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A Diagnosis of the Public Procurement System in Kenya

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Acronyms and Abbreviation

ACECA	Anti-Corruption and Economic Crimes Act
AGPO	Access to Government Procurement Opportunity
AUCPCC	African Union Convention on Preventing and Combating Corruption
CoK	Constitution of Kenya, 2010
CSO	Civil Society Organization
EACC	Ethics and Anti-Corruption Commission
GDP	Gross Domestic Product
KEMSA	Kenya Medical Supplies Agency
MoE	Ministry of Education
MPI	Market Price Index
OAG	Office of the Auditor General
OECD	Organisation for Economic Co-operation and Development
PPADA	Public Procurement Assets and Disposals Act, 2015 (Revised 2016)
PPARB	Public Procurement Administrative Review Board
PPP	Public Private Partnerships
PPRA	Public Procurement Regulatory Authority
PWD	Persons Living with Disability
UNCAC	United Nations Convention Against Corruption
UNCITRAL	United Nations Commission on International Trade Law
WTO GPA	World Trade Organisation Government Procurement Agreement



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Executive Summary

For a country of its income level and without much endowments with natural resources from which to extract rents, Kenya's revenue mobilisation effort which fluctuates between 18-20% of the Gross Domestic Product is impressive. And yet despite this effort through legislation supporting revenue mobilization, the development results of public spending remains unimpressive. The stark development needs of the country and high levels of poverty make it imperative for government agencies and departments to utilise resources in the most cost effective and efficient ways.

This paper traces the institutions and processes that govern the use of public resources within the public sector in order to identify whether the broad goals of the public procurement policy are being achieved. Following this detailed review and selected case studies, the study contends that while the quest to use public procurement to advance economic development is a legitimate policy goal, government procurement in Kenya unequivocally fails to do so. And this failure is regular and consistent throughout most state departments, ministries and agencies, suggesting that the incentives for a clean, transparent and effective public procurement in Kenya will remain a long-term challenge in Kenya's development path.

In the diagnostic of the public procurement machinery in Kenya, the study plausibly connects the conundrum of a heavily regulated and legislated policy area to the evident failure to meet public policy objectives including efficient purchase, transparent processes and traceability of decision making regarding supplier firms and the terms of their contracting. For instance, offices that are established by the laws on public procurement repeatedly violate the laws that have created them and thereby generate low public trust in the public procurement processes resulting in the multiplication of costs on purchases, in addition to creating new costs through adverse court action against the public sector.

Based on benchmarking, the paper gives credit to the public sector and parliament for the statutes that govern public procurement in Kenya. Evidently, the recurrent challenges in the practise of public procurement are not due to the absence of laws or regulations but the reading suggests that these may be related to capacity but most clearly to obvious dereliction of duty among decision makers managing the procurement processes and especially the contract management stages. This finding shows that the systematic weaknesses in the public procurement practice in Kenya cannot be fixed by

further legislation as much but the strengthening of both negative and positive incentives for agents in the public sector to behave in the ways that are consistent with the interest of the public.

Given the demonstration of the enormous opportunities that a competently managed public procurement system should offer to the republic, the study proposes a number of concurrent institutional and operational fixes. The overall profligacy of the institutions of public procurement can be strengthened with better transparency, the adoption and enforcement of open contracting, creation of capacity and deployment of technology. However, the nugget of this study is not that Kenyan's public procurement systems are weak or that they have enormous potential for contributing to its growth. The real policy lesson is that the dysfunction of the public procurement reflects the inability of institutions such as parliament to assert authority in ensuring that allocations are used effectively and that the managers of procurement throughout the 4000 entities in government have the incentive to apply public resources well. In other words, the ineffectiveness of Kenya's public procurement is an issue of the political economy in Kenya. And solutions do not lie in new laws but ensuring that accountability for use of resources has real meaning. Sustaining Kenya's development depends on getting this right.

“As I hurtled through space, one thought kept crossing my mind - every part of this rocket was supplied by the lowest bidder.” ~ John Glenn

Although purchasing is not only about finding the lowest price, this quote still makes people think and means a lot when you think of best value over best price. Best value in this instance means every part of the rocket procured was safe enough to carry all on board to that far off darkness ... [Please note that there is some discrepancy on whether Glenn or astronaut Alan Shepard actually said this. Either way- one of America's finest and bravest.]

“The world's poorest and most vulnerable populations are the most dependent on public goods and services. They feel the brunt of waste and corruption in public procurement more than anyone else.” ~ Unknown

“Public funds are scarce and governments must invest with intention. Improving public procurement systems contributes to a vibrant private sector, helps governments get the most out of its investments, and supports growth.”

Catherine Masinde Practice Manager, Macroeconomics, Trade & Investment Global Practice,
World Bank

1

1.0 Introduction

Public procurement is the process of acquisition, normally through contractual arrangement of goods, services and works by the public sector from private sector. The procurement process scopes a cycle from identifying need, procurement planning, the selection of suppliers to post contract award management including disposal. In acquisition of these goods, services and works, it is paramount that this is done in a cost effective manner and that they are provided in the right quantities at the right quality from the right source in timely agreed delivery period at the lowest possible price. Governments mainly implement functions in form of programs and projects through purchase of goods, services and works.

Overall, governments around the world spend \$9.5 trillion each year procuring goods and services by construction of schools, purchasing of hospital supplies, building roads, or securing computer systems in public buildings by public procurement. Developing countries alone, spend \$820 billion per year in obtaining these goods and services from the private sector thus making the public procurement market a huge business opportunity for firms around the world¹. Effective public procurement systems thus help governments see better value for money, reduce pressure on public budgets, and leave agencies better prepared to invite private investments.

Globally and specifically for developing countries, public procurement has progressed from being purely a support supply function to the public sector to now being considered an important means in economic policy, and debatably the most detectable ideal for quality of governance. Efficient public procurement also has a direct impact on poverty reduction considering government programmes are implemented through procurement of goods, infrastructure and services which have a multiplier effect on the social economic situations in a country. As such, efficient public procurement is vital for achieving Sustainable Development Goal 1 of ending poverty and by extension, sound public investment, spending being unquestionably an important factor in attaining the other 16 Goals. Over the last two decades, countries have recognized the need to modernize the way they buy goods, services and works and further specifically closely regulate this very lucrative function of public service.

¹World Bank, Washington 22nd May 2018

1.1. Public procurement as an economic source of growth

A composition of government expenditure and public expenditure reforms matter for economic growth². Government spending on health and education, for example, will increase productivity of labour and increase the growth of the economy while public expenditure on infrastructure such as roads, railway, power and telecommunications are expected to reduce the cost of production and doing business thus promoting private sector investment and profitability of firms which in effect fosters economic growth. However, prudent spending on these resources is critical, which import means transparency, accountability and value for money for the tax payer is key at all stages of public finance management.

