III. Conspiracy and Procurement:

The offence of conspiracy was charged in 6 of the 8 cases reviewed, with convictions in 2 cases. Note that the charge of conspiracy concerned procurement in 2 cases: ***Sesay*** and ***Ken Gborie*.** Regarding acquittals, in ***Sesay*** the Accused were acquitted of conspiracy to willfully fail to comply with procurement procedure. In ***Lukuley*** the Accused was acquitted of a conspiracy to willfully failure to comply with applicable procedures relating to management of funds and also acquitted of a conspiracy to misappropriate public funds for want of evidence in both instances. In the ***FCC case***, the Accused were acquitted of conspiracy to misappropriate since the charge was erroneously plead. In the ***Al Jazeera*** case, the Accused was acquitted of conspiring to offer and solicit an advantage, the evidence demonstrating no such common design. Regarding convictions; in ***Katta***, the Accused were convicted of conspiring to cause loss of revenue, while in ***Ken Gborie***, the Accused were convicted of conspiring to willfully fail to comply with procurement procedure. Charges were also brought in ***Sesay***, ***the FCC case*** and ***Ken Gborie*** for willful failure to comply with procurement procedure (*as a substantive offence and not through the mode of conspiracy*).[1]

1. Conspiracy:

A. Pleading:

Conspiracy as a mode of commission can be charged in relation to any substantive offence of the ACA 2008. The Prosecution has kept repeating the same error in pleading conspiracy, but the Court's approach has grown more tolerant to these misses over time. In the ***FCC case*** in August 2012, conspiracy was plead under s. 128 generally, instead of 128 (1) and even though all s.128 (2) simply refers to are the investigative powers for conspiracy, the conspiracy charge was dismissed for possibly prejudicing the Defence. It could not be amended since, it was argued, the erroneous charge never created an offence in the first place, and any amendment would now introduce an offence never part of the committal proceedings. In ***Ken Gborie*** in July of 2014, the same problem arose, but this time J. Paul interpreted s. 128 without more, as creating the offence of conspiracy. Here, it was held that a statute should be construed in conformity with the common law and that conspiracy was a common law offence. The Accused had pleaded not guilty to the offence, meaning that he understood the charge and was not prejudiced in his defence. In ***Katta*** in April of 2014, J. Paul followed the precedent he had set, by dismissing the Defence's argument that the conspiracy charge was defective and vague since it was ***again*** charged under s. 128 ACA, instead of s. 128 (1). Referring to ***Ken Gborie***, he stated that s.128 without more does indeed create the offence of conspiracy, since the ACA simply imported the preexisting common law offence and statutes had to be construed in conformity with the common law, unless there was a contrary intention. The Accused was not prejudiced in his defence since he must have understood the charge in order to have pled to it and s. 148(1) of the CPA of 1965 made such amendments possible, contrary to dicta in the ***FCC case.***

B. Evidence:

Sesay makes clear that the law on conspiracy criminalizes the existence of an agreement between two or more to do an unlawful act by unlawful means *and* the intention to play a role in the agreed scheme. According to ***Sesay***, proving a conspiracy means proving that the parties allegedly involved had a **common purpose**. Similarly, in ***Katta***, J. Paul stated that the offence of conspiracy is the agreement between two or more persons to do an unlawful act but he went further in saying that the offence requires an act in pursuit of that criminal purpose, accompanied by the intention to do the unlawful act. As per the review, the Prosecution's case theories set out corruption offences *generally* as requiring a lot of "hands" to pull off and conceal. The more massive the amounts at stake, the more convoluted the criminal plan becomes, requiring more persons to effectuate it; a conspiracy. ***Katta*** recognized that conspiracies come in different forms, with roles of varying significance and conspirators need not know each other or to have started the conspiracy simultaneously; it can be joined tacitly at a later stage by others, aware of all the essential facts and having the same object.

The rules as set out in the cases reviewed, on the admissibility of, and weight to be given to evidence sought to be adduced in support of a conspiracy charge, are consistent with each other and with more generalized rules on evidence concerning joint trials simpliciter. ***Sesay*** is authority for the general principle that the Prosecution must adduce all evidence on which it intends to rely as probative of guilt of the Accused before the close of its case. In the ***ABC case***

[1] See heading 4, p. 5 below.

where conspiracy was not charged, it was stated that despite a joint trial, each Accused's case/evidence must be treated separately, that evidence inculpating one Accused should not be treated as necessarily inculpating another and that, where there is no direct or circumstantial evidence establishing an Accused's guilt, independent of the evidence against their co-Accused, he is entitled to an acquittal. Regarding conspiracy then, ***Sesay*** indicates that acts clearly proved against some defendants may be **used** against all the defendants, **as evidence of the nature and objects** of a conspiracy. The ***Al Jazeera case*** further sharpened this principle stating that a **conspiracy may be proved** against an Accused by admitting the acts of his co-Accused against him, but only if that co-Accused acted in furtherance of a common plan between himself and the Accused; the co-Accused's conduct sought to be admitted should indicate the pursuit of a plan as between them and even where this criterion is met, other independent evidence implicating the Accused in the conspiracy is needed. Therefore, evidence of the Co-Accused's conduct by itself does not suffice. ***Katta*** added very little to these conditions, saying that in proving conspiracy, the words, deeds or omissions, of an Accused conspirator in furtherance of the common design, made in the absence of the co-Accused/co-conspirators, may be admitted in evidence against these co-Accused and that this was a question for determination on an individual case basis. **The net effect of these cases is that generally and in conspiracy cases specifically, evidence admissible against an Accused may be admitted against other Co-Accused. However, a conviction requires evidence independent of the evidence against one's co-Accused.** This is a due process protection mechanism consistent with the presumption of innocence and the standard of the burden of proof (beyond a reasonable doubt), incumbent on the Prosecution.

It is difficult to secure evidence directly implicating an Accused in corruption offences. In ***Katta*** it was stated quite generally that; "*It is difficult to detect corruption in public service since participants consciously cover their tracks. Perpetrators of corruption offences are skilled and devious schemers, operating covertly*." In relation to proving conspiracy, it is even more difficult to secure direct evidence of a common agreement and of an Accused's consent to/ involvement in it. ***Sesay*** makes clear that; "*it is possible to infer such an agreement from the circumstances*." Hence, the Prosecution's heavy reliance on circumstantial evidence, especially as regards conspiracies, to prove the existence of an agreement and the Accused's involvement in it. As was voiced in ***Katta***; "*the intention to do the unlawful act and the act done in pursuit of that criminal purpose, tend to be rarely capable of being proved through direct evidence. These elements of the offence must be inferred from objective factual circumstances, i.e. acts or omissions of the parties. Very often, the act is the only proof of conspiracy…Circumstantial evidence …are thus relied upon to demonstrate the agreement to participate or commit the crime and the commission of the crime itself*." **In short, the fact that various acts were committed by the various Accused which all work together to produce a natural consequence/outcome can be proof of intention and agreement.** For example in ***Katta*** it was held that, although there was no direct evidence of Fornah's acts as proof of a conspiracy, conspiracy may be inferred from his acts where it appears to be the natural consequence of his actions. Turay's role in the conspiracy was evident from his overt acts and omissions which breached all known bank procedures to ensure the diversion of NRA cheque into Magsons' account and Mrs. Katta's phone conversations to these two were, "*part of the multitudinous little things that corroborate the overarching conspiracy*" to divert the cheque, going to show she was party to the conspiracy. Katta was held to be complicit in the overarching conspiracy, since he started withdrawing from the account as soon as the payment was made. On the other hand, in the ***Al Jazeera*** case, the Accused were acquitted of conspiring to solicit and to accept the offer of an advantage, since taken together their conduct did not amount to collusion or go towards proof of such an agreement.

In the ***FCC*** case, the Court stated that it's unadvisable to charge a conspiracy where the supporting evidence is simply evidence of the actual commission of substantive offence (s).[2] However, in ***Katta***, J. Paul reasoned that it was

[2]Ramsay I. and Pinnock T., (Undated), *Conspiracy-An Expanding Net*, www.jambar.org/index.php?...Conspiracy%20-%20An%20Expanding%, p. 8; In *R v. Dawson* (1960) 1 W.L.R. 163, p. 170, the Court complained, "*This Court has more than once warned of the dangers of conspiracy counts, especially these long conspiracy counts, which one counsel referred to as a marathon conspiracy count. Several reasons have been given. First of all, if there are substantive charges which can be proved, it is in general undesirable to complicate and to lengthen matters by adding a charge of conspiracy. Secondly, it can work injustice because it means that evidence which otherwise would be inadmissible on the substantive charges against certain people becomes admissible. Thirdly, it adds to the length and complexity of the case so that the trial may easily be wellnigh unworkable, and impose a quite intolerable strain both on the court and on the jury*." See also pp. 5-6; The practice direction which followed the UK Criminal Law Act 1977 advised judges that, "*In any case where an indictment contains substantive counts and a related conspiracy count, the judge should require the prosecution to justify the joinder, or failing justification, to elect whether to proceed on the substantive or on the conspiracy counts*"; Practice Direction (1977) 1 W.L.R. 537. The direction was issued in response to complaints that unjustified charges of conspiracy were being brought to enable the prosecution to take advantage of the hearsay exception rule of the conspiracy doctrine.

permissible to charge conspiracy and substantive offences on the same facts and that charging a general conspiracy more accurately reflects the reality than just charging the substantive offences which are subsumed within it. The consequence of this, is that the proof of the conspiracy is then entirely contingent on convictions for these substantive offences so that where these fail, the former also does, as in ***Lukuley*** where the Accused was charged with conspiracy to willfully miscalculate his per diem which was contingent on misappropriation charges and in ***Sesay*** where Sesay was acquitted of conspiracy since the substantive offence of personally breaching s. 48(2) (b) failed.

