

PROCUREMENT GOVERNANCE

CERTIFIED PROCUREMENT AND SUPPLY PROFESSIONAL OF KENYA

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SAMPLE WORK

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CHAPTER 1

THE LEGAL AND REGULATORY FRAMEWORK OF PUBLIC PROCUREMENT SYSTEMS IN KENYA

Historical development of Public Procurement in Kenya

The Public Procurement system in Kenya has grown from a rudimentary stage during the colonial and post-colonial period to a vibrant regulated system that compares well with the international standards. I would like to trace this growth to present day, first for the benefit of the new generation that is entering the profession of Procurement, secondly as one who has been involved in Public Procurement for now over 30 years having joined it in 1983. For ease of managing the massive data and better understanding, I would like to divide my discourse as follows:

- i. The colonial period*
- ii. Post-colonial era i.e. 1963-1978*
- iii. 1978-2001*
- iv. Era of reform 2001-2010*
- v. The Era of the New Constitution i.e. 2010 to the present*

We are sure the above classification of epochs will make it easier for readers to know what changes were taking place in area of Public Procurement. It will also bring to light how the various political systems and regimes affected Public Procurement (Political economy so to speak).

Colonial Era

Kenya was a colony state under Britain. The economy was arranged so as to serve the colonial masters where Kenya was converted into a cheap source of raw materials and manufactured goods were to be imported from Great Britain.

To facilitate the process of procurement, the following structures were in place:

a. Crown Agents

Handled overseas purchases on behalf of the Government. Its prominent role continued into 1970s.

- a. Central Tender Committee (CTB) was established in 1955 through a Treasury Circular. CTB was to handle all government tenders.
- a. In 1959, Procurement and Supplies Unit was established under the Ministry of Public Works to handle common-user goods and services. In 1960 it was converted to Supplies Branch which exists to date but with much reduced mandate.

It should be appreciated that during this period the government organization was small and therefore Procurement and Supplies was centralized. In 1960, Supplies Branch went through further restructuring and the Chief Storekeeper (possibly a White man) became the Chairman and the Chief Purchasing Officer became its Secretary. All Government Departments were to obtain their common-user supplies from Supplies Branch. The Government Press under the office of the Governor and later the President was to provide the printing services.

Period between 1963-1978

Kenya attained independence from the British Colonial rule in 1963 and like all other structures, supplies services continued as they were during the pre-independence period whereby Crown agents organized Procurement for the government up to 1970s. However, in 1974 there was a major shift when the CTB was placed under the Treasury from the Ministry of Public Works. The Chairman was the Deputy Secretary, Ministry of Finance and the Secretariat was managed by the Supplies Staff. The Secretary was the chief Executive Officer. Another major introduction was the Supplies Manual in 1978.

For a while, the Supplies Manual became the main guiding document in supplies matters. A major flaw of the document was that it never unified procurement in the government. It further did not cover corporations and parastatals. Another major development in this era (1963-1978) was the establishment of the office of the Head of Supplies Services (HSS). The first occupant of this office was Mr Wan'goo. He was still in office when we joined the service as university graduates in 1983. The main responsibility of HSS was to ensure observance of the manual.

Those of us who joined the supplies services then were perplexed and confused at the number of circulars we were to refer in order to make a procurement decision:

- i. Many Treasury Circulars some superseding each other at high speed

- ii. Circulars were also emanating from the Ministry of Public Works that was also to clear a department when getting common user supplies outside Supplies Branch.
- iii. Other circulars were emanating from the office of the President.

The above scenario became riddled with corruption and thievery of public money. Above all works were not covered by the Supplies Manual. The Ministry of Public works and the office of the President had a free hand on public works.

1978-2001 – Era of World Bank Reform

In 1997, the World Bank conducted country wide review on Public Procurement and reported the following weaknesses:

- Reduced effectiveness of Public Financial Management
- Government inability to deliver services effectively
- Obscure rules not based on fair competition and transparency rendering the system to abuse
- No legal framework to enforce procurement rules.

During this period the most famous Procurement policy document was the Blue Book (Nyachae Book) that regulated Procurement in the era of District focus for Rural Development Strategies.

Era of Public Procurement Reform 2001-2010

This “Golden Era” saw major reforms in Public Procurement with far reaching results.