Public procurement is the means through which government and state-owned enterprises delivers goods, services and programmes to the citizens through spending. A good portion of government revenue, which is tax payers' money, is spent through public procurement which during the fiscal year 2018 accounted for 26 percent of Kenya's GDP³. During the fiscal year 2015, spending on public procurement constituted about 45 percent of Ministries, Departments and Agencies budgets⁴. Public procurement being a key economic activity, even though plays a central role in driving socio-economic development, is prone to risks and loss of public funds, especially where procurement procedures and systems are not efficient to support the process in implementing government programmes, projects and activities. The Kenyan procurement system is also considered a high risk area for investors. The Global Competitiveness Report 2011-2012 indicates that corruption remains prevalent in procurement processes with widespread practice of favouritism towards well connected firms and individuals when deciding upon contracts and policies being a main area of concern⁵.

It is worth to noting however, that public procurement offers rare opportunity for the different socio-economic sectors of the society to not only get empowered but contribute to inclusive economic growth of the country. It's on this understanding that the Kenya is implementing Access to Government Opportunity (AGPO) Program, which seeks to facilitate enterprises owned by women, youth and persons with disability to access government opportunities through public procurement. By law, procuring entities are required to set aside 30 percent of their procurement opportunities to enterprises owned by these groups. The program is founded on Article 227 of the Kenya Constitution 2010 on the fair, equitable, transparent and cost-effective procurement of goods and services, Article 55 on affirmative action and section 7 (2) (i), 157 (14) of the Public Procurement and Asset Disposal Act, 2015 which mandates public procurement entities to prepare and submit to Parliament every six (6) months a report on contracts awarded to youth, women and persons living with disabilities.

²The Impact of Government Expenditure on Economic growth in Kenya: 1969-2008; Maingi J.N, 2017, Dept. of Econ. Kenyatta University.

³World Bank, 2018

⁴PPOA Annual Report 2015

⁵World Economic Forum 2012

This direction is implemented through performance contracting in public service where government agencies are awarded points on meeting this affirmative action target which is not only a matter of policy but now a legal requirement.

In 2013 the country saw the enactment of the Public Private Partnership Act. This legislation was informed by the need to spur private sector participation in the development of infrastructure in the country. With private sector involvement, it was envisaged that provision of public services and works would be accelerated at affordable rates. This approach has deviated from the traditional public procurement process as it incorporates the element of risk sharing between the parties, with private sector bearing a large portion of the risk including financial, operational and management responsibilities. Further with this model, private sector is provided with an opportunity not only to grow but also provide jobs for Kenyans and subsequently contribute towards economic expansion for the country.

On government to government procurement and contracting with foreign entities, it is now a requirement of law for foreign entities to not only source locally for raw materials, but to also employ a prescribed percent of Kenyans in their firms and transfer ensure requisite transfer of technology to locals.

1.2 Governance and social accountability in public procurement

Public procurement has a direct correlation to public governance. The main pillars for effective and successful public governance are increased value for money, improved public service delivery and creating an enabling environment for private sector growth. Public procurement links directly to these pillars thus making it an element for governance reforms.

The initial trend of procurement reforms, which started about 20 years ago, focused on improving the regulatory framework and building skills for personnel in the supply chain management arena. Later, reforms are now concentrated on combating corruption and waste by improving accountability, transparency, and integrating better public procurement practices across government. These reforms are however slow particularly in the regulatory regime that requires openness across the entire public procurement process. Translating the legislative and institutional framework into a system that is credible, objective, transparent and offers value for money is a challenge that most economies continue to struggle with.

Previous procurement reforms often disrupted entire procurement systems and daily related operations. As time went by, such reforms met so much resistance that they were given up or watered down but over time, changes have occurred not only through reengineering of systems, but improved workflows, individual conduct, tools and most importantly, minimizing costs, all the while managing the resistance to change inherent in nearly all public bureaucracies. At the core of good governance is effective financial management which is linked to multi-stakeholder engagement, effective checks &

balances, decentralization and local participation. Success in this is seen through increased value for money, improved public service delivery and a conducive environment for private sector led growth. Public procurement must be linked to these key pillars as an essential cog in governance reforms.

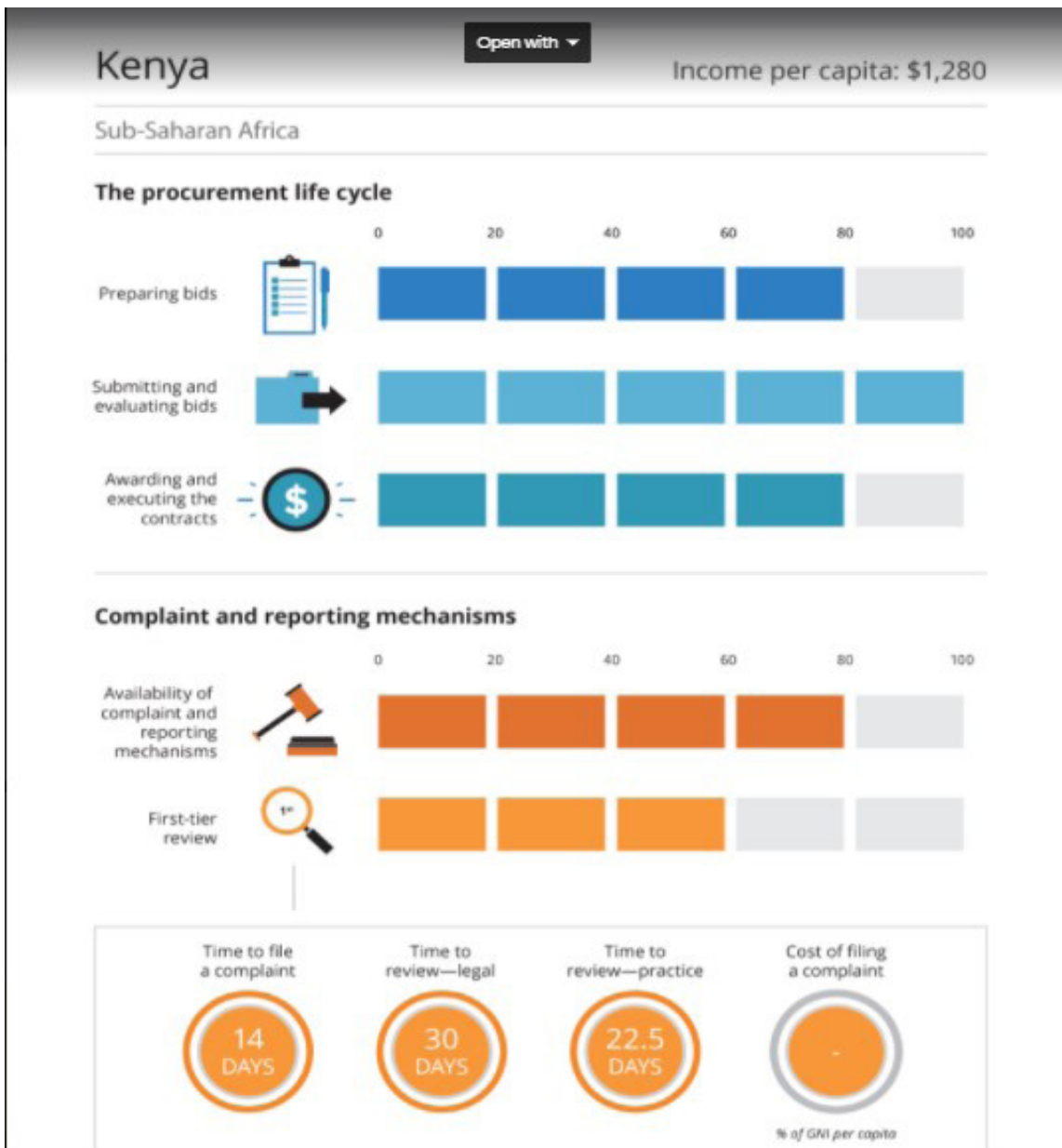
With assistance from the World Bank Group and OECD, governments around the world are purposely focused on improving their public procurement systems with a focus to create a leveled playing field for firms. Over the past three years beginning 2015, the World Bank has been compiling data on public procurement regulatory environment and their impact on companies in doing business with governments. The exercise is aimed at promoting evidence based decision making by governments and to build data in the area of public procurement noting that very little empirical data exists. This continuous assessment is aimed at establishing gaps and inconsistencies in public procurement markets as systems in place often do not fit into best practice. When this happens, private sector, particularly the small scale and medium enterprises can miss important opportunities. Further, availability of a fair, transparent and timely complaint mechanism entrenched in a procurement system, increases trust in the process.