Therefore, for a charge of conspiracy, the Prosecution may seek to admit diverse and disparate pieces of circumstantial evidence as admitted against one Accused, as against co-Accused, even where not directly related to the latter, to set the scene; to depict a large scale enterprise, to prove the element of a grand scheme/design/plan and to demonstrate the coalescence of that scheme.[3] In line with due process safeguards, the evidential principles enunciated above do not prevent this, but operate to ensure that where such generalized evidence has no direct nexus to an Accused, it does not serve as the basis for their convictions; only evidence implicating the Accused in the orchestration of the conspiracy, not just his co-Accused, should be the basis for attributing personal responsibility to him for the offence.

Direct evidence is by definition independent of any other and so qualifies as both admissible and grounds for conviction. The above principles on admissibility and grounds for conviction therefore only require testing as against circumstantial evidence, since its nexus to the Accused in question may vary, as stated by J. Paul in ***Ken Gborie***; "*Circumstantial evidence constitute a network of facts cast around the Accused; they may be unsubstantial, salient but not cohesive enough, or salient, coherent and cohesive leaving the Accused with no plausible argument or alibi.*" The evidential principles from the review exist to ensure that convictions are not based on circumstantial evidence with tenuous links to the Accused. To say that in order for circumstantial evidence to serve as the basis of conviction against a particular Accused, it must be independent from the bulk of the evidence admitted as against her co-Accused, simply means that that piece of evidence must bear pertinently on the Accused. It is its direct relevance to the Accused in question that makes it **independent of the bulk of the other evidence admitted against co-Accused**. This is because it may possibly be considered generalized circumstantial evidence as against one's co-Accused. Or, if the piece of evidence simultaneously implicates all co-Accused, it can still meet the independent evidence criteria since it is independent in terms of implicating each individual Accused. Since the test does not stop circumstantial evidence from coming in at all, but stops improximate circumstantial evidence from being the basis of a conviction for reasons cited above, by itself, it does not render proving a conspiracy impracticably difficult.

2. Procurement and the Evidential Test for Conspiracy:

As to whether this requirement for "*proximate circumstantial evidence*" is practical and makes for good law in relation to conspiracies in procurement, note that it is not a more stringent standard unmatchable by the nature of the circumstantial evidence that conspiracies in procurement normally throw up.[4] The exposition above seeks to make clear the evidential requirements for proving a conspiracy, to be harnessed for further elaboration if need be. If ***Sesay*** becomes an authoritative precedent, this evidential test above will only apply to conspiracies in procurement (i.e. under s. 48(2) (b) ACA 08), where the conspirators are considered public officers, but the test will not be applicable where private parties are also so charged, that charge being voidable.[5] If the reasoning in ***Sesay*** as regards the capacity of private parties to commit conspiracy under s. 48(2) (b) ACA 08 is overruled, the test will be relevant across the board.

[3] The National Revenue Authority (The NRA) Case/The State v. Allieu Sesay et al., 28 June 2011, p. 60; "*...the overt acts which are proved against some defendants may be looked at as against all of them to show the nature and the objects of the Conspiracy*."
[4] See the discussion on indicia for identifying conspiracies in procurement at **Application**, p. 12 below.
[5] See the discussion on the impact of ***Sesay*** at heading 5, pp.6-9 below.

3. Public Procurement:

Public procurement, a practice designed to meet public needs in a way that serves the public interest, is starkly a good governance issue. It aims to secure goods, services or works, from an external source at optimum conditions to obtain the best value for tax payer's money.[6] The PPA 2004 generally establishes an open bidding process as per s. 37(1)[7] with the exception of sole source procurements in s. 46, and restricted bidding in s. 42. The point of a competitive process is to achieve best value for money since competition stimulates innovative ranges of better quality services and goods,[8] more efficient performance and lower costs. These factors support economic growth and are lost in the face of corruption/collusion. Corruption/collusion results in overpriced ***gratuitously*** awarded contracts which produce defective outcomes and divert public funds away from public amenities. ***Procurement focused anti-corruption efforts therefore directly impact governance.***

Procurement fraud is deliberate deception to secure unlawful gain. It can take the form of cartels, prevalent in smaller markets with fewer competitors i.e. explicitly deceitful behavior among otherwise rival firms for their mutual benefit based on secret conspiracies determining the winner of contracts. Cartels operate through bid-rigging/collusive tendering, meaning they artificially inflate prices (price fixing) and submit tailored bids and agree on who will win or agree not to bid against one another, compensating each other with subcontracts. Similarly, complementary bidding[9] is the submission of token tenders by bidders that are too high or deliberately defective, and sometimes from shell companies,[10] to simply create the appearance of genuine competitive bidding, securing the winning bidder's place at inflated prices. Cartels may engage in bid suppression/bid limiting so that competitors refrain from bidding or withdraw previously submitted bids or may engage in bid rotation where bidders take turns at being the winning bidder depending on the size of the contract, geographic areas, job, etc. tending to occur with successive contracts. Similarly, the Cartel may divide markets up and agree not to compete on certain bases. These practices involve misrepresentation, sometimes through the submission of false invoices or statements of prior work experience etc. Collusion and corruption coincide when public officials are favored for facilitating collusion. Such facilitation may involve unevenly evaluating bid components, providing bidders with advance "inside" information or failing to share key bidding information with all bidders. ***All these tendencies make it compelling for procurement officials to exercise due diligence to determine the real beneficial ownership of a bidding company where such information is not disclosed as part of the bid package***.[11] **Banks** have a major due diligence role, to perform checks verifying the background of firms and to confirm the contractual award by verifying the documentary basis of the award; minutes of the Procurement Committee meetings/report, contract document etc. in order to process contractual payments made via cheques (see Reg. 73 (1) FMR at p. 12 of **Section IV**.)

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[6] S. 1 PPA 2004; "Procurement" means the acquisition by any contractual means of goods, works, intellectual services or other services. S. 29 (1) PPA 2004; All procuring entities shall undertake procurement planning, with a view to achieving maximum value for public expenditures and the other objects of this Act.

[7] S. 37(1) PPA: Public procurement shall be undertaken by means of advertised open bid proceedings, to which equal access shall be provided to all eligible and qualified bidders without discrimination, subject only to the exceptions provided in sections 38, 39, 40 and 41.

[8] Kühn S. and Sherman L.B., (2014), *Curbing Corruption in Procurement, A Practical Guide*, Transparency International, p.10, http://issuu.com/transparencyinternational/docs/2014_anticorruption_publicprocureme?e=2496456/8718192. OECD,(2010), *OECD Policy Roundtables Collusion and Corruption in Public Procurement*, Directorate for Financial and Enterprise Affairs Competition Committee, Global Forum on Competition, pp.202, 476, 448, http://www.oecd.org/competition/cartels/46235884.pdf. The Irish Competition Authority, (2009), The *Detection and Prevention of Collusive Tendering*, http://www.tca.ie/images/uploaded/documents/Booklet%20-%20The%20Detection%20and%20Prevention%2 0of%20Collusive%20Tendering.pdf, p.3.

[9] Also known as cover/protective/shadow/courtesy bidding.

[10] Wikipedia (2015), see section on *Procurement Fraud*, https://en.wikipedia.org/wiki/Procurement. Project Auditors, (2014), *Procurement Fraud*, http://www.projectauditors.com/Dictionary2/1.8/index.php/term/,62555a9cae535 f6f68555aaf5d5c5b.xhtml. International Anti-Corruption Resource Centre ,(2015), *Guide to Combating Corruption & Fraud in Development Projects*, http://guide.iacrc.org/potential-scheme-collusive-bidding/; A front or shell company/shadow vendor has no physical presence, employees or commercial activity and its main purpose may simply be as a token bidder for collusive agreements between bidders. It may also serve to disguise the identity of government officials.

[11] Kühn S. and Sherman L.B., (2014), *Curbing Corruption in Procurement, A Practical Guid*e, Transparency International, p.20, http://issuu.com/transparencyinternational/docs/2014_anticorruption_publicprocureme?e=2496456/8718192; stating that "*Disclosure of ownership should be mandated for privately held companies and that special due diligence is required to make sure that all bidders are treated exactly the same*." International Anti-Corruption Resource Centre,(2015), *Guide to Combating Corruption & Fraud in Development Projects*, http://guide.iacrc.org/potential-scheme-collusive-bidding/; states specifically under the heading, Basic Steps to Detect and Prove Collusive Bidding;"*Do due diligence background checks on the winning and losing bidders to identify, for example, undisclosed common ownership, employees or other affiliations, or prior involvement in other collusive bidding schemes*." National Technical Expert Team, (2014), *National Anti-Corruption Strategy (Sierra Leone) (2014-2018)*, Commissioned by the ACC; http://www.psru.gov.sl/sites/default/files/STRATEGY.pdf, p. 31, calling for due diligence by public authorities in order to examine the credibility and integrity of bidders.

Banks are obliged and have an opportunity to conduct due diligence checks each time a contractor takes out securities; *bid, advance, performance* and *retention securities* (refer to p. 21 of **Section IV.**) Due diligence checks may prevent government official owned firms from bidding against private firms since the former do not factor a cost/expense margin into their quotations and only equals should be bidders. Due diligence background checks may also reveal any joint shareholding by firms.[12]

4. Prosecuting Collusion in Procurement, *Sesay*:

As regards collusion, note that public officials can easily enough be prosecuted for the substantive offence of willful failure to comply with procurement procedure; 3 cases in the review evince this. It was charged under 3 counts in ***Sesay***, as against Sesay himself, resulting only in acquittals. It was charged under 2 counts against the same set of 4 individuals in the ***FCC case***, resulting in the convictions of Williams on both counts, Philips and Konehni under one such count, Kwesi-John being acquitted on both counts. In ***Ken Gborie***, this substantive offence was charged under one count against Ken Gborie and Magbity resulting in the convictions of both.

