstract

This article emerges from a deep analytical engagement with the ECOWAS Training on Procurement and Contract Management held from 30 June to 4 July 2025. It offers a comprehensive reflection on the evolving role of public procurement, not merely as a transactional mechanism but as a strategic tool for inclusive governance, equitable development, and resilient institutional frameworks. The paper examines procurement through a triadic lens that encompasses legal enforceability, commercial pragmatism, and ethical innovation. It evaluates the strengths of current doctrinal and operational paradigms while identifying systemic omissions in contract lifecycle enforcement, supplier diversity, and justice-oriented innovation. In doing so, it proposes a reimagined procurement-contract ecosystem that places inclusion, sustainability, and strategic accountability at its core. The article concludes by outlining a charter-driven roadmap for equitable procurement, positioning it as a critical lever in regional governance and sustainable development.

Reconsidering the Contractual State

In the twenty-first-century governance architecture, public procurement has transcended its traditional character as an administrative function to become a locus of power, policy, and development. No longer relegated to the backstage of bureaucratic procedure, procurement now operates as the interface between state intention and public outcomes. As scholars such as Sue Arrowsmith have long argued, procurement systems function as a primary mechanism through which public objectives are pursued, particularly in developing jurisdictions.¹ It determines who is permitted to participate in development

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¹ Sue Arrowsmith, *The Law of Public and Utilities Procurement* (3rd edn, 2014, Sweet & Maxwell) 687.

projects, how benefits are distributed, and whether legal and ethical safeguards are respected in state-market engagements. Against this backdrop, there is an urgent need to reconsider procurement as a terrain for strategic action, where contracts serve not merely as instruments of exchange but as tools for delivering social value, ensuring compliance, and advancing the public good.²

A Triadic Lens

To unravel the complex functions of procurement and contract management, this article adopts a triadic interpretive framework that balances normative, operational, and aspirational dimensions. This draws from recent multidimensional approaches in governance theory which stress the need to examine public functions not just through technical or legal prisms, but through ethical and developmental lenses.³

First, the Legal Architect perspective grounds the analysis in enforceability, jurisdictional clarity, and regulatory compliance. This echoes the foundational works on contract enforceability by Treitel and the relevance of legal certainty in public-private engagements.⁴ Second, the Commercial Realist approach considers efficiency, cost-effectiveness, market engagement, and value-for-money principles, reflecting principles from Porter's strategic procurement paradigms.⁵ Finally, the Ethical Futurist dimension introduces imperatives of inclusion, environmental and social governance (ESG), and adaptive innovation, aligning with normative discourses in global procurement ethics.⁶

This multidimensional framework facilitates a more sophisticated understanding of procurement, treating it not simply as a functional discipline but as a dynamic domain through which power is mediated and public interest pursued.

² Carol Harlow and Richard Rawlings, *Law and Administration* (3rd edn, 2009, Cambridge University Press) 245.

³ Mark Bovens, Paul 't Hart and B. G. Peters, *Success and Failure in Public Governance* (2001, Edward Elgar).

⁴ GH Treitel, *The Law of Contract* (14th edn, 2015, Sweet & Maxwell).

⁵ Michael Porter, *Competitive Strategy: Techniques for Analyzing Industries and Competitors* (1980, Free Press).

⁶ Sope Williams-Elegbe, *Public Procurement and Multilateral Development Banks* (2017, Hart Publishing) 87–99.

Doctrinal and Operational Foundations

At the doctrinal level, the legal foundations of contract enforceability are comprehensively delineated, particularly around the canonical elements of contract formation: offer, acceptance, consideration, capacity, legality, and intention, drawing on standard principles of common law contracts.⁷ The case of *Best (Nigeria) Ltd v Blackwood Hodge (Nigeria) Ltd*.⁸, underscores the the judicial insistence on the sanctity of contract, reaffirming that where contractual terms are clear and unambiguous, they must be enforced as agreed by the parties without judicial interpolation. Such jurisprudential signals reaffirm the primacy of contractual certainty and legal discipline in procurement regimes.

Operationally, the correct application of control, integration, and mutuality tests to clarify employee versus consultant classifications demonstrates maturity in institutional contract design, particularly relevant in long-term, high-value procurements. There is a nuanced appreciation of strategic procurement tools, evidenced by the use of Abnormally Low Bid Threshold (ALBT), the Kraljic Matrix, Porter's Five Forces, and differentiated incoterm structures.⁹ The procedural integrity of bid selection and evaluation is further strengthened through the inclusion of methods such as Quality and Cost-Based Selection (QCBS) and Least-Cost Selection (LCS), reflect best practice standards as outlined in the OECD/DAC Harmonised Procurement Guidelines.¹⁰

These normative and operational strengths constitute a solid foundation on which more inclusive, resilient, and ethically anchored procurement systems can be constructed.