In regard to this, a pilot assessment was conducted by the World Bank in 2014, affecting 11 economies. This was scaled up in the subsequent year 2015 to include 77 economies and further 180 economies in the third evaluation that was undertaken in 2016, a report that was published in 2017. Kenya was amongst the economies that formed the latter two evaluations.

The purpose of the assessments labeled 'Benchmarking Public Procurement' is to measure internally accepted good practices across various phases of procurement cycles. It also focuses on the procurement system to determine how functional complaints mechanisms are. In the 2015 measure, Kenya comparatively does well, with scores above 80%⁶ in respect to complying with legal requirements relating to the procurement cycle, from preparation of bids to awarding of tender and execution of contracts. In terms of turn-around times in complaint and reporting mechanism, the score was reasonable averaging 14 days to 30 days on the whole.

⁶Benchmarking Public Procurement 2016. Assessing public procurement systems in 77 countries

The performance for Kenya for the past two compilations is as illustrated below for 2016 and in Annexure 1 for 2017 reports respectively:



Source: Benchmarking public procurement 2016

The subsequent evaluation in 2017 was better intended as it unpacked the assessment into looking at specific steps within the procurement system from the needs assessment/bid scoring phase all the way to payment stage. This third evaluation was conducted across 180 economies. Comparatively, Kenya's score is encouraging considering that at the time of compiling this report, the legislative framework has been amended to reflect some of the weaknesses observed in the Benchmarking Public Procurement 2017 evaluation. In this evaluation, the scores for Kenya are above 57 with the

highest being 73 out of the maximum score of 100. However, in the area of processing of payment to suppliers, the score is 37 for Kenya. This score comparatively, is low across most economies evaluated. Payments are timely in only 1/3 of the economies measured⁷. I have attached a table on the 2017 outcome of the measures as Annex 1.

To support initiatives offered by donor institutions in opening up public procurement, the Constitution offers a thread that runs across it on matters that require public involvement. Article 1 reiterates who the power belongs to, Article 10 speaks to values and principles of which public participation is part of. Equality and nondiscrimination of persons, freedom of expression and right of access to information are prescriptions under Articles 27, 33 and 35 respectively. Article 232 on value and principles of public service directs on transparency and provision of accurate information to the public in a timely manner. These Constitutional provisions are buttressed other legislation that are cited later in this analysis.

1.3 Objectives of this paper

1. Analyse the System and Practice of Public Procurement in Kenya
2. Review Trends and Identify the recurrent Challenges in Public Procurement
3. Recommend Proposals for Policy Improvement

1.4 Analysis approach and methodology

The approach used in undertaking this exercise was based on an analysis of the legal, and institutional framework for public procurement in Kenya; past reports and data on the subject matter.

The main source of data for analysis includes:

1. Constitution of Kenya and other relevant legislation to understand the legal, institutional and systems framework for public procurement in Kenya;
2. Auditor General Reports;
3. Public Procurement Regulatory Authority Reports and Manuals; and
4. Salient reports on public procurement in Kenya and other countries.

⁷Benchmarking Public Procurement 2017. Assessing Public Procurement Regulatory Systems in 180 economies

2

2.0 The Practice of Public Procurement In Kenya

2.1. Legal and regulatory framework

2.1.1. Background

The procurement legal framework is the guide book for public procurement. Ideally, it should be further developed into policies and procedures, procurement and contract administration manuals and guidelines, including standard solicitation documents that are used to call for offers from contractors, suppliers and service providers. These subsidiary documents must align with what is established in the public procurement legal framework, which is anchored on the Constitution. Adherence to the public procurement law is obligatory, any infraction is punishable by law. The procurement legal and institutional frameworks, which may be referred to as procurement rules govern everything from the identification of a requirement through to the closing out of a contract; sometimes including disposal, reutilization and destruction of goods.

Public procurement system in Kenya has evolved from a crude system with no regulations to an orderly legally regulated procurement system. Below is a summary of the evolution of Public procurement system in Kenya.

2.1.2. Evolution of Public Procurement System Reform and Legislation in Kenya

Crown Agents: This was a UK firm that managed overseas purchases until the 1970s

1955: Central Tendering Board established through a Treasury Circular was under the Ministry of Works. CTB handled all government tenders.

1959: Procurement and supplies unit established in the Ministry of works to handle common user items and services.

1974: CTB was moved and placed under Treasury. Procurement and supplies restructured to supplies branch to supply all government departments with common user supplies. Printing was done by government printer.

1968- 1978: Public procurement was guided by Circulars from the Treasury.

1978-2001: In addition to the circulars, a Supplies Manual was developed as it was considered best practice at the time. This manual became the main document to guide the public procurement function. These documents not being law left procurement officers with enormous discretion. The period of the Supplies Manual also saw the introduction of the Blue Book that regulated public procurement in the era of District Focus for Rural Development Strategies.

2001-2005: As a result of recommendations of a World Bank survey, the Exchequer & Audit (Public Procurement) Regulations (2001) pursuant to section 5A of the Exchequer and Audit Act were promulgated as a stop gap measure pending development and enacted of a law on public procurement.