The ***Sesay*** judgment surprisingly contains only a few references to the Public Procurement Act 2004 and Regulations,[13] despite the fact that provisions of the PPA 2004 make it clear that prosecutions can be brought for breaches of the PPA; s. 33 (6) PPA states that public officers who contravene the PPA and its regulations are liable to administrative and civil sanctions and prosecution under criminal laws, including the ACA 2000. Also s. 34 (6) PPA states that bidders who engage in **fraudulent, corrupt or coercive practices** in public procurement are subject to prosecution under criminal laws, including the ACA 2000. These provisions make clear that as regards public procurement, the primary/statutory source of the obligation is the PPA and regulations, and that the ACA is simply the statute that provides the legal avenue/cause of action for prosecuting such breaches. Hence, breaches of the PPA could be prosecuted by State Prosecutors under other causes of action/criminal law provisions. The ***Sesay*** judgment itself referred principally to the applicable ACA provisions, but did not as could have been expected correlate the charges to the source provisions in the PPA. Although the judgment failed to employ this correlative approach in the interests of diligence/thoroughness and so as to use the PPA as an additional descriptive guide against which to test the facts of the case, a process which would have augured better in the interests of justice, the Former Director of IIP, ACC, Prosecutions makes clear that there was no such similar omission by the Prosecution.[14]

The ***Sesay*** judgment refers vaguely to the PPA and regulations on only eight fleeting occasions.[15] Specifically, in discussing the conspiracy charge against the three private parties, it once refers to the PPA 2004; "*…there is nothing in the PPA No. 14 of 2004 which expressly prohibits a parent company and its subsidiary from bidding for the same contracts.*"[16] Its evaluation of the charge of conspiring to willfully fail to comply with procurement procedures and guidelines i.e. s. 48 (2) (b) ACA 08, completely sidesteps the need to discuss what these procedures and guidelines are by interpreting s. 48 (2) (b) as being directed at the conduct of public officers so that private parties quite simply cannot be amenable to conspiracy charges to commit the said offence. Neither are provisions of the PPA or its regulations discussed in relation to assessments of the following charges; i. Re the charges of misleading the ACC contrary to s. 127 (1) ACA '08[17] which although not directly corresponsive to any one particular PPA provision,

[12] Interview with the Head of Capacity Building, NPPA, Mr. Mohamed J. Musa, 12 August 2014.

[13] Responses furnished by the Former Director of Investigations, Intelligence and Prosecutions (IIP UNIT), ACC, Mr. Reginald Fynn, 2 July 2015; "Q. *In Sesay, did the Prosecution in its submissions set out the relevant provisions of the PPA 2004, go back and forth on the precise conduct that the ACA actually criminalized, use the PPA to flesh out the prohibited conduct?* A. *The procurement violations were laid out for the judge who appeared to believe they were of a minor non criminal kind*."

[14] Ibid.

[15] The National Revenue Authority (The NRA) Case/The State v. Allieu Sesay et al., 28 June 2011; at p. 44: Prosecution Witness 3, A.H. Charm said Fatma Allie Contracts were below the threshold of the *PPA*. At, p. 49: Prosecution Witness 11, Gaiva Paul Lavaly, local representative of Crown Agents U.K. said that he gave advice to the Procurement Committee meeting about what was to prevail according to the *procurement rules*. At, p. 50: Prosecution Witness 11 stated that one of his functions was to ensure that appropriate procedures were followed as laid down in the *NPPA and the Regulations*. At p 51: Prosecution Witness 15, Osman Rahman Kamara, an ACC investigator, stated that one of his functions was to ensure that appropriate procedures were followed as laid down in the *NPPA and the Regulations*. At pp. 63-64: "*Prosecution Witness 2, Labor, did not for one moment say that Sesay told the Committee to violate the Procurement Rules*." At pp. 72 and 73: Prosecution Witness 3, A.H. Charm said Fatma Allie Contracts were below the threshold of the *PPA*. At pp. 73 and 74: Prosecution Witness 2, Labor said that Sesay's minutes admonished the Procurement Committee to follow strictly the *Procurement rules and Guidelines*... and the same Accused instructed him to bend the *Procurement rules*.

[16] The National Revenue Authority (The NRA) Case/The State v. Allieu Sesay et al., 28 June 2011, at p. 61.

[17] Ibid, at pp. 65 and 66.

roughly approximates to s. 32 (6) of the PPA which imposes disclosure obligations on the procuring entity (procurement records and proceedings) in relation to ACC requests; ii. Re the charge of offer of an advantage,[18] which corresponds to s. 34 (2) PPA prohibiting bidders from offering directly or indirectly any inducement in order to influence a procurement process or the execution of a contract, s.34 (4) PPA which states that where this happens the procuring entity shall reject a bid and notify law enforcement and s. 34 (6) PPA which makes it clear that this is a crime subject to prosecution; iii. Re the charge of accepting an advantage,[19] which corresponds to s. 33 (1) (d) PPA which prohibits public officers involved in procurement and administering the implementation of contracts, from aiding or abetting corrupt or fraudulent practices by soliciting or accepting any inducements and s. 33 (6) PPA which states that a breach of s. 33 makes them liable to prosecution. The charges of peddling influence[20] also correlate to the preceding PPA provisions. iv. Re the charge of conflict of interest,[21] note that s. 33 (1) (c) of the PPA also obligates any public officer involved in procurement and administering the implementation of contracts to disclose any conflict of interest and recuse himself, s. 33 (3) specifically to recuse himself where he has a financial interest in the bidder, where the bidder is a close relative or his employer or an employer of a relative, and under s. 33 (4) this recusal continues to apply to the administration and management of an awarded contract. v. Re the charges of abuse of office,[22] and abuse of position respectively,[23] similar provisions can be found in s. 33 (1) (a) PPA which makes it incumbent on the public officer to discharge his duties impartially so as to assure fair competitive access to procurement, and s. 33 (1) (d), to not commit or abet corrupt or fraudulent practices, coercion or collusion.

5. Prosecuting Collusion in Procurement, *Sesay* on Private Parties:

Ken Gborie demonstrates that where the charge of conspiracy to commit s. 48 (2) (b) ACA 08 involves only one private party, it is no less a conspiracy than that that would exist between parties to bypass the right procurement procedure, except that it likely does not involve collusive bidding but rather involves agreeing to use a wrongful procurement method, i.e. sole source procurement and an active role by public officers in making this award. However, in ***Sesay*** the facts concerned 3 private parties. It is submitted that the PPA and PP regulations are more illustrative of prohibited conduct tending to occur around procurement. They could have served as a yardstick in ***Sesay***, against which to measure the allegations of the Prosecution against the three private parties, of conspiring to willfully fail to comply with applicable procedures i.e. the exercise would have been to test out the law on conspiracy and on willful failure to comply, and on collusion as set out in the PPA *on one hand*, as against the Prosecution's contentions and its evidence *on the other*. However, that juncture was averted by the pronouncement that private parties could not commit s. 48 (2) (b) and could not by extension therefore be liable for a conspiracy to commit it. S.48. (2) (b) in short talks about how a person with *access to and control over* public property, commits an offence if he willfully or negligently fails to comply with the law on procurement or the tendering of contracts. There is no use of the term, "public officer", although it may be implicit in the aforementioned acts. As an aside, Sesay was acquitted of conspiracy since the substantive offences upon which this conspiracy was based failed i.e. that he personally failed to observe procurement procedure in awarding the contracts. Public concern was expressed over the "public officer" bar in ***Sesay*** being a highly obstructive precedent to future prosecutions of collusive procurement. Since s. 48 (2) (b) aims to ensure that the persons controlling/implementing the procurement process observe procurement regulations, it is obvious that private persons vying for a public contracts cannot on their own breach it. However, the "public officer" bar is impractical for the following reasons.

A. Contra the "Public Officer" criterion:

Firstly, s.48 (2) (b) does not say public officer specifically because it is meant to also catch members of mixed nature bodies. To now use specifically "Public Officer" may be illegitimately exclusionary. S. 48 (2) (b) should still apply to members of state owned enterprises; companies with the state as the main stockholder, that undertake commercial activities on behalf of government. It could apply to members of a mixed company of public-private nature, with elements of state and private ownership which may use both private and public capital, where the state may have some

[18] Ibid, at pp. 66 through 68.
[19] Ibid, at pp. 68 through 69.
[20] Ibid, at pp. 69 to 70. Alternative charges in the ACA 2008 also appropriate for the circumstances would have been; s. 29(1) prohibiting the offering an advantage to a public officer for using his influence for the procurement of contracts with a public body, (c) or in obtaining an advantage under any contract and s. 29(2) prohibiting the acceptance or seeking of such.
[21] National Revenue Authority (The NRA) Case/The State v. Allieu Sesay et al., 28 June 2011, p. 70.
[22] Ibid, at pp. 71 and 72.
[23] Ibid, at pp. 72 and 73.