- i. **Enactment of the Exchequer and Audit (Public Procurement) Regulations, 2001.**

Major changes were: CTB was abolished, and Public Procurement Directorate and Public Procurement Appeals Board were established. The Chairmen of the Tender Committees were to come from the private sector. Corporations and parastatals were for the first time subjected to the Public Procurement Regulations just as was the Central Government. Each public procuring entity was to establish a procuring unit within it and all purchasing and disposal processes were to be managed by the same unit. This was the genesis for the establishment of the current Procuring Department in the University under the Procurement

Manager. Before then, procurement (Tender) and Purchasing were under Personnel Division and Finance Department. In later discussions, we shall trace the evolution of Procurement in the University of Nairobi and challenges.

i. **Public Procurement and Disposal Act, 2005**

The Public Procurement and Disposal Act, 2005 was approved and gazetted in 2005. The Act had to wait for the approval of the Public Procurement and Disposal Regulations, 2006 to be approved by the Minister for Finance then Mr Uhuru Kenyatta in order to operationalize the Act. The Act, 2005 came into operation in 2007. Henceforth, Public Procurement and Disposal came under one legal regime.

i. **Public Private Partnership**

The Government found that it did not have enough financial resources to carry out projects it deemed necessary to enhance economic growth and public welfare. As a result, the above regulation was enacted to assist in mobilizing financial resources in the private sector to be used in public projects under specific conditionality.

The above Public Procurement Law & Regulations that started in 2001 have dramatically changed the landscape of Public Procurement functions hence the profession has been upgraded significantly from its obscure position in 1970s through 1980s.

2010 – PRESENT DAY

- i. The new Constitution, 2010 has outlined principles for Public Procurement and Disposal i.e.:
- a. *Fair*
 - b. *Equitable*
 - c. *Transparent*
 - d. *Competitive*
 - e. *Cost-effective*

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- i. The Public Procurement and Disposal (Preference and Reservations) Regulations 2011.

These regulations cover groups or regions that have been disadvantaged over time and cannot be able to compete favourably with more established firms and hence must be given preference.

The target groups include:

- a. Small enterprises
- b. Micro enterprises
- c. Disadvantaged groups
- d. Citizen contractors
- e. Local contractors
- f. Citizen contractors in joint venture with foreign forms

The objective of the Regulations is to promote local firms/industries and disadvantaged groups or individuals.

- i. **Public Procurement and Disposal (County Governments) Regulations, 2013**

The Regulations, 2013 focus on Procurement and disposal within the newly established County Governments. The purpose of the Regulations is to operationalize the application of the Public Procurement and Disposal Act, 2005 in County Governments and promote local industries. Otherwise the principles and tenets of Public Procurement and disposal remain the same.

Regulation, 2013 marks the end of our discourse on the historical evolution of Public Procurement in Kenya starting from the colonial period to the present.

In conclusion, Public Procurement in Kenya has come a long way beginning from the colonial period through the post-colonial to the present. Further changes are bound to occur.

Public Procurement and asset Disposal Act, 2015

A new law governing procurement and assets disposal by public entities in Kenya known as the **Public Procurement and Asset Disposal Act**, No. 33 of 2015 (the “Act”) came into force on 7th January, 2016.

Below is a highlight of the provisions of the new Act:

Objective of the Act

The Act gives effect to Article 227 of the Constitution which provides for a system that is fair, equitable, transparent, competitive and cost-effective. The Act also provides for procurement by the county governments and makes provisions for e-procurement.

Application

The Act will apply to all public entities including state organs, departments, state corporations, county governments, companies owned by public entities and bodies in which the national or county government has a controlling interest, among others.

Exclusion

Noteworthy is that the Act will not apply to:

- procurement and disposal of assets under Public Private Partnership Act, 2013; and
- Procurement and disposal of assets under bilateral or multilateral agreements between the Government of Kenya and any other foreign government, agency, entity or multilateral agency unless otherwise prescribed in the Regulations.

In our view this provision effectively excludes Government to Government contracts from the competitive procurement method.

Repealed law

The Act repeals the Public Procurement and Disposal Act, 2005 which was one of the laws governing public procurement in Kenya but provides that procurements which commenced before 7th January 2016 shall be continued in accordance with the law applicable at the time, among other reservations.

Procurement at the Counties

The County Treasury will be responsible for the implementation of the Act at the county level.

Tender Security

While the repealed Act was silent on the value of the tender security, the new Act now specifies that tender security in any tender shall not exceed 2% of the tender as valued by the procuring entity.

Citizen Contractors and County Reservations

20% of procurement at the County level will be reserved for County residents. Kenyan citizens (or entities in which Kenyan citizens own at least 51% shares) will automatically be entitled to an additional 20% of their total score in certain situations.