From 2005: Public Procurement Assets and Disposal Act 2005 enacted to cure the inadequacies that existed in the procurement system and instill renewed confidence.

2010: Public Procurement anchored in the New Constitution under Article 227.

2011: Preference and Reservations Regulations promulgated through a gazette notice.

2013: Public Private Partnerships (PPPs)

Components that an efficient public procurement system must at a basic level include the following parameters: -

1. Legislative framework;
2. Remedies mechanism;
3. Sanctions regime;
4. Supporting Institutional Framework and;
5. Adequate resources to support the function.

In Kenya, procurement law exists in three levels, namely International, Regional and Domestic. There are elaborate expectations from the community of nations in international law on how public procurement should be regulated, trade being a global endeavour.

2.1.3. International and Regional Legal Obligations

By virtue of Article 2(6) of the Constitution, Kenya has ratified various international and regional instruments in the regulation and operationalization of public procurement. These instruments that include the UNCAC, UNICITRAL, WTO GPA and AUCPCC are the basis for which the public procurement legislation in the country is domesticated. Kenya signed and ratified the United Nations Convention against Corruption (UNCAC) in December 2003 and the African Union Convention

on Preventing and Combating Corruption (AUCPCC). The UNCAC has attained a near universal application, having been signed and ratified by 186 parties currently. The AUCPCC applies at the African continental level, and has been signed by 49 and ratified by 40 countries. The Draft East African Community Protocol on Preventing and Combating Corruption under development stalled with Tanzania's decline to negotiate indicating the proposed area is not covered under the EAC Protocol. However, the +proposed Protocol reaffirms a number of provisions in the AUCPCC and UNCAC.

UNCAC under Art. 9 speaks to procurement measures and management of public finances. Specifically, the article is based on Transparency, Competition and Objective Criteria in decision making and outlines goals of procurement systems as:-

1. Value for Money;
2. Competition;
3. Fair and equitable treatment;
4. Transparency;
5. Objectivity; and
6. Accountability.

Although both UNCITRAL and the WTO GPA have mandates addressing the rules governing international trade, their scope is different. The WTO GPA addresses state-to-state relations, whereas UNCITRAL's texts relate mainly to private law commercial transactions in individual states. As regards procurement, the WTO GPA addresses the harmonization of procurement law with the express aim of opening up markets to international competition by preventing parties from discriminating against suppliers from other parties, and applying rules of transparency and open competition in procurement. UNCITRAL seeks to facilitate international trade through the harmonization of national law on procurement based on the main principles of transparency and competition (but it is arguably less demanding as regards international competition and more flexible on the protection of national suppliers). The mandate of both organs on procurement are based on the UNCAC principles under Art, 9 and were pivotal in informing the finalization of the UNICITRAL model law on public procurement⁸. This model law is the basis upon which public procurements principles in the Constitution and provisions of the PPDA Act are developed and promulgated.

The 18th IACC in Copenhagen in 2018 featured a series of high-level meetings among OECD and non-OECD countries, international and regional organisations where participants made a set of statements on steps each intend to take to make progress in anti-corruption strategies, based on existing commitments including Open Government Partnership (OGP) action plans, UK summit,

⁸UNODC Guide book on anticorruption and the management of public finances. Good practices in ensuring compliant with Art.9 of UNCAC

UNCAC, OECD instruments, SDGs amongst other commitments. Kenya reiterated on 8 commitments related to the fight against corruption and specifically committed to the following in respect to Public Procurement:

- i. Enhance mechanisms on open governance initiatives. This was done through Executive Order No. 2 of 2018 which directs all public procurement entities to maintain records by continuously update and publicise complete information on all contracts awarded, list of all registered suppliers, contractors and consultants. This directive has been effective from 1st July 2018.
- ii. Work towards securing a seamless integration of all procurement entities to the e-procurement module under the Integrated Finance Management Module by 1st January 2019. Under this, procurement entities are expected to undertake procurement through e-procurement module.
- iii. Conduct periodic vetting of public officer to determine levels of integrity and suitability. This vetting mainly focused on Accounts and procurement officers.
- iv. Formulate a National Ethics and Anti-Corruption Policy to enshrine strategies crucial to spearheading war against corruption.

2.1.4. Domestic Law

The Constitution under Article 10 provides for national values and principles of governance, which include rule of law, good governance, integrity, transparency and accountability. Chapter Six provides an elaborate framework for leadership and integrity. Article 232 prescribes the values and principles of public service. Article 75(1) (a) and (b) provide that a state (and public) officer shall behave, whether in public or official life, in private life, or in association with other persons, in a manner that avoids any conflict between personal interests and (public) official duties, or compromising any public or official interest in favour of a personal interest. Articles 76 and 77 further provide for financial probity and restrictions of certain activities. These provisions of the Constitution establish thresholds within which public officials should behave in exercising official duty.

The Constitution further provides under Article 227, broad compliance standards for public procurement. These standards are anchored on Article (9) of UNCAC in respect to a procurement system that is fair, equitable, transparent, competitive and cost effective. The Constitutional Article further broadly prescribes thresholds upon which legislation on public procurement must be developed, specifically placing responsibilities on both the agencies within the procurement system and contractors, to share opportunities equitably, protect disadvantaged groups and abide by contractual and legal obligations respectively. The Constitution perceives parties in the procurement space to be to be persons of good ethical standing in their various capacities as stakeholders.

The Public Procurement of Assets and Disposals Act of 2015 (PPAD) and attendant Regulations is the main law that governs public procurement and disposal of goods, services and works in governments and government entities respectively at both national and county levels. This legislation is customized from the UNCITRAL Public Procurement Model Law, this being a global standard legislation for

public procurement. This specific procurement legislation is also complemented by guidelines from both Treasury and the Public Procurement Regulatory Authority. The preamble to the Public Procurement and Asset Disposal Act, 2015 states that the overarching objective of the law is to give effect to Article 227 of The Constitution; to provide procedures for efficient public procurement and for assets disposal by public entities; and for connected purposes. The legislation, including the regulation is very prescriptive with the specific procurement processes well-articulated.

The PPDA provides for the roles of the treasuries and both levels of government, establishes the various organs to oversee and regulate the procurement entities which also have within them specific committees with specific functions in the procurement process. This process is regulated through regulation of procurement methods, timelines, standards and grounds for debarment. Members of the various committees within the procurement entities are established to provide the necessary checks and balances and are individually liable for actions that offend the Act. The PPADA has since the promulgation of the Constitution undergone amendments to provide for reduction time of requests to advertise tenders, removal of tender security for certain cadre involving Youth, Women and Persons living with Disability and setting aside 30% of public tender for disadvantaged groups. The number of days for the pre-qualification process has been reduced from 14 to 7 days and submission of restricted tenders also reduced from 14 to 7 days. Days allowed for tender evaluation has been reduced from 30 to 15 days with accounting officer given discretion to increase this to a maximum of 30 days. This are just a few of the reforms brought about by the amendments of the PPAD Act in its present form.