Silence in the Lifecycle and the Margins

Despite this technical robustness, procurement continues to be treated predominantly as an upstream activity, often neglecting the downstream elements of contract performance,

⁷ Ewan McKendrick, *Contract Law* (13th edn, 2023, Macmillan).

⁸ (2011) 5 NWLR (Pt 1239) 95.

⁹ Peter Kraljic, 'Purchasing Must Become Supply Management' (1983) 61(5) *Harvard Business Review* 109.

¹⁰ OECD/DAC Harmonised Procurement Guidelines (2006)
<https://www.oecd.org/dac/effectiveness/40529573.pdf>.

enforcement, and exit strategies. This critique echoes the World Bank’s observations in its Country Procurement Assessment Reports (CPARs), which document the gap between award and actual service delivery.¹¹ Critical mechanisms such as Key Performance Indicators (KPIs), Service Level Agreements (SLAs), performance audits, and structured close-out procedures are frequently underdeveloped, undermining post-award accountability.

More notably, the exclusion of supplier diversity frameworks and inclusion-sensitive evaluation criteria constitutes a missed opportunity to transform procurement into a redistributive tool. The marginalisation of women-owned businesses, youth-led enterprises, and historically disadvantaged suppliers reflects institutional inertia due to the structural neutrality of most procurement models.¹² The neutral façade of open competition often conceals deeper structural inequalities, as noted by Sope Williams-Elegbe in her analysis of procurement and inequality in Africa.¹³

The treatment of intellectual property (IP) within procurement contracts is likewise limited to conventional interpretations of legal ownership and dispute resolution under the Arbitration and Mediation Act, 2023. In the digital domain, interpretations of intellectual property remain confined to static licensing frameworks, failing to account for algorithmic discrimination, AI-generated content, and open-source innovation—areas now gaining prominence under AfCFTA protocols and the UNESCO AI Ethics Recommendation.¹⁴

Furthermore, Environmental and labour safeguards remain peripheral in most procurement models, despite increasing calls to align with the UN Sustainable Development Goals (SDGs).¹⁵ There is little attention paid to social safeguards: clauses

¹¹ World Bank, Country Procurement Assessment Reports <https://www.worldbank.org/en/projects-operations/products-and-services/brief/procurement-assessment-reports>.

¹² African Union Commission, Gender Equality Strategy for Africa 2018–2028.

¹³ Williams-Elegbe [n6] at 2.

¹⁴ African Union, AfCFTA Protocol on Intellectual Property Rights (Draft 2023) available at <https://au-afcfta.org/legal-documents/>; UNESCO, Recommendation on the Ethics of Artificial Intelligence (2021).

¹⁵ UN General Assembly, ‘Transforming our World: The 2030 Agenda for Sustainable Development’ A/RES/70/1 (21 October 2015) <https://sdgs.un.org/goals>.

mandating anti-exploitation, wage parity, workplace safety, or protection against harassment are largely absent from standard contract templates. Nor are there concrete mechanisms to ensure that public procurement respects environmental standards or integrates green procurement principles.

Procurement and Contract Management as a Continuum

The conceptual and operational divorce between procurement and contract management weakens both domains. This paper argues for their integration into a seamless continuum that links procurement planning, bid evaluation, contract enforcement, and supplier development into a unified strategic ecosystem which aligns with reform proposals in the UNCITRAL Model Law on Public Procurement 2011.¹⁶ As Carol Harlow and Richard Rawlings have argued, integrating contract enforcement mechanisms with social accountability tools creates more participatory administrative law.¹⁷

When bid processes incorporate anti-discrimination clauses, they naturally facilitate supplier diversity and equitable access. Technical evaluations aligned with performance-based contracting enhance quality and accountability. Price realism, supported by risk-sharing provisions, promotes fair value without exploitation. ESG targets are enforceable only when embedded within measurable contract clauses and subject to periodic audit. Each procurement element must therefore anticipate and feed directly into contract management practices, creating a feedback loop that privileges long-term value over short-term compliance.¹⁸

A. From Procedural Neutrality to Substantive Inclusion

The prevailing assumption in many procurement systems is that procedural openness suffices to guarantee fairness. However, open access is not synonymous with equitable participation. Systemic barriers ranging from language and documentation challenges to

¹⁶ UNCITRAL Model Law on Public Procurement (2011) <https://uncitral.un.org/en/model-laws/public-procurement>.

¹⁷ Harlow and Rawlings [n2] at 2.

¹⁸ UNIDROIT and ALI, Principles of Transnational Civil Procedure 2004.

digital exclusion and financial capacity gaps, continue to restrict entry for vulnerable groups.