Use of ICT in procurement

In line with GoK's electronic procurement system, Information and Communication Technologies (ICT) may be used in procurement proceedings as will be prescribed in the Regulations.

New procurement methods

In addition to retaining the procurement methods under the repealed Act (i.e. Open Tendering, Restricted Tendering, Direct Procurement, Request for Proposals, Request for Quotations and Low Value Procurement) the new entrants under the new Act include:

- two-stage tendering;
- design competition;
- electronic reverse auction;
- force account;
- competitive negotiations; and
- Framework agreements.

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Who is a successful tenderer?

Under the Act, the successful tender shall be the one which meets any of the following requirements as will be specified in the tender documents:

- the tender with the lowest evaluated price;
- RFP- the responsive proposal with the highest score determined by the procuring entity by combining, the scores assigned to the technical and financial proposals;
- the tender with the lowest evaluated total cost of ownership; or
- the tender with the highest technical score, where a tender is to be evaluated based on procedures regulated by an Act of Parliament which provides guidelines for arriving at applicable professional charges

Changes with regard to the evaluation process

- *Post qualification due diligence:* Under the new Act, the tender evaluation committee, may, after tender evaluation, but prior to the award of the tender conduct due diligence to confirm and verify the qualifications of the tenderer who submitted the lowest evaluated responsive tender to be awarded the contract.
- *Professional Opinion:* Under the new Act, all procurement function in Kenya will be handled by qualified procurement professionals who will be required to give an opinion.

Note: With regard to the above two (2) procedures, the Act is silent on the timelines. The Act is also not express whether a bidder can be disqualified on the basis of such due diligence or opinion. It is also not clear what the due diligence will entail, particularly because it is done after evaluation, and how it reconciles with the provision that a successful tender can be the tender with the lowest evaluated price.

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Approval of procurements contracts by the AG

All contracts of a value exceeding five (5) billion shillings will require to be cleared by the Attorney-General before they are signed.

Liquidated damages and interest

Under the new Act, and unless otherwise provided in the particular contract, public entities will be required to pay interest on any overdue amounts while the contractor will be liable to liquidated damages for delayed performance.

Regulating bodies

- The National Treasury will be responsible for public procurement and asset disposal policy formulation.
- The PPOA has been replaced by the Public Procurement Regulatory Authority which will play an oversight role with regard to all public procurement in Kenya.
- The Public Procurement Administrative Review Board which reviews and determines tendering and asset disposal disputes has been retained under the new Act

Public Procurement and Disposal (PP&D) manual

This Public Procurement and Disposal General Manual (PPDGM) has been issued by the Public Procurement Oversight Authority (PPOA) for the purpose of: -

(a) Providing guidance to public officials who are responsible for the public procurement processes, Auditors, Public Finance Managers, Accountants and Administrators in their everyday work relating to public procurement.

(b) It is also expected to be useful to all other parties participating in public procurement in one way or other and in particular the suppliers contractors and consultants.

(c) Playing a pivotal role in development of sector specific manuals that are unique to entities that are performing specialized services with a view of enhancing the quality service delivery to their internal and external customers.

The Manual shall assist participants in public procurement in the application of the Public Procurement and Disposal Act 2005 and the Public Procurement and Disposal

Regulations 2006. It will also play a big role in the standardization of the public procurement practices across all procuring entities in Kenya.

Public Procurement and Disposal Framework in Kenya

Details of Procurement Methods

- ✓ Open Tender
- ✓ Two-Stage Tendering
- ✓ Design Competition
- ✓ Restricted Tendering
- ✓ Direct Procurement
- ✓ Request for Quotations
- ✓ Low - Value Procurement
- ✓ Force Account
- ✓ Electronic Reverse Auction

Methods of disposal

Subject to prescribed provisions, an accounting officer of a procuring entity may dispose assets by a method which may include any of the following —

- (a) Transfer to another public entity or part of a public entity, with or without financial adjustment;
- (b) Sale by public tender;
- (c) Sale by public auction;
- (d) Trade-in;
- (e) Waste disposal management; or
- (f) As may be prescribed.

Supplies Practitioners Management Act, 2007

An Act of Parliament to make provision for the training, registration and licensing of supplies practitioners; to regulate their practice and for connected purposes.