Key changes introduced by the newly gazetted The Public Procurement and Disposals Regulations, 2020 that came into effect on 2nd July 2020 have introduced key changes that need the attention of private parties participating in public procurement. These salient changes are: -

(a) Procurements undertaken in respect to bilateral/multilateral agreements

Pursuant to Section 4(2) (f) of the PPADA, Government-to-government procurements are exempt from the provisions of the Act which provides that procurements and disposal of assets under bilateral or multilateral agreements between the Government of Kenya and any other foreign government, agency, entity or multilateral agency are not procurements or asset disposals with respect to which the Act applies. This does not however remove said procurement from application of Article 227 of the Constitution of Kenya which requires that all procurements be undertaken in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. It is based on this provision that projects such as the Standard Gauge Railway financed through a concessional loan are undertaken with little visibility. Subject to section 42 mentioned above, details of the Standard Gauge Railway Project have been shrouded in secrecy. Nothing is known on the details of the award, let alone what method of procurement was used. Bits and pieces of information have been shared on social media with one of the daily newspapers running an article on it. However, details of the project are yet to be availed to the public, this being a concessional loan used for establishment of a public utility, a debt on the people of Kenya.

To provide clarity on this, the new Regulations outline requirements for the government-to-government exemption under the Act. Those requirements are summarised as follows: -

- i. where a government-to-government procurement is financed through a negotiated loan, the Public Procurement and Asset Disposal will apply unless the agreement specifies the procurement and asset disposal procedures to be followed;
- ii. Officers responsible for procurement in the respective procuring entity must be involved at the negotiations stage of the bilateral/multilateral agreement to ensure the public procurement and asset disposal interests of Kenya are considered; and
- iii. Unless an exemption is issued by national treasury, the tender documents for a government to government procurement must contain requirements that the tenderer shall transfer technology to locals in a well laid out technology transfer plan and include the following:
 - include a plan for technology transfer to locals;
 - plan to reserve 50% employment opportunities for Kenyans; and
 - 40% of inputs must be sourced locally.

Although the New Regulations provide that relevant bilateral/multilateral agreement has to specify a procurement procedure, no further guidance has been provided with respect to the type of procurement procedure to be adopted. This ambiguity leaves the door open for parties to relevant bilateral/multilateral agreement to adopt procedures such as direct procurement or restricted procurement in awarding contracts pursuant to the Government to government exemption by National Treasury. The New Regulations require that all procurement contracts be published and publicized within fourteen days after signing the contract.

(b) Debarment proceedings

A tenderer found to have breached provisions of the Act may be blacklisted and debarred from participating in future procurements for a period of not less than 3 years. The regulations operationalize this by introducing procedures for the hearing and determination of debarment proceedings by the Public Procurement Regulatory Board. A tenderer who is subject of the proceedings can now contest debarment and will be allowed to respond and submit evidence in defense. Where an entity is debarred, any successor entity of that entity is also debarred and the debarment extends to directors and partners if the debarred person is a company or a partnership. This debarment does not affect contracts entered into with the procuring entity prior.

(c) E-procurement

In a bid to encourage the adoption of information technology and efficiency in procurement, the New Regulations provide guidance and elaborate procedures for the establishment and use of e-procurement systems and a central online portal to be developed by the Public Procurement Regulatory Authority.

It is not only a government directive, but a legal requirement for all procurement entities and the regulator to implement the automation of the procurement process and upload information on the same to enhance transparency and accountability.

(d) Preferences and Reservations

Section 155 of the Act provides for preferences and reservations to be applied by procuring entities. Preference should be given to:

- i. supplies wholly mined and produced in Kenya;
- ii. supplies partially mined or produced in Kenya or assembled in Kenya; or
- iii. firms with 51% Kenyan shareholding.

The New Regulations now further provide that the tender documents must as a mandatory requirement specify that the successful bidder shall:

- i. transfer technology, skills and knowledge through training, mentoring and participation of Kenyan citizens;
- ii. reserve at least 75% employment opportunities for Kenyan citizens for works, consultancy services and non-consultancy services, of which not less than 20% shall be reserved for Kenyan professionals at management level;
- iii. Include in its tender a local content plan specifying:
 - positions reserved for employment of local citizens;
 - capacity building and competence development programmes for local citizens;
 - timeframes within which to provide employment opportunities;
 - demonstrable efforts for accelerated capacity building of Kenyan citizens;
 - succession planning and management; and
 - a plan demonstrating linkages with local industries which ensures at least 40% inputs are sourced from locally manufactured articles, materials and supplies partially mined or produced in Kenya, or where applicable have been assembled in Kenya.
 - In circumstances where an international tender does not meet the above requirements, specific approval from the National Treasury shall be required.

(e) Clarity in relation to ‘Specifically Permitted Procurements’ under Section 114A of the Act

In 2017, the Act was amended to include procurement through a procurement method specifically permitted by the National Treasury. The New Regulations limit the use of ‘Specifically Permitted Procurements’ to instances where such procedure is in “...the public interest or interest of national security”. These terms are however not defined.

(f) Amendment and variation of Contracts

The New Regulations now distinguish between a variation and amendment of a contract entered into following a tender award.

An amendment is defined as a change to the terms and conditions of an awarded contract and contract, while a variation refers to a change to the price, completion date or statement of requirements of a contract. Parties therefore have greater flexibility when making amendments to contracts but variations may only be considered 12 months after the date of signing the contract and only where the proposed variation meets the conditions specified in Section 139 (4) of the Act.

Apart from the PPDA, there exists other statutes with provision that broadly regulate public procurement, public officers and stakeholders involved with public procurement. These legislations include:

Leadership and Integrity Act 2012 (LIA) which is enacted pursuant to Article 80 of the Constitution to establish procedures and mechanisms for the effective administration of Chapter Six. A state or public officer is required to declare such interests as and when they exist or occur, or come to the knowledge of the state/public officer.

Public Officer Ethics Act, 2003 (POEA) establishes Responsible Commissions for purposes of administering the requirements of the Act in respect of the public officers or cadre of officers for which they are responsible. Part IV of the POEA contains provisions on declaration of income, assets and liabilities by public officers, as a tool for management of conflict of interest. Public officers are required to make a formal declaration of their income, assets and liabilities; including those of their spouse/s and dependent children under the age of 18 years. The declaration is made once every two years, at the time of entry into public service, and within 30 days upon ceasing to be a public officer. However, the regulations have not been developed to date.

Anti-Corruption and Economic Crimes Act, 2003 (ACECA) is legislation that provides for prevention, investigation and punishment for corruption, economic crime and related offenses. Sections 42 and 44 of the Anti-Corruption and Economic Crimes Act, 2003 (ACECA) criminalizes Bid Rigging and non-disclosure of conflicting interest respectively.