level of control, depending on the proportion of stock owned by the state, for e.g. the state may manage the company, appoint and replace its directors, and determine the direction and results of its activity. There are also companies spawned from public–private partnerships for projects, where both sides have shares.[24] As far as the ACA is concerned, conspiracy to commit s.48 (2) (b) is the most suitable charge for collusion in procurement; collusive procurement is clearly a conspiracy (an agreement to act to circumvent procurement law), while s. 48 (2) (b) aims to enforce procurement law. Conspiracy is traditionally an offence which allows admission of the kind of wide ranging circumstantial evidence likely to be seen in collusive procurement; direct evidence of collusion in procurement is unlikely and it is intuition that guides the assembly of circumstantial evidence making the Prosecution's case.[25] Further, precluding private persons from prosecution based on these charges is impractical because alternative charges e.g. offering an advantage to influence also make clear that there was an agreement to circumvent procurement procedure. Also, parties chose to conspire precisely because they are not personally placed to commit the substantive offence themselves; *in practice they quite simply cannot*![26] Moreover, the ACC was established by the ACA 2000 as amended by the ACA 2008 to prevent, investigate, prosecute, and punish corruption and corrupt practices; collusive procurement is one such practice, which is widely recognized both nationally and internationally as a pervasive problem contributing to Sierra Leone's underdevelopment.[27] It is as such one area the Act was designed to regulate. The possibility of charging conspiracy to commit s. 48 (2) (b) is a deliberate recognition by legislators of the need to singularly recognize a specific kind of corrupt practice that plagues Sierra Leone, a recognition unattainable by simply prosecuting under other heads. Importantly, there is at common law no principle making the commission of conspiracy dependent on some of the Accused's ability to meet the technical requirements of the substantive offence;**"*It is clear that there may be a conspiracy although only one party is capable of committing the substantive offence as a principal. If, for example, the offence can be committed only by a licensee and A, who agrees with B, a customer who is incapable of committing the substantive offence as a principal, that he, A, will do so, there is a conspiracy to contravene the licensing legislation. The course of conduct will necessarily amount to the commission of the offence by one of the parties.*"**[28]

[24]Castro and Jannsens, (2013), *Mixed Private-Public Ownership Companies "Empresa Mixta"*, AfDB, http://ppp.worldbank.org/public-private-partnership/library/mixed-private-public-ownership-companies-empresa-mixta. PPPIRC (2014), *What are Public Private Partnerships?*, http://ppp.worldbank.org/public-private-partnership/overview/what-are-public-private-partnerships.

[25] Procuring officers and investigators may simply be prompted by a hunch to review the case and each piece of circumstantial evidence may on its own suggest that something is not quite right with the procurement process, a sense that grows with one's amassing of circumstantial evidence, which all tend to point in a particular direction. The Irish Competition Authority, (2009), The *Detection and Prevention of Collusive Tendering*, p.2, http://www.tca.ie/images/uploaded/documents/Booklet%20-%20The%20Detection_%20and%20Prevention%2_0of%20Collusive%20Tendering.pdf; "*Did you get the nagging feeling that something wasn't quite "right" about some aspect of the process? On reflection, did the tenders seem very alike to you? Unreasonably so? Or did you notice a peculiar pattern emerging, compared to previous tender exercises*?"

[26] Shorunkeh-Sawyerr B., (2011), *Beyond Reasonable Doubt: A British QC Damns the Faulty Reasoning in the Allieu Sesay Judgment*, referring to Lady Joanna Greenberg QC, http://www.anticorruption.gov.sl/show_news.php?id=94

[27] Unnamed, (Feb 13 2015), *Unlawful Deals to Sierra Leone's 5 Biggest Ebola Contractors*, http://www.switsalone.com/21064_unlawful-deals-to-sierra-leones-5-biggest-ebola-contractors/. Transparency International Sierra Leone, (2015), *Corruption in Sierra Leone*, http://tisierraleone.org/page38.html; 70% of government spending is on public procurement, which is prone to corruption. Degun G., (27 May 2014), *Global Fund Exposes Ministry of Health of Procurement Irregularities*, http://mysierraleoneonline.com/sl_portal/site/news/detail/2523; piece concerning a global fund investigation which revealed fake invoices and evidence that suppliers did not exist for contracts awarded between 2008-11. National Public Procurement Authority, (Date), *Report on the sensitization workshops for Local Councils and Private Sector Service Providers*, http://www.publicprocurement.gov.sl/files/Sensitisation_Report.pdf. Department of Intelligence, Investigation and Prosecutions, ACC, (10 May 2010), *Anti-Corruption Commission Report for the Deputy Commissioner on Investigation of Alieu Sesay*, reposted on June 1, 2010, http://www.standardtimespress.org/artman/publish/article_4659.shtml; on the allegations of collusive bidding against Cole and Pratt. Vandy E.P., (3 May 2015), *'I paid a bribe Sierra Leone' – a new website for reporting graft* http://www.thesierraleonetelegraph.com/?p=9268. Sesay J.A.K., (1 December 2011), *Preventing Corruption in Sierra Leone: Is the Anti-Corruption Commission's System and Processes Review Project working?*, http://www.carl-sl.org/home/reports/531-preventing-corruption-in-sierra-leone-is-the-anti-corruption-commissions-system-and-processes-review-project-working-. ACC Commissioner and NPPA CEO, (16 July 2008**),** *Joint Press Release, ACC and NPPA, Public Procurement by Public Entities* http://news.sl/drwebsite/exec/view.cgi?archive=5&num=9141; on the ACC's recognition of non compliance with procurement law by public entities. Clinton N, (11 February 2015), *Why Does Third-World Competent Public Procurement Matter to International Trade?*, http://public.spendmatters.eu/2015/02/11/why-does-third-world-competent-public-procurement-matter-to-international-trade/. Auditor General Sierra Leone (2011), *Auditor General's Annual Report on the Accounts of Sierra Leone, Executive Summary*, http://www.sierraherald.com/audit-2011-executive-summary.htm. National Technical Expert Team, (Undated), *National Anti-Corruption Strategy Sierra Leone 2014-2018*, http://www.psru.gov.sl/sites/default/files/STRATEGY.pdf; talks about the high incidence of corruption at the interface of the public and the private sectors, through procurement. Heggstad K., Frøystad M., and Isaksen J., (2010), *The basics of integrity in procurement, A guidebook*, Chr. Michelsen Institute Commissioned by DFID, http://www.cmi.no/file/?971.

[28] Ormerod D., Laird K., (2015), *Smith and Hogan's Criminal Law*, 14th Edition, Oxford University Press, Oxford, citing in support of this principle; *Whitchurch* (1890) 24 QBD 420 and *Duguid* (1906) 21 Cox CC 200.

Importantly, there is also dicta that strongly suggests J. Ademusu's public officer criterion is desperately mistaken. 3 years later in 2014, J. Paul in ***Ken Gborie*** makes clear that; ***"in order to found a conviction under Section 48(2) (b) ACA 08, the prosecution need not prove that the person charged is a public officer."*** [29] This was stated when the possibility of convicting for the substantive offence itself in s. 48 (2) (b) was under consideration. The natural outcome of J. Paul's reasoning must therefore be that there cannot be any requirement for persons Accused of conspiracy to commit the offence in s. 48 (2) (b), to satisfy the public officer criterion (even if not herein stated as such). J. Paul in ***Ken Gborie*** instead makes the Accused's "function" the decisive factor in determining whether he can be charged and convicted under s. 48 (2) (b), i.e. his actual involvement in the administration, custody, management, receipt or use of any part of public revenue or public property.

Even in evaluating the charges of misappropriation of donor funds/property under s. 37(1) of the ACA 08, J. Paul in ***Ken Gborie*** adopts the same function-centred approach. He stated; "*An offence under Section 37(1) of the Anti-Corruption Act 08 can be committed by a non-member of a public body*."[30] What mattered was that the Accused was part of the management of an organisation, public body or otherwise, that had received donations for the benefit of the people of Sierra Leone or a sector thereof. Here, the 3rd Accused, Roberts, who was not a member of a public body, but the proprietor of a private enterprise, was capable of committing s. 37 (1).

J. Paul's treatment of the offence of conspiracy in ***Katta*** runs counter to ***Sesay*** where the Accused had to be capable of committing the particular substantive offence underlying the conspiracy with which he had been charged. In ***Katta***, the Defence contested the charge of conspiracy to cause loss of revenue to NRA (GOSL) since there was no such substantive offence articulated in the ACA 08.[31] This Defence argument was ignored although other Defence arguments were addressed.[32] All 4 Accused were convicted under this charge, despite there being no discussion of the elements of the substantive offence or whether the Accused was capable of committing the latter. Since there was a conviction for conspiracy for a substantive offence absent from the charging statute, any requirement that the Accused be capable of committing the substantive offence underlying a conspiracy with which he is charged seems redundant.

B. Alternative Charges for Private Parties:

"*The issue of the best way to prosecute collusion in procurement has not been raised in the PPA review at all*."[33] If the ***Sesay*** approach to collusive procurement is upheld, prosecutors would have to prosecute the latter under alternative charges. CARL reporting on ***Sesay*** suggests that conspiracy can still be charged in these circumstances, stating; "*a company, not being a public body, is no bar for conviction if he* ***conspires to procure, aid or abet the commission of a corrupt offence***" since, CARL states, "*s. 128 (1) ACA 2008 provides that, acts of aiding, abetting and procuring a corrupt practice amount to an offence even in situations where the offence had not been completed*."[34] Although this is true, technically the issue in ***Sesay*** was not that the substantive offence was not completed, but that it should be capable of being committed by all the parties charged with conspiracy. Conspiracy in itself at common law is at any rate complete with a simple criminal agreement and intent; ***Sesay*** simply created a technical bar to further consideration of conspiracy, by assessing the potential of the alleged co-conspirators to meet the requirements of the substantive offence. CARL's suggestion does however mean that conspiracy would be the mode of commission/inchoate offence and that procuring, aiding and abetting would then be the substantive offence so that J. Ademusu's technical bar is circumvented. It is also possible to charge procuring, aiding and abetting the offence in s. 48 (2) ACA, if J. Ademusu had based his approach on s. 128 (1) ACA which states that; "*any rules which apply to proving the substantive offence, shall also apply in like manner to proving conspiracy to commit such offence*."[35] This is because there would be no extension of the evidential requirements of s. 48 (2) (b) ACA to the offences of

[29] The ***Gavi Funds case***, p. 92.
[30] The ***Gavi Funds case***, p. 39.
[31] The ***NRA case***, p. 16 (Handwritten judgment).
[32] Ibid at pp. 15-25; "*Having disposed of these arguments, I come now to the substantive matter before me*"; p. 25.
[33] Interview with the Head of Capacity Building, NPPA, Mr. Mohamed J. Musa, 12 August 2014.
[34] Sesay J.A.K. , (06 July 2011), *A Recount of the Judgment in the Trial of Allieu Sesay et al*., http://www.carl-sl.org/home/reports/502-joseph-ak-sesay
[35] S.128. (1) ACA 08: Any attempt or conspiracy to commit a corruption offence or aiding, abetting, counseling, commanding or procuring the commission of a corruption offence shall be punishable as if the offence had been completed and any rules of evidence which apply with respect to the proof of any such offence shall apply in like manner to the proof of conspiracy to commit such offence. (2) The powers of investigation conferred by Part V shall apply with respect to a conspiracy to commit an offence under this Act in like manner as they apply to the investigation of any such offence.

procuring, aiding and abetting. However, this trio of inchoate offences do come with their own baggage in terms of evidential rules and *quantitative qualifiers* for weighting the contribution of the Accused towards the substantive offence. The triad of inchoate offences may not be subject to the same liberal evidential regime as conspiracy.[36] Similarly, the chances are that there is no evidence of the private parties having offered the procuring officer an advantage, so that this cannot be charged.