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CHAPTER 2

REGULATORY BODIES AND THEIR ROLE IN PUBLIC PROCUREMENT IN KENYA

Regulatory bodies in Public Procurement in Kenya

a) National Treasury

Section 7 of PPAD 2015 states that the National Treasury established under section 11 of the Public Finance Management Act, 2012, shall be responsible for public procurement and asset disposal policy formulation.

Role National Treasury on public procurement and assets disposal.

- (a) Formulate, evaluate, promote and research on national and county public procurement and asset disposal policy and standards;
- (b) Develop policy guidelines for the efficient procurement management and disposal system for national executive;
- (c) Design and prescribe an efficient procurement management system for the national and county governments to ensure transparent procurement and asset disposal as contemplated by Article 227 of the Constitution:

Provided that the National Treasury shall prescribe through Regulations a system under this paragraph which operates, respects and promotes the distinctiveness of the national and county levels of government;

- (d) Provide technical assistance on procurement and assist in the implementation and operation of the public procurement and asset disposal system;
- (e) Manage and administer the scheme of service of the procurement and supply chain management services cadre for the national government;
- (f) Carry out general research, develop and promote electronic procurement strategies and policies in both the national and county governments including state corporations and other government agencies;
- (g) Carry out review of procurement and supply chain management system to assist procuring entities;
- (h) Develop and review policy on procurement of common user items in the public sector both at national and county government levels;
- (i) Develop policy on the administration of preference and reservations scheme and registration of target groups under preference and reservations scheme as prescribed;

- (j) Facilitate affirmative action for disadvantaged groups in accordance with the Constitution and advance their participation in the procurement process
- (k) Develop and review policies and guidelines on the management of assets;
- (l) Issue guidelines to public entities with respect to procurement matters; and
- (m) Perform such other functions as prescribed by this Act or any other legislation.

b) *Public Procurement Regulatory Authority*

Under Section 8 of PPAD(1) There is established an authority to be known as the Public Procurement Regulatory Authority which shall be a body corporate with perpetual succession and a common seal and shall in its corporate name,

- (a) Monitor, assess and review the public procurement and asset disposal system to ensure that they respect the national values and other provisions of the Constitution, including Article 227 and make recommendations for improvements;
- (b) monitor the public procurement system and report on the overall functioning of it and present to the Cabinet Secretary and the county executive member for finance in each county, such other reports and recommendations for improvements;
- (c) Enforce any standards developed under this Act;
- (d) Monitor classified procurement information, including that of specific items of security organs and make recommendations to the Cabinet Secretary;
- (e) Monitor the implementation of the preference and reservation schemes by procuring entities;
- (f) Prepare, issue and publicise standard public procurement and asset disposal documents and formats to be used by public entities and other stakeholders;
- (g) Provide advice and technical support upon request;
- (h) To investigate and act on complaints received on procurement and asset disposal proceedings from procuring entities, tenderers, contractors or the general public that are not subject of administrative review;
- (i) Research on the public procurement and asset disposal system and any developments arising from the same;
- (j) Advise the Cabinet Secretary on the setting of standards including international public procurement and asset disposal standards;

- (k) Develop and manage the State portal on procurement and asset disposal and ensure that it is available and easily accessible;
- (l) Monitor and evaluate the preference and reservations provided for under this Act and provide quarterly public reports;
- (m) Create a central repository or database that includes—
- (i) Complaints made on procuring entities;
 - (ii) A record of those prohibited from participating in tenders or those debarred;
 - (iii) Market prices of goods, services and works;
 - (iv) benchmarked prices;
 - (v) State organs and public entities that is non-compliant with procurement laws;
 - (vi) Statistics related to public procurement and asset disposal;
 - (vii) Price comparisons for goods, services and works; and
 - (viii) Any information related to procurement that may be necessary for the public;
- (n) Inform, as applicable, the Cabinet Secretary, Parliament, the relevant County Executive member for finance, the relevant County Assembly or Auditor-General on issues of noncompliance with procurement laws once the relevant State organ or public entity ignores the written directives of the Authority, including material breaches of the measures established under this Act;
- (o) Generally report to Parliament and the relevant county assembly;
- (p) Develop a code of ethics to guide procuring entities and winning bidders when undertaking public procurement and disposal with State organs and public entities;
- (q) In undertaking its functions, cooperate with state and non-state actors with a view to obtaining recommendations on how public procurement and disposal can be improved;
- (r) Ensure the procurement entities implement the preference and reservations and provide data to the Authority disaggregated to indicate the number of disadvantaged groups that have benefitted;
- (s) Perform such other functions and duties as are provided for under this Act and any other relevant law.

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