Bribery Act came into force on January 13th January 2017. This is a law that was driven by private sector in an effort to place responsibility on the private sector as well as those who are drivers of corruption through bribes to public officials. In the Act, associated persons include agents and employees. The Act contains heavy sanctions both on individuals and juridical persons ranging from fines, imprisonment, disqualifications, payback order and confiscation orders.

Proceeds of Crime and Anti-Money Laundering Act, 2009 (POCAMLA) provides for the offense of money laundering and also introduces measures for combating the offense to provide for identification, tracing, freezing, seizure and confiscation of the proceeds of crime. Proceeds of economic crimes related to public procurement may involve large sums of money, sufficient to lose audit trails. This law, unbundles the layering and rolling of such stolen public resources by placing responsibilities on third parties outside actual participants to the specific economic crime.

Public Finance Management Act, 2012 - The Constitution under Article 201 prescribes principles that "...shall guide aspects of public finance..." in the country. One of these principles speak to "...openness and accountability, including public participation in financial matters..." It goes further to provide that "public money shall be in used in a prudent and responsible manner and that "financial management shall be responsible and fiscal report shall be clear". It is based on these principles that public procurement must also be handled. The PFM Act assigns powers and responsibilities in the public service structure, with respect to management of public resources and assets.

Public Private Partnerships Act No. 15 of 2013, PPP provides for the participation of the private sector in the financing, construction, development, operation and maintenance of infrastructure projects of the government through concessions or other contractual arrangements. The Act establishes institutions that regulate, monitor and supervise the implementation of project agreements on infrastructure. One of the key features of the Act is the creation of the Public Private Partnership Unit (PPPU) which is a Special Purpose Unit within the National Treasury. The PPPU is responsible for the systematic coordination of all the PPP projects review and approval process, which is geared towards promoting the flow of bankable, viable and sustainable projects that further the Kenya's National Policy on PPPs. Infrastructure projects that have been built using PPPs include the Port of Mombasa Grain Terminal that was built in 1998; the Malindi Water Utility which was built in 1999 on a 5-year management contract; the Jomo Kenyatta International Airport Cargo Terminal (JKIA Cargo) which was built in 1998; the Kenya-Uganda Railway Concession in 2006, among others.

Access to Information Act, 2016 requires government agencies to make official information more freely available. It also requires for proper access by every person to official information relating to that person in public interest. The Act is anchored on Article 35 of the Constitution with oversight and enforcement powers are conferred on the Commission on Administration of Justice. Public procurement is matter of public interest and thus subject to the Access to Information Act.

Mwongozo, The Code of Governance for State Corporations, 2015 - The Mwongozo Code was jointly issued by the Public Service Commission and the State Corporations Advisory Committee, to provide a comprehensive framework for embodying board charters, codes of conduct, professional ethics and performance management in State Corporations. One of the key provisions is the requirement for Boards of State Corporations to have instill integrity in the day to day functions of the various public organisations.

Public Service Commission Human Resource Policies and Procedures Manual for the Public Service, 2016

Based on Constitutional prescriptions on National values and public service values, The Public Service Commission reviewed the Manual in 2016; it has provisions on management of conflict of interest. Regulation J13 defines a “conflict of interest” to mean a conflict between the public duty and the private interests of a public officer in which the officer’s private capacity interests would improperly influence the performance of their official duties and responsibilities.

It provides that a public officer shall use the best efforts to avoid being in a situation where personal interests conflict or appear to conflict with the public officer’s official duties. Further, an officer shall not hold shares or have any other interest in a corporation, partnership or other body, directly or through another person, if holding those shares or having that interest would result in the public officer’s personal interests conflicting with his official duties. An officer whose personal interests conflict with his official duties is required to declare the personal interests to his supervisor or other appropriate body and refrain from participating in any deliberations with respect to the matter.

The Manual further states that a public official shall not award a contract, or influence the award of a contract to oneself, spouse or relative, a business associate, or to a corporation, partnership or other body in which the officer has an interest. Further, an officer who is serving on a full time basis shall not participate in any other restricted gainful employment.

Lastly, an officer shall not be engaged by or act for a person or entity in a matter in which the officer was originally engaged in as a public officer, for at least two years after leaving public office. The Manual defines “personal interest” to include the interest of a spouse, relative, or business associate. The Manual applies only to public officers in respect of whom the Public Service Commission exercises supervisory control.

National Ethics and Anti-Corruption Policy (NEAP) - The National Ethics and Anti-Corruption Policy was developed and approved by the National Assembly. The Policy directs that public entities develop and prescribe Codes of Conduct and Ethics.

Institutional and Sector-Specific Instruments - Various Codes and institutional policies prescribe specific requirements for management professional ethics at the institutional or sector level. Examples of these include; the Third Schedule of the Ethics and Anti-Corruption Commission Act, which prescribes a code of conduct for members and employees of the Commission; the Code of Conduct for Members of the National Assembly; the National Prosecution Policy and the Code of Conduct and Ethics for Public Prosecutors.

2.2 Public procurement institutional framework

The Public Procurement Assets and Disposal Act, 2015 has established institutional framework to support the country's procurement system.

The National Treasury has a responsible for public developing the Public Procurement Assets and Disposals National Policy. Other responsibilities include formulate, evaluate and research on public procurement policy and standards for the country. National Treasury is also mandate to design an efficient procurement management system, provide technical assistance, facilitate affirmative action for disadvantaged groups and issue guidelines with respect to procurement matters, National Treasury may present a national framework to support procurement administration and management of common user items for National Government.

Public Procurement Regulatory Authority (PPRA): Section 8 of the Public Procurement Assets and Disposals Act 2015 establishes the PPRA, which is a body corporate. The Authority's management rests on a Board. The PPRA is a renamed regulatory authority from its former function mainly as an advisory body.

The mandate of the Authority is to enforce the Act through monitoring procurement entities for compliance for the procurement law. It also has a mandate to ensure enforcement of preferences and implementation of national values and principles in respect to procurement. Monitoring is done through training, inspections and reports for a better functioning of the procurement system. The Authority also has a mandate to investigate and act on complaints received on procurement and assets disposals from stakeholders, research and create a central repository or data base for public procurement amongst other functions.

The Authority may seek information from public entities, investigate and debar an entity from participating in public procurement.

Sections 27 of the PPAD Act establishes the **Public Procurement Administration Review Board**. The **Review Board** is the central independent Appeals Board. This unincorporated Board comprising 15 members has a mandate to access its services across the country.

The role of the County Treasury is similar to that of the National treasury but is limited to County level.