It is also possible to bring charges for collusive scenarios in procurement under s. 32 ACA 08 which is entitled Bid Rigging. This is a more targeted provision than s. 48 (2) (b) since it addresses specific manifestations of collusion in procurement, not just a general nonobservance of procurement procedure. These concrete, identifiable prohibited acts targeted by s. 32 ACA are all associated with the treatment of tenders, proposals, quotations or bids. The evidential requirements of s. 32 ACA are higher since it requires proof of either the giving/offering or receiving/soliciting of an advantage as an inducement, *or* proof of an agreement to give/offer, receive/solicit an advantage as an inducement, ***for*** the performance of the prohibited acts, that could be described as the mishandling of tenders, proposals, quotation or bids. Of course, these elements of the offence can be proved through either direct or circumstantial evidence or both. Clearly, s. 32 ACA does encompass a conspiracy scenario since it also criminalizes agreements to commit the aforementioned prohibited acts. The actual acts which would be subject to inducement are; refraining from submitting the said documents, withdrawing or changing them, or submitting them with a specified price or with any specified inclusions or exclusions. The evidential requirement for s. 32 ACA are higher since s. 36 (2) is of a more complex construction and its scope for the admission for circumstantial evidence is narrower than under s. 48 (2) (b). Whereas conspiracy to commit s. 48 (2) (b) is a conspiracy to effect an outcome, conspiracy under s. 36 (2) is a conspiracy to commit a specific act in order to achieve a specific object. There is therefore a third elemental limb in s. 32 which makes the inference exercise possible under s. 48 (2) (b) unworkable. In s. 48 (2) (b) the achievement of an object requiring the participation of different parties, can give rise to the inference that they conspired to do so. In s. 32, the conspiracy is twice removed so that the achievement of an object, cannot give rise to any such inference. Under s. 32 (3) ACA 08, a conviction under this section can incur a fine of a minimum of Le30 million or imprisonment for a minimum term of 3 years or both.

6. Collusion in Sesay:

J. Ademusu does not test out the allegations of collusion against the sum total of relevant facts adduced by the Prosecution. He summarily dismisses the allegations of collusion against Cee Dee, Tabod and Taria by only making reference to the single fact that they are not public officers,[37] ***mistaking the Prosecution's argument as being that, the undisclosed relationship between Cee Dee and First Fidelity should without more be taken as evidence of collusion. Contrarily, the Prosecution's argument here was also grounded in the host of circumstances indicative of a flawed procurement procedure and of collusive practices. These facts are consistent with the indicia for identifying collusion according to recognized authorities in the field of anti-corruption***.[38] Taria was also charged with conspiring with Sesay, although there are no express allegations against it of having a closeted relationship with companies against which it bid. J. Ademusu erroneously states that there is nothing unhealthy "as regards Cee Dee, First Fidelity and Tabod tendering for one contract", which is factually inaccurate as the three did not simultaneously bid for a single contract.

[36] Perry D., (2011), *UK: Secondary Liability In The Criminal Law*, http://www.mondaq.com/x/136506/Crime/Secondary+Liability+In+The+Criminal+Law; Aiding requires actual support or assistance to be given to the principal. Abetting means to incite by aid, instigate or encourage. The Accused must intend for his acts to assist/encourage or knew/believe that his conduct has the capacity to assist/encourage. "*Before a person can be convicted of aiding and abetting the commission of an offence he must at least know the essential matters which constitute the principal offence*"; *Johnson v. Youden* [1950] 1 K.B. 544, *Churchill* [1967] 2 A.C. 224 and *Maxwell* [1978] 1 WLR 1350. This means having knowledge that the principal is going to do an unlawful act with an unlawful frame of mind. Some cases have watered down this standard to an awareness of risk. Procuring means to produce by endeavour, so that some amount of causation is vital, although it need not be the only cause; *Attorney General's Reference (No. 1 of 1975)* [1975] Q.B. 773. Procuring requires the Accused to endeavour to cause the commission of the offence.

[37] The NRA case/The State v. Allieu Sesay et al., 28 June 2011, lines; "*Without further ado... (they) do not fulfill the words of s. 48 (2)*."

[38] See for example: Kühn S. and Sherman L.B., (2014), *Curbing Corruption in Procurement, A Practical Guid*e, Transparency International, p.20, http://issuu.com/transparencyinternational/docs/2014_anticorruption_publicprocureme?e=2496456/8718192. International Anti-Corruption Resource Centre, (2015), *Guide to Combating Corruption & Fraud in Development Projects*, http://guide.iacrc.org/potential-scheme-collusive-bidding/. OECD,(2010), *OECD Policy Roundtables, Collusion and Corruption in Public Procurement*, Directorate for Financial and Enterprise Affairs Competition Committee, Global Forum on Competition, pp.202, 476, 448, http://www.oecd.org/competition/cartels/46235884.pdf.

The relationship between these 3 companies, 2 of whom won contractual awards, is as follows: Cee Dee and First Fidelity (FF) were partners and had some common membership in the form of Samuel Cole and Franklyn Pratt who were subscribers to FF and shareholders in Cee Dee Investments.[39] These 2 companies bid for the ICT infrastructure contract, with Cee Dee winning it.[40] J. Ademusu's judgment obscurely repeats Franklyn Pratt's statement that this partnership between FF and Cee Dee does not include Tabod, although a piece of PW2 (the Acting Senior Procurement Manager, Head of the Procurement Unit and member of the Procurement Committee, NRA) Labor's evidence is that, Samuel Cole collected bidding documents on behalf of Tabod,[41] although Cole said he took no part in the procurement process,[42] making Cole a link between Tabod, FF, and Cee Dee. Tabod and FF bid separately for the local area network contract, with Tabod winning.[43] Clearly then, FF bid for both the ICT infrastructure contract and the local area network contract. J. Ademusu misses the Prosecution's point completely in arguing the lawful right of individuals to be members/shareholders of "as many contracting companies as possible", the legitimacy of conjoint relationships between companies, that their conduct was compatible with free enterprise and investors' rights and opportunities to invest, that the PPA does not expressly prohibit a parent company and its subsidiary from bidding for the same contracts and that the companies involved had performed their contractual obligations. Based on these arguments, he ruled there was no overt conduct on which a conspiracy (collusive practices) by the three could be inferred. What matters however, is the bigger picture and how the pieces of the puzzle fit together and ***whether the undisclosed relationships and the manner in which the bidding process was implemented affected fair and competitive bidding.***

Regarding the contracts for ACs, bidding docs were issued to 5 but only 3 bidding docs were received at the close of bid submission time, which Taria being the lowest priced bid. The evaluation of bids report recommended asking bidders for their technical specifications, but only Taria responded with specifications. Of the original 5, 2 bidders later disclaimed bidding documents.[44] Post the award to Taria, Taria was later permitted by Sesay to change the originally agreed upon brand of AC without relevant contractual amendments.

Regarding the local area network contract, bidding docs were issued to initially 5 bidders including Tabod Ents., FF and Damsel, although the latter bid is disclaimed by Damsel.[45] Only 4 including these named, submitted their bids at the bid opening. The evaluation report recommended Tabod as the most responsive bidder.

Regarding the ICT infrastructure contract, bidding docs were issues to 5 bidders including FF, Cee Dee and Taria with all 5 being submitted at the close of bid submission, with Cee Dee being the most responsive bidder.

None of these companies disclosed any relationship between any of them. Note that Franklyn Pratt in his admission to the ACC that he set up FF and was one of the directors, said he could not recall the names of the 7 shareholders, except when confronted with the name of the 2nd Accused, Samuel Cole. Pratt said that FF was set up to do supplies and general maintenance, that FF tendered bids to the NRA for 2 IT contracts; that although FF had never before done IT installation, it would have subcontracted this work, had it won either contract.[46] *According to Allieu Sesay*, the

[39] ***The NRA case***, 28 June 2011, p. 23; The ACC tendered business registration documents of Cee Dee and Tabod. Tabod's was dated 9 May 2007. It also tendered the M and A of First Fidelity, dated 21 May 2009.

[40] It should also be noted that Taria was also a bidder for that contract and although there is no evident relationship between Taria and Cee Dee, Tabod, and First Fidelity, Taria's bid for AC contracts also raised collusive issues.