A shift is thus required: from formal neutrality to purposeful, outcome-oriented inclusion. Research by the African Development Bank shows that procedural openness does not translate to equitable access without targeted interventions.¹⁹ Procurement systems must be re-engineered to embed inclusive logic into each stage of the procurement lifecycle—planning, design, solicitation, evaluation, award, and enforcement.

This reengineering involves transforming eligibility criteria into tools for social policy, such as pre-qualification pathways for women/youth-owned SMEs. Evaluation frameworks must evolve to include weighted metrics for ESG and DEI impact, not just technical and financial benchmarks.²⁰ Contracts must move beyond deliverables to include binding obligations around social value delivery, wage parity, and inclusive employment practices. Terms of reference (ToRs) should be tailored to local socio-economic realities, not standardised into one-size-fits-all templates.

B. Engineering Inclusion: Design Interventions for Equity

Inclusion must be engineered, not assumed. This begins with localised, multilingual pre-bid briefings that lower the threshold for participation by demystifying procedural requirements. Technical and financial evaluation panels should reflect regional, linguistic, and gender diversity to mitigate unconscious bias and increase legitimacy. Procurement documents should be made digitally accessible and translated into dominant local languages to widen participation consistent with the World Bank Procurement Framework 2016.²¹ A Regional Supplier Diversity Index could serve as a tool to pre-screen inclusive vendors and inform institutional sourcing decisions.

¹⁹ African Development Bank, Procurement Policy for Bank Group-Funded Operations 2015.

²⁰ Ibid.

²¹ World Bank, Procurement Framework and Regulations for Projects After July 1, 2016 <https://thedocs.worldbank.org/en/doc/178331467062457292-0340022016/original/ProcurementRegulations.pdf>.

Such interventions reconfigure procurement into a system of opportunity rather than exclusion.

C. Embedding Inclusion into Contractual Terms

Inclusion must not only be encouraged; it must be enforceable. Legal clauses must institutionalise equity, sustainability, and justice. Model provisions could include requirements for non-discriminatory hiring and reporting obligations, minimum contract value allocations for marginalised enterprises, and ESG reporting requirements.

These clauses convert social aspirations into contractual duties, ensuring that justice is embedded into legal obligations and institutionalised into standard practice.²² They also protect procuring entities from reputational harm and compliance risks. This aligns with recent innovations in social procurement clauses promoted in Commonwealth countries.²³

D. Oversight and Enforcement of Inclusion Commitments

Beyond contract formation, institutions must actively monitor and enforce inclusion. Social impact dashboards can track vendor performance on non-financial indicators, while equity audits conducted at contract close-out can assess the lived effects of procurement on target communities.²⁴ Redress mechanisms must be institutionalised to allow suppliers and affected parties to challenge discriminatory practices or non-compliance with social clauses.²⁵

Such enforcement mechanisms demonstrate a commitment to not only signing inclusive contracts but also delivering inclusive outcomes.

²² Arrowsmith [n1] at 1.

²³ Commonwealth Secretariat, Gender-Responsive Public Procurement 2021.

²⁴ World Bank CPAR [n11] at 4.

²⁵ OECD, Government at a Glance 2023.

E. Toward a Regional Charter on Equitable Procurement

To consolidate these reforms, a Charter for Equitable Procurement and Contracting should be developed at regional level. Anchored in the development goals of member states, the AfCFTA protocols, and global commitments such as the SDG 12, this Charter would enshrine benchmarks, principles, and harmonisation tools for inclusive procurement.²⁶ Similar initiatives have emerged under the Pan-African Public Procurement Network (PAPPN) and the African Union's AUDA-NEPAD development agenda.²⁷

It would enable the mutual recognition of inclusive vendor certifications, align national procurement policies with regional equity targets, and promote the institutionalisation of gender-responsive procurement as standard practice rather than exception.

Procurement as a Site of Co-Creation

The journey from procedural procurement to principled power requires a paradigmatic shift. Procurement must move from a tool of compliance to a site of co-creation, where legal, commercial, and ethical values converge. Institutions must begin to treat procurement not as a marginal administrative task, but as a strategic instrument through which inclusive futures are imagined, resourced, and realised. This vision builds on the foundations of administrative justice and policy legitimacy, making procurement not just a transactional mechanism, but a transformative one.²⁸

To do this is to recognise procurement as a means of purchasing not merely goods and services, but justice, sustainability, and legitimacy. In the age of planetary uncertainty and democratic fragility, such recognition is not just timely—it is imperative.

²⁶ AfCFTA Secretariat, Framework Document on Inclusive Trade (2024, forthcoming).

²⁷ African Union Development Agency (AUDA-NEPAD), Continental Procurement Transformation Agenda 2022.

²⁸ Bovens, 'Public Accountability' in *The Oxford Handbook of Public Management* (OUP 2005).