Internal Organization of public entities

Section 45 (1) mandates Accounting Officers (AO) to establish systems and procedures to facilitate decisions for procurement and disposal of assets. The AO is directly responsible for the public procurement and disposal processes and appointing of ad hoc committees for each procurement. The

Act prescribes for qualification for appointment of members to the various procurement committees. The Act under section 49 provides for establishment of a procuring agency at national or county for purposes of procurement and distribution of sector specific goods, services or works. On behalf the procurement entities. This is to enable consortium buying.

3

3.0 The Current State of Play of The Public Procurement System

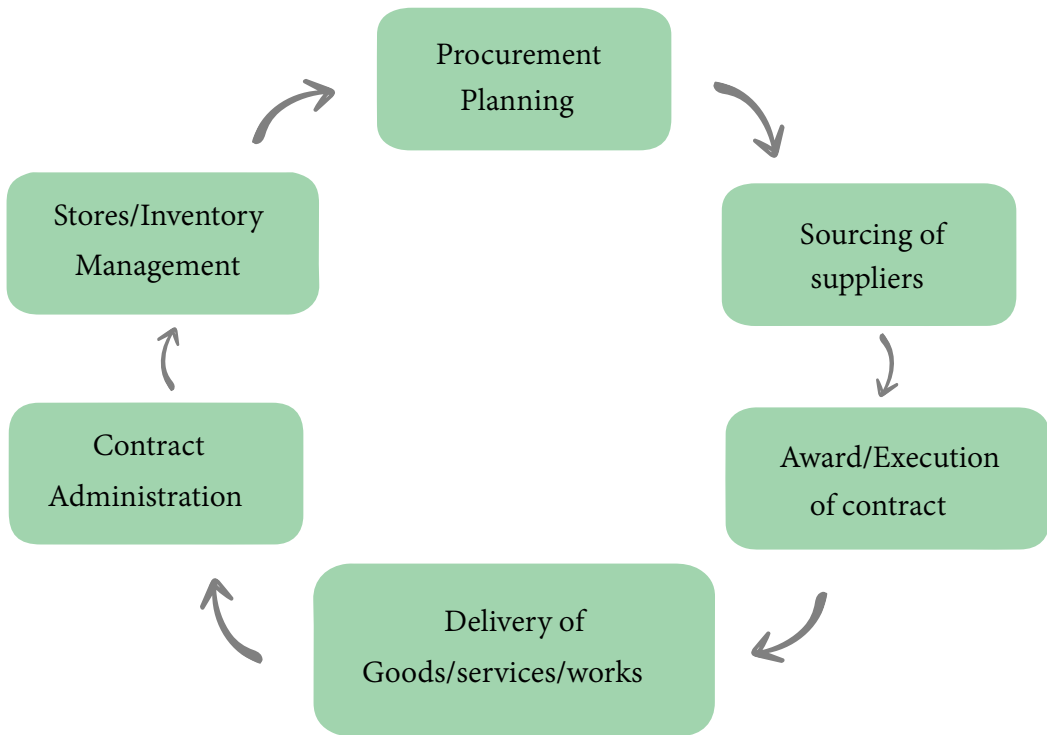
Public procurement architecture is stronger on the legislative and regulatory framework than has been in the past two decades and this is reflective in the enactment and revision of the legal and regulatory framework settled currently on the Public Procurement and Asset Disposal Regulations that came into effect on the 2nd of July 2020.

The law that governs public procurement has established organs that oversight and regulate the function and further prescribes the disputes resolutions mechanisms around this very critical utility of public service. The law also establishes organs within procurement entities to provide he necessary checks and balances to the whole procurement chain. The first line in review of a procurement decision is undertaken within the structures of procurement entities which if handled effectively, will result in a system that can as well be the benchmark for good governance in the running of public service.

The legal framework to begin with, offers a comprehensive and clear structure to drive public procurement in all government institutions. The PPADA provides for procurement methods to be applied, advertising rules, time limits, specifications of tender documents and how they are drawn, procedures for the whole line of the tendering process and alternative dispute resolution mechanism at all levels of the supply chain management of the government and its entities. The procurement system as presented in its regulatory and institutional framework has been tested since the advent of its reforms spanning the last two decades.

As has been mentioned earlier, the primary role of government is to provide services to its people. Therefore, public procurement through procurement of goods, works and services facilitates the government in delivering its mandate to the people. Research has shown that public procurement accounts for 20-30% of any country's budget (OECD, 2009) which forms a substantial portion of taxpayer's money. A lot has improved no doubt. However, there is great need to further open up the public procurement function for scrutiny considering public resources are at the centre of all processes in the public supply chain.

A generic procurement cycle consists: need identification, specifications development, bid solicitation, bid evaluation, contract award, contract administration, payment and disposal. Every step in the procurement cycle is a high risk area prone to various, sometimes conflicting interests. Such a process in a public procurement procedure, which is not addressed affects the legality of the procurement process. It leads to the breach of the principles of fairness, equity, transparency, competitiveness and cost-effectiveness as laid down by Article 227 (1) of the Constitution. It is therefore important to get public procurement procedures right as it has a direct correlation to governance of a country.



In Kenya, like other developed and developing jurisdictions, procurement is one the major government activities geared towards ensuring that the citizens get goods and services as part of national development endeavour. Although it comprises a significant share of the GDP and an also enabler of public services, public procurement faces certain challenges and weaknesses that affects its efficiency and thereby the delivery of goods and services by the procuring entities.

Challenges and weaknesses are encountered at every step of the procurement cycle. The processes include: pre-selection of activities such as needs assessment, project design and drafting the call for bids; tendering process, including the drafting, the technical specification and selection criteria, publication of the tender and bid submission; bid evaluation comprising the selection process for the best tender; post-selection activities, which include contract management and execution, asset disposal, contract re-negotiation and variation orders; and record keeping and auditing. For the purpose this analysis, challenges and weaknesses which are also associated with professional

competence and integrity risks occur at every stage of the procurement cycle: from needs assessment over the bidding phase to contract execution and payment. The nature of integrity risks may differ for each step but the red flags may include undue influence, conflict of interest and various kinds of fraud risks, (OECD, 2016).

3.1. Compliance to Public Procurement Procedures and Processes by the Procuring Entities

3.1.1. Needs Assessment

The procurement process at the pre-tendering stage starts with the identification of needs in regards to goods and services needed by the procurement entity. It is the stage where value for money is first determined in the overall procurement process for goods and services. It is the state that determines the effective, efficient and economic use of resources, which require an evaluation of relevant costs and benefits along with assessment of risks, non-price attributes and total cost of ownership as appropriate ⁹. Market analysis is done on the basis of approved procurement plans which are also integrated in the budget estimates of the procuring entities. The analysis is necessary for the purpose of enabling the procurement entities to develop an appropriate understanding of the relevant market sectors, their structures and how they operate which is then reflected in the procurement planning document. Market analysis will often require more than just research and procuring entities may need to undertake an early supplier engagement in order to gain the necessary data and information useful in the tendering process. Based on this understanding, the procurement plan is tailored to ensure that bidders find contract packages attractive and are motivated to provide innovative solutions within their proposals. However, assessing of needs and undertaking a comprehensive market analysis are both a challenge and weakness in public procurement at this stage. According to the assessment and review by the Authority in 2015 with regard to specific contract audits on 13 procuring entities, one key findings included initiation of procurements without procurement planning or procurement requisition¹⁰. Apart from lack of adequate needs assessment, this stage is prone to influence of external actors on official decisions and informal agreement on contract¹¹. According to the analysis, the implication of such a situation is that transparency which embodies efficiency, quality and flexibility is exposed to risks of procurement fraud and subversion of the law. Some procurement entities failed to prepare procurement plans¹² and this one wonders how the needs were arrived at and budgeted for.