[41] The National Revenue Authority (The NRA) Case/The State v. Allieu Sesay et al., 28 June 2011, p. 38, lines 1-4;"*...told him to ensure that Tabod get the contract....he contacted the 2nd Accused to send somebody to come and collect the documents....*"

[42] It should also be noted that although Cole also states that the Local Area Network Contract was signed for by him on behalf of Cee Dee, (***The NRA Case***, 28 June 2011, at p.35 lines 3 and 4), count 7 against Cole and Pratt makes clear that this Local Area Network Contract was awarded to Tabod (***The NRA. case***, 28 June 2011, at p. 4); the charge in count 7 is that Sesay, Cole and Pratt conspired to this end.

[43] ***The NRA case***, 28 June 2011, at p. 4, p. 26 and at p.42, final para. make clear that the contract for local area network was awarded to Tabod. However, the term *local area network contract* is used in relation to both Tabod and Cee Dee at p.42, final para. This does not change the fact that the 2nd Accused is associated through PW2's testimony with Tabod; ***an area not developed in the judgment.***

[44] ***The NRA case***, 28 June 2011, at pp. 46-47; M.P. Traders and Choithrams Electricals. Often, bidding documents would be supported by proforma invoices although it should noted that "*strictly speaking, invoices do not matter and are not part of the procurement process, so the weight they are given in the Prosecution's case is questionable*"; interview with the Head of Capacity Building, NPPA, Mr. Mohamed J. Musa, 12 August 2014.

[45] ***The NRA case***, 28 June 2011, at p. 52; PW18 Luke, said he was IT consultant at Damsel Business Centre and did not know about the IT installation at Quay side; his business was different, not Damsel Enterprises as in the bidding documents. Since, the actual owner of said, Damsel Ents. was not called, this is a disclaimer.

[46] Although the PPA 2004 does not expressly exclude bidders lacking the technical expertise, it does list it among the criteria for consideration (optional) in determining the award of contracts: s. 21 (1); criteria set by the procuring entity, may include – professional and technical qualifications.

Procurement Committee (PC) on the basis of the evaluation reports, conclusively approved contractual awards to Taria, Cee Dee and Tabod *and he directed that their recommendation for further action pre-awards be followed up, though precisely how, he did not state in his direction*. He said he awarded the contracts on the basis of their (PC) approval and that he granted Taria permission to change the make of ACs without resorting to written contractual amendments as required because there was no cost difference. Vagg, the DFID rep. said that by the date for bid opening, he still had not seen the bidding documents. 2 DFID reps and one NRA member said the PC did not recommend any of the winning contractors. The external audit confirms this and clarifies that none of the contracts were approved by the PC, that they were awarded without addressing recommendations of the reports, without addressing Vagg's concerns, signed by Sesay without Vagg's certification, that Sesay changed contractual terms without contacting the DFID reps. Vagg said he had noted that the company profiles were not detailed enough, that only 3 companies submitted profiles out of the 15 invited to bid and those 3 profiles were identical.[47] Vagg alerted the PC to the fact that one of these 3 was a boutique.[48] Similarly, an ACC investigator said that the given addresses of certain shareholders were false.[49] Vagg noted there were 4 companies instead of 5 in one evaluation report. Vagg and another witness said that 2 evaluation reports were rejected because they were not signed. The Director of ICT in the PC said that he had not even evaluated company profiles, when he learnt contracts had been awarded. 3 NRA members denied having been part of the evaluation report, although their names appear on it. Some witnesses describe the reports as incomplete. PW2, Labor's evidence that Sesay had predetermined the winner of the contracts, is corroborated by PW4, Alfred Demby, Director of Modernisation Programme and Chairman of the PC.[50] Labor testifies that Sesay applied for a waiver to use the restricted bidding method; there is a letter from the NPPA authorising this for the 3 contracts. Demby said that the original budget by DFID was lower than what turned out to be the lowest bid. Demby said that the DFID reps queried why ICT providers were not included on the short list and that Vagg asked him *who* had awarded the contracts. Labor was sacked from the NRA and PW3 Mr. Charm, Director Policy and Legal Affairs and Mr. Demby were demoted.[51]

It is submitted that the manner in which the 3 companies participated in the bidding process fits within the description of fraudulent and collusive practices in the PPA 2004 and corresponds with the indicia for collusion set out by globally renowned/credible authorities in anti-corruption. It is submitted that the Prosecution may consider in cases such as these, openly testing out the facts as against relevant descriptions of the prohibited conduct as found in the legislation, and try funneling the attention of the judge to the fact that anti-corruption authorities have set out lists of the indicia to be used in identifying collusive bidding or corrupted procurement processes and that the facts here correspond to said indicia. This would compel judges to re-think the facts and make it difficult for them to ignore or outrightly dismiss the apparent without coming across as blatantly biased. (Also note that "red flags are fleshed out in a number of (NPPA) monitoring tools which look at procurement procedures, functionality of the procurement structures, procurement processes, require the collection of daily and weekly findings and analyses which may prompt investigation and/or monitoring.")[52] At the least, J. Ademusu's arguments employed to exculpate the 3 company reps and even Sesay, would have been better replaced by arguments predicated on the reasonable doubt standard. Some further elaboration about the threshold that such evidence must meet would have greatly illuminated this area.

Application: Under s. 34 (6) PPA, bidders should not engage in or abet corrupt or fraudulent practices including misrepresentation, corruption, collusion, price fixing, and non-performance of contractual obligations; forms of conduct for which they may be prosecuted under s. 34(6) PPA or debarred under s. 35(1) PPA. The bidders were also under an obligation to not misrepresent facts in order to influence procurement or the execution of a contract, and not

[47] ***The NRA case***, 28 June 2011, at p. 54; Vagg did not say which of these 3 profiles were identical which would have helped greatly.
[48] ***The NRA case***, 28 June 2011, at p. 54; Vagg did not say which company was a boutique.
[49] ***The NRA case, 28*** June 2011, at p.55; PW22 Sitta did not say who these shareholders were, although he said he was tasked to investigate Tabod, Habika Ents., and Taria Ents. at the Administrator General's office.
[50] ***The NRA case***, 28 June 2011, at p. 45, lines 4-5; "The Witness told the Court substantially the same story as PW2 as regards the process involved in the award of contracts."
[51] ***The NRA case***, 28 June 2011, at pp. 41 and 42.
[52] Interview with the Head of Capacity Building, NPPA, Mr. Mohamed J. Musa, 12 August 2014; "*I developed such tools*."

to interfere in the ability of competing bidders to participate in procurement under s. 34 (2). The Accused's non-disclosure amounts to an omission or misrepresentation of the facts. As to whether it was done to influence the selection process, the sum total of the evidence tends towards that conclusion since they appear to present a collusive bidding scheme which may have involved "price fixing, coercive, corrupt or fraudulent practices designed to deprive the procuring entity of the benefits of free and open competition" as prohibited under s. 34 (3). From the facts that identical profiles of bidders were submitted, that an applicant connected to other bidders, who bid on 2 IT contracts was not technically qualified and admitted to intending to subcontract, the fact that the winning bid was higher than the procurer's cost estimates, that it was a small group of bidders which kept getting smaller and that Taria and FF bid twice, that some bidders who bought bidding forms did not submit them, that the losing bids were defective, that the addresses of some shareholders were misrepresented, that there was common personnel in the form of Pratt and Cole and specifically that Cole appears to have been connected to 3 bidders, that Sesay who awarded the contract to Taria became involved in its supervision, that Taria's contract specifications were altered after the contractual award, that there were issues surrounding the authenticity and accuracy of the minutes of the 14th July meeting; from all these facts the appearance of "*a scheme/arrangement between the two or more (consultants) with or without the knowledge of the procuring entity, designed to establish prices at artificial, noncompetitive levels*" is discernible, falling within s. 2 PPA 2004.

With regard to ***Sesay***, ***Cole***, ***Pratt***, and ***Gabisi***, and as to the effect of applying the proximate circumstantial evidence test (above) to the evidence admitted against each Accused and as to whether this test was met, note that the more generalised circumstantial evidence would have been admissible on the basis of being indicative of the background of a flawed procurement process (i.e. of things not going quite right). Note also that there were clearly more proximate pieces of circumstantial evidence bearing more directly on the Accused by, for example identifying the Accused as representatives of bidding companies who participated in this flawed procurement process and, in some instances, by identifying the Accused as associated with companies that had bid against each other. These latter pieces of circumstantial evidence bore directly on the Accused and gained significance when viewed against the sum total of generalised/improximate circumstantial evidence. It is submitted that these latter proximate pieces of evidence by their nexus to each of the individual Accused met the independent evidence criteria necessary to ground a conviction in the trial of each Accused.

7. Suggestions on Procurement Methods and Corrupt Practices:

The procurement procedure as revealed by the cases is uniform and consistent with the PPA 2004; there is a procurement unit which is responsible for daily administration of procurement activities, under which is the procurement committee which approves awards.[53] In general, the choice of a bidding model depends on the assessed risks of corruption and collusion inherent in the circumstances since each bidding model has its own risks. The ***FCC case*** and ***Ken Gborie*** evince instances of the unapproved employ of sole source procurement, a method which allows direct negotiation with a supplier but which normally needs to be approved by the PC under exceptional circumstances under ss. 46 and 47. In ***Sesay***, selective/ restricted bidding was authorised by the NPPA and the NRA invited a select group of 5 to bid to the exclusion of others, but it was conducted in the same manner as a dynamic/open competitive bid with bidders eventually simultaneously gathering at a public venue to submit once and for all, sealed bids which are then disclosed with full identification of each bidder's price and specifications. Typical open bidding processes are said to avoid opportunities for corruption of procurement officials or preferential treatment and if used in competitive markets, the risk for collusion is small. ***It therefore appears imprudent that given the already oligopolistic nature of markets in SL, there appeared to be a move for a restricted bidding process in Sesay.***

In ***Sesay***, the award of DFID funded contracts were to be monitored by DFID reps. Such donor reps. are expected at least popularly, to be beyond the reach of corruption, to evaluate the process, bids and represent donor interests and viewpoints. In ***Sesay***, the donor representative Vagg was to be actively involved in the award of contracts at the final stage, although he was bypassed. It would be practical to assume that his role was stated in the MOU between DFID and the NRA or some other form of donor instruction, which are normally given pride of place among procurement rules; s. 1(2) of the PPA states that, "*Where this Act conflicts with the procurement rules of a donor or funding agency, the application of which is mandatory pursuant to or under an obligation entered into by the Government, the*

[53] This point is made in the ***FCC case***, in ***Sesay*** and in ***Ken Gborie***.

requirements of those rules shall prevail; but in all other respects, the procurement shall be governed by this Act." [54] S. 32 (6) of the PPA states that; "*Records and documents maintained by procuring entities on procurement … and where donor funds have been utilised for the procurement, donor officials shall also have access, upon request, to procurement files for the purpose of audit and review*." The judgment makes apparent Vagg was a member of only the PC, and not of the PU and the Evaluation Committee. ***Would the presence of donor reps. in these organs for the same reasons mitigate the risk of a defective process, nip it in the bud or worst case scenario prompt review/investigations into it and in the event of a trial/inquiry provide objective evidence?***

A lot has been written about the possibilities of altering the mechanics of procurement to create alternative arrangements that produce desired outcomes. Pragmatism dictates however that the re-design of methods of operation depends on human will power. Hypothetical scenarios of large scale corruption in theory would simply overwhelm any possibility of any model working efficiently, meaning the process would be both marred and that fact of it being thus, would be well concealed.

It is suggested that for both donor and non-donor funded contracts, the role of the PC, the weight or significance of its findings/decisions/recommendations need to be starkly clear, with such findings being spelled out unequivocally. The question as to whether the PC actually approved an award should not be subject to discussion as in Sesay. It's worth considering making it obligatory on the PC to verify whether contracts are being awarded contrary or prior to their conclusive determination and to issue statements to the procuring entity, the NPPA and the ACC when this is the case. Similarly, it could be endowed with powers which enable it to nullify or retract such contracts, such contracts technically being voidable, having been concluded unlawfully.[55] A final proposition is that the actual activity of drawing up a shortlist of bidders could be more transparent; it could be compiled openly by the PU as a whole, or if it continues to be done by just 2 individuals as in Sesay, (the Head of the PU and a donor approved Procurement Specialist), to have attached the reasoning behind their decisions.

[54]National Commission for Democracy, (2014), *NCD North hosts workshop on the Promotion of Democratic Good Governance*, http://www.ncd-sl.org/media-center/news-and-events/92-ncd-north-hosts-workshop-on-the-promotion-of-democratic-good-governance; donor policies should match those of the state to avoid sub-standard procurement. World Bank, (2012), *Sierra Leone - Assessment of national public procurement system based on OECD and DAC benchmarking tool, Draft Report*, May 20, 2012; http://documents.worldbank.org/curated/en/2012/05/16597175/sierra-leone-assessment-national-public-procurement-system-based-oecd-dac-benchmarking-tool, pp.22; stating that, the procurement rules of a donor or funding agency that are prescribed as part of an international donor/funding agreement would prevail in cases of conflict with the PPA, and citing citing s. 1 (2) PPA and Regulation 1(2)(a) of the PPR. Confirmed in interview with the Head of Capacity Building, NPPA, Mr. Mohamed J. Musa, 12 August 2014; "*The review also seeks to address how to partner with development partners/donors; they insist on using their own procurement processes, because they lack confidence in the Sierra Leonean system. The review seeks to harmonize all this.*"

[55] Interview with the Head of Capacity Building, NPPA, Mr. Mohamed J. Musa, 12 August 2014; "*Regarding the possibility of voiding a contract where the procurement process was not adhered to, one of the changes in the Public Procurement bill is that the Independent Procurement Review Panel (IPRP) should be able to at any point put an injunction in the contract. The IPRP would now be able to sit as a court (…)*"

Conclusions:

Sesay's "public officer" criterion, is a legal development which has yet to be overturned, potentially hindering future prosecutions of private parties for collusive practices. Aside outright reversal of this reasoning, it's possible to re-interpret the criterion as accommodating companies of a mixed public-private nature, where the state has some control.[56] Other possible alternatives and their implications are discussed above. Furthermore, the PPA is currently under review in Parliament for amendments that will strengthen it. The Former Director of IIP, ACC admits that, "although s.128 ACA was designed for collusive conduct, its design coupled with the imprecise nature of s.48, seems defective in relation to procurement and that the PPA efforts could provide curative action here." [57] The suggestion made above for corrupt, fraudulent and especially collusive practices to be fleshed out in order that allegations might be tested against them, may well be underway as "*the review aims to make specifically criminal a number of breaches and in some cases fix penalties, in particular, violations relating to tender and rushed processes*."[58] "*In parliament at the pre-legislative meetings, (...) at the committee level where every section in the bill is discussed in detail, all these definitions of collusive, fraudulent and corrupt practices have been raised as issues needing to be addressed. The ACC sent a rep to (…) address issues of definition (…). The NPPA holds the view that when the issue is in the well of parliament, those issues will be addressed. But the implications of the Allieu Sesay judgment for private parties were not really raised at all*."[59]

Although ss. 33 (6) and 34 (6) PPA make public officers and contractors respectively, amenable to sanctions which include criminal prosecution under the ACA, most of the PPA's provisions prohibiting certain forms of conduct are open ended and do not restrict prosecutorial action to the ACC. Breaches of the PPA may give rise to civil and administrative action,[60] including a review by the head of the procuring entity, or by the IPRP and debarment of bidders and suppliers by the NPPA. However, under ss. 77 and 78 ACA 2008, public officers/bodies have a duty to report acts of corruption or to refer suspected cases of corruption to the ACC respectively, demarcating the scope of the ACC's competence as against disciplinary actions by other bodies. Nonetheless, the potential for overlap may be one reason why the current parliamentary review of the PPA includes review of channels of communication/cooperation between the NPPA, the ACC and the Ministry of Finance.[61] "*There is currently no line of communication between the NPPA and these institutions. 4 years ago, I proposed that they set out a memorandum of understanding between these institutions; it got aborted in not agreeing about areas of competence. For now, the only line of communication is in PPA which states that the NPPA may approach the appropriate authority; ACC, if, there is an issue of corruption, or Accountant General, Auditor General for an issue of not following generally accepted accounting procedures, anything deemed abnormal in the procurement process. The NPPA like other public bodies are obligated to recommend to the ACC suspected cases of corruption*."[62] These modes of inquiry/sanctions outside the ACA 2008, underline that if the J. Ademusu "public officer" tack is upheld, it is still possible for Law Officers to prosecute breaches of the PPA (specifically collusion/conspiracy), under the Common Law of Fraud; "*it was not uncommon prior to the ACC Act for State Prosecutors at the LOD to bring charges of fraud for botched procurement processes*."[63] However, the ACC would still have primary competence over corruption.

It would bode well if the developmental path of the law on conspiracy, flawed procurement and specifically conspiracy in procurement processes were clearly encapsulated in a single judgment in a manner succinct and clear enough for subsequent judgments to refer to as guideposts, yet flexible enough to allow for the necessary maneuvering as the facts may demand. This scenario calls for more openly deliberative/contemplative judgments, not just a cut and dry application of identified law to accepted facts, but judgments which are expressed in retrospective and projective terms that are policy-oriented and whose outcomes are also steeped in policy. Litigation, parliamentary debates,

[56] See above heading 5. A. at pp. 6-8.
[57] Responses furnished by the Former Director of Investigations, Intelligence and Prosecutions (IIP UNIT), ACC, Mr. Reginald Fynn, 2 July 2015.
[58] Ibid.
[59] Interview with the Head of Capacity Building, NPPA, Mr. Mohamed J. Musa, 12 August 2014.
[60] Such as under s. 65 (1) for e.g., which provides for an application for review by the Independent Procurement Review Panel. Responses furnished by the Former Director of IIP, ACC, Mr. Reginald Fynn, 2 July 2015; "*The current PPA review will also consider the possibility of an appeals process to the IPRP, try to control vexatious complaints and to strengthen its independence*."
[61] Interview with the Head of Administration and Human Resources Department, NPPA, Mr. Sylvester H. Demby, 30 June 2015. Interview with the Head of Capacity Building, NPPA, Mr. Mohamed J. Musa, 12 August 2014.
[62] Interview with the Head of Capacity Building, NPPA, Mr. Mohamed J. Musa, 12 August 2014.
[63] Ibid.

written government policies (including anti-corruption policies) and independent research by civil society and local and international think tanks form part of the continuous, policy formation feedback loop. It's therefore apparent that efforts to feed these into judicial deliberations, would go some way towards further refining or streamlining the policy making process.[64] Given parliamentary review of the PPA has been ongoing for the past 7-8 years,[65] and that from the debates generated therefrom, can be gleaned public sentiment/perception of the issues and the nature and regularity of the problem, the review should be, for reasons of consistency and complementarity, a principal reference point for such judgments. It's important also to look beyond ACC judgments with similar or identical statutory offences, to also draw from fraud-related judgments prosecuted at common law.

[64] Integrity Action/Tiri (2007), *Integrity in Reconstruction*, Sierra Leone Executive Summary, p. 2, http://www.integrityaction.org/sites/www.integrityaction.org/files/documents/files/Sierra%20Leone%20Summary.pdf; "*A public sector procurement code needs to be devised*." World Bank, (2012), *Sierra Leone - Assessment of national public procurement system based on OECD and DAC benchmarking tool*, Draft Report, May 20, 2012; http://documents.worldbank.org/curated/en/2012/05/16597175/sierra-leone-assessment-national-public-procurement-system-based-oecd-dac-benchmarking-tool, pp. 17, 120-121; talks about the need for many improvements to be made to the legal framework, and about how there are several inconsistencies among the PPA, its Regulations and the procurement manual, stressing on the need for harmonization. National Technical Expert Team (2014), *National Anti-Corruption Strategy (Sierra Leone) (2014-2018)*, Commissioned by the ACC; http://www.psru.gov.sl/sites/default/files/STRATEGY.pdf, p. 31, called for review of and simplifying the current regulatory framework. Interview with the Head of Capacity Building, NPPA, Mr. Mohamed J. Musa, 12 August 2014; "*There are various sources regulating Procurement; the PPA, the PP Regulations 2006, the standard bidding documents and manuals. There are issues in the other documents which the Act is blind to. So the review is also about addressing this. There is a disparity between the manual and the Act for e.g. certain parts of the manual give the NPPA certain powers not in the PPA, but then the PPA trumps the manual*."

[65] Interview with the Head of Administration and Human Resources Department, NPPA, Mr. Sylvester H. Demby, 30 June 2015. Interview with the Head of Capacity Building, NPPA, Mr. Mohamed J. Musa, 12 August 2014; "*The review has been going on since 2008.*"

Overview

- ***Based on their assessment of the evidence, ACC prosecutors tend to charge conspiracy to commit s. 48 (2) (b) ACA to address collusive practices, since this charge is the most fitting in terms of reflecting the circumstances/reality of collusive practices and since it may be evidentially less cumbersome for prosecutors in terms of tests and standards to be met; the charge of offering and accepting an advantage under s. 28 and other similar charges such as; using influence for contracts under s. 29, peddling influence under s. 31, offering, receiving or soliciting an advantage for bid-rigging under s. 32, are definitely more precisely framed offences with higher evidential standards bearing on an "exchange element."***

- ***Aiding, abetting, procuring an offence requires a two tier approach to proving the Accused's guilt; first, proving the Accused's act and intention and proving the link between the latter and the act/s and mental state of the principal; in short, you would have to prove that the Accused acted with the intention or knowledge that his act would have an effect or impact on the act of a principal whom the Accused knew was engaged in conduct to a certain end/conduct that would have a certain outcome. This two tier approach is expressed in various manners in different sources of law, but this is the gist of its more challenging nature.***

- ***Conspiracy also allows for wide ranging circumstantial evidence to be admitted against the Accused for the fact of an existing scheme to be established. Once that scheme is established, the fact of the Accused's role in it must also be proved to ground a conviction, demanding a link between the circumstantial evidence and the Accused. All you have to do is prove that the Accused did an act which contributed to an outcome and the facts of that act and that outcome are proof itself of the Accused's intention to want to bring about that outcome.***

- ***As far as the actual procurement officials are concerned, they can always be prosecuted under the substantive offence of s. 48 (2) (b); simply willfully failing to observe procurement procedure.***

- ***The Sesay judgment surprisingly contains only a few references to the Public Procurement Act 2004, despite the fact that it is the PPA that is the original source of the procurement rules not being observed and may provide a more illustrative yardstick against which to test conduct that is mostly implicit and elusive. It is suggested that such a correlative approach is preferable.***

- ***It is suggested, again, because collusive practices are implicit and elusive, that judges might consider a teleological (progressive and realistic) interpretation of the law/relevant statutes. It must be recognized that this is an area which is still very much in its gestation phase, and that strictly literal interpretations of the law may be unduly restrictive and abstract. It must be recognized that the PPA is largely prohibitory in nature and yet as is characteristic of law, it simply sets out framework principles which an objective, insightful, well-informed, realistic and practical adjudicator must employ both as a prism and a yardstick to evaluate the facts. Clearly, the PPA cannot set***

out every single instance of what might amount to a collusive practice, which is why it frames most of its prohibitions in terms of undesirable outcomes, so that this might potentially be the starting point of any evidential assessment. This requires looking at the bigger picture not facts in isolation, to determine whether the manner in which the bidding process was implemented affected fair and competitive bidding. Clearly, the only definitive statement that can be made about the forms of collusive practices is that they are deceptive and disguised and not static in their forms, nay they seek to employ shifting market forces and features to enhance these characteristics of theirs. These facts call for a return to very basic principles of statutory interpretation such as, that guided by legislative intent and given the prevalence of the problem, a prohibitive rather permissive approach[66] to statutory construction.

- ***In the same vein, the Prosecution should seek to buttress its allegations by demonstrating how they align with globally recognized indicia for collusive practices as set out by credible anti-corruption authorities and in the NPPA monitoring tools. Again, these indicia are to serve as an illustrative list to flesh out the possibilities, and not as a restrictive list. They might fill in the gaps between the loosely articulated limbs of the framework (PPA).***

- ***Essentially, what's suggested is an expressly comparative approach (alleged facts, legislation + indicia) and for the Prosecution to try framing its arguments/ submissions in these terms. This more compelling approach attempts to cover all bases and may streamline the judicial deliberative process; at the very least, it would have to be addressed.***

- ***In Sesay, the allegations of collusion against the representatives of 3 private companies, forming the substance of the charges under s. 128 (1) and s. 48(2) (b) are not addressed at all, such consideration appearing to have been made redundant by a technical bar requiring first of all, that the substantive offence be capable of commission by all the Accused. Since the 3 Accused were not Public Officers, it was deemed that they could not commit s. 48 (2) (b) and therefore could not technically be capable of committing a conspiracy to commit s. 48 (2) (b). The "Public Officer" criterion which the Sesay judgment sets out as a condition necessary to be fulfilled for commission of s. 48 (2) (b) is doubtful, because that section itself never uses those precise words. Also, there are authorities which suggest that since the substantive offence need not have been completed for a conspiracy, there is no need to extend the requirements of the substantive offence to the charge of conspiracy, no need to test out whether the accused could have met the requirements for commission of the substantive offence. These authorities strongly suggest that all that is needed is for one of the parties to be capable of committing the substantive offence, in order for a conspiracy to exist. Additionally, the Sesay judgment does not say how this Public Officer requirement will play out against members of /mixed public-private sector bodies.***

- ***The approaches to the construction of the substantive offences under s. 48 (2) (b) ACA and s. 37 (1) ACA 08 in Ken Gborie are function, rather than title-focused,***

[66] In this area of practice, statements like, "*this (identified) circumstance/practice is not expressly prohibited in the relevant instruments, and therefore is permissible*", sounds nearly shocking! See for e.g., the ***NRA Case***, p. 61; "*…there is nothing in the PPA No. 14 of 2004 which expressly prohibits a parent company and its subsidiary from bidding for the same contracts.*"

countering J. Ademusu's "public officer" criterion in Sesay. The approach to the necessary relationship between the mode of commission (conspiracy) and the substantive offence, i.e. the delinking of the two in Katta also differs from the approach taken in Sesay.

- ***Since a likely recurrent issue in cases like Sesay, which can serve to develop the substance of the law and public policy on collusive practices in procurement, is whether the evidence of collusion between the parties meets the standard of the burden of proof for criminal liability, (i.e. proof beyond reasonable doubt), it is suggested that such cases should aim to provide more incisive analyses employing the evidence in hand, to articulate the nature of the evidence that would meet that standard.***

- ***It might also be worth considering creating an obligation to publish decisions to employ the sole source procurement and selective/restricted bidding methods in the same way that calls for proposals and tenders are subject to an obligation to publish.***

- ***Donor representatives could also be positioned not just in a single procuring organ, such as the PU, but also in all such procurement concerned organs in a procuring entity, that they might have a broad overview of the process and ensure the cohesiveness in the necessary links in between.***

- ***All suggestions concerning improvements that might mitigate corrupt practices in procurement ultimately depend on human will power; massive institutional corruption can hardly be countered.***

- ***The role of the PC and its decisions should be starkly clear, unequivocal and not subject to discussion as in Sesay. The PC could be more proactive in inquiring about the status of awards and ensuring its decisions are complied with.***

- ***The drawing up of shortlists of bidders could be more carried out more transparently amidst a larger group with the reasoning behind their decisions attached and possibly published.***

- ***"Procurement Officers have a tendency of compromising because they are the most lowly paid and not even highly qualified. The PPA review is considering the creation of a directorate/training institution for the public sector procurement cadre to be sited in MOFED. The NPPA had developed a national curriculum, outsourced to IPA, but also approached the Tertiary Education Commission to develop a curriculum to harmonise the whole landscape so that the knowledge of officers is uniform. If however a directorate is created for training, it will be fully responsible."[67] This is clearly a compelling issue for policy focus.***

- ***There is a current review of the PPA which has been ongoing since 2008 and a likely result appears to be a further elaboration of certain prohibited forms of conduct; "to***

[67] Interview with the Head of Capacity Building, NPPA, Mr. Mohamed J. Musa, 12 August 2014.

make certain breaches specifically criminal."

- ***Although different actions can be taken for breaches of the PPA, the ACC has priority over corrupt acts. Nonetheless, this potential for overlap, may be one reason behind the current PPA review's looking into improving channels of communication between all procurement concerned MDAs. A memorandum of understanding setting out the respective areas of competence of all implicated bodies might be a good place to start.***

- ***The possibility of prosecuting collusive practices in procurement still exists under the common law of fraud, embezzlement, theft and larceny by servant.***[68]

- ***Judgments in this area need to be fully contextualized, acknowledged as stemming from and feeding into the policy formation process and as such should be explicit, well-researched and openly deliberative pointing the way to the future.***

[68] Telephone conversation with Emmanuel Abdulai Saffa, Coordinator Society for Democratic Initiatives (SDI), 22 June 2016.