The Public Procurement Regulatory Authority (PPRA), in implementing its mandate under the new legal and regulatory framework in public procurement, has developed many guidelines to guide procurement practices and pricing of common user items. The guidelines include Public

⁹ADB, 2018

¹⁰PPOA Annual Report 2015, Page 23

¹¹IEA, 2018 and OECD, 2016

¹²OAG financial Report 30th June 2016 for Imetha water and Sanitation Company, Meru

Procurement Market Price Index (MPI), General and Disposal Manual, Procurement Manual of Works, Procurement Manual for Information and Communication Technology, Procurement Manual for Insurance Services and procurement Manual for Non-Intellectual Services, among others (PPRA, 2012). Details in the manuals for the commonly procured items include: specifications, unit of purchase, and respective brand names from various procuring entities for the different categories as well as the outlets where these items are procured as required under Regulation 43 (2) of the Public Procurement and Asset Disposal Regulations, 2020. The Market Price Index (MPI) continues to guide procuring entities to avoid overpricing and ensures the entities get value for money. However, weaknesses have been experienced in the regularity of publication of the MPI and they may not be as current as expected which in in contravention to section 54 (3) which requires the Authority to issue quarterly market price indices (MPI) as a reference guide to assist accounting officers make informed price decisions. The latest MPI in the website is for March, 2020. Public Procurement Oversight Authority, the precursor to the Public Procurement Regulatory Authority, in 2007 estimated that procuring entities were buying at an average price of 60 percent above the prevailing market price, an indication that public procurement in Kenya does not receive the benefit of competitive procurement.

3.1.2. Procurement planning and budgeting

Developing procurement plans and budgeting are requirements in law and should be done according to the applicable guidelines. The processes are also adequately supported by the existing legal framework. The legal framework provides thorough guidance on procurement planning, linking up the planning process with the budgeting process (including finance, accounts and audit) hence providing an important first step towards actual integration of procurement planning and budgeting process. The linkage of procurement planning, budgeting process, finance, accounts and audit has a basis. Public procurement is linked to the budget in order to ensure no procurement is undertaken or commenced before the budget and availability of funds to pay the supplier or contractor is ascertained. Finance and accounts departments in procurement entities on the other hand must ensure that the cash flow is linked to procurement plans and the tenderers are paid in a timely manner and in accordance with the contract.

Section 44 of the Public Procurement and Asset Disposal Act, 2015 (Rev. 2016), among others, obligates the accounting officer of a procuring entity to ensure procurement of goods, works and services of the public entity are within the approved budget of that entity and that procurement plans are prepared in conformity with the medium term fiscal framework and fiscal policy objectives that are then submitted to the National Treasury.

As part of the procurement planning process, a procurement entity should develop a procurement plan. The plan is not only important for the reasons that it lists all requirements expected to be procured over a period of time and from it the procurement schedule is developed, but it is also important in engendering competition in the procurement process. It enables potential bidders to plan ahead and prepare for future bidding for tenders. The Schedule establishes timelines for carrying out each step

in the procurement process up to contract award and fulfilment of the requirement; it allows for the consolidation of similar requirements under one contract or the division of a requirement into several contract packages for economies of scale; from the number of requirements on the procurement plan, procuring entity can determine any need for additional staffing, including external assistance for the purpose of completing all procurement requirements listed on the procurement plan; it allows for the monitoring of the procuring process to determine how actual performance compares with planned activities, and thus to alert the pertinent departments and the procurement plan accordingly; and it enhances the transparency and predictability of the procurement process. It follows, therefore, that inadequate planning leads to failure and arbitrariness in the conceptualization of the entire procurement process by the procuring entities and non-alignment of procurement of goods and services with overall government investment decision making. The assessments and reviews of public procurement systems and procedures with respect to procurement planning during 2014-2018 period by the Authority established that procuring entities did not prepare procurement plans, were operating without an approved consolidated procurement plans, procured items not planned for and initiation of procurements without procurement planning or procurement requisition¹³. In Busia County, purchase of agricultural equipment amounting to Kes. 30.3m was not included in the procurement plan¹⁴. This offends the provisions of Section 44 of the Public Procurement and Asset Disposal Act, 2015, especially with regard to Section 44 (c) which requires accounting officers of procuring entities to ensure procurement plans are prepared in conformity with the medium term fiscal framework and fiscal policy objectives. Furthermore, the procuring entities are also required to prepare and submit to the PPRA part of the procurement plan demonstrating application of preference and reservation scheme in accordance with Section 158(2) of the Act and PPRA Circular No.1/2016 of 16th December, 2016. Additionally, the entities should have the plans ready for review by the PPRA to enable them find out whether or not the plans were prepared in accordance with the provisions of the law and directives of the Authority.

¹³PPRA/PPOA Annual Reports 2014-2018: Key findings of assessments and reviews undertaken by the Authority with respect to procurement plans:

(a) "...procurement entities ...did not prepare procurement plans and undertook contract variations that overshot the set thresholds." PPOA Annual Report 2014, Page 19.

(b) "...procuring entities operating without approved and consolidated procurement plans/procurement items not planned for..." PPOA Annual Report 2015, Page. 22

(c) "...failure by majority procuring entities to submit procurement plans..." PPOA Annual Report 2016, Page 26

"...only 153 procuring entities submitted their annual procurement plans ... only 3 County government entities submitted the annual procurement plans as required." PPRA Annual Report 2018, Page 23

¹⁴OAG Busia County Financial report 2013/2014 FY

Despite the strong integration between procurement planning and budget process through a supportive provided legal framework, the practice of procurement planning by procuring entities in Kenya is still deemed to be generally poor in certain aspects. The main inadequacy often cited is the capacity constraints in terms of personnel in most of the procuring entities¹⁵. In Elgeyo Marakwet during the FY 2017/2018, Ksh. 13.9m used for purchase of motor vehicles were not budgets for and thus not approved¹⁶. The other challenge is to do with integrity of actors in the procurement process. In undertaking market survey to determine the prevailing prices of goods and services the procuring entities intend to procure, a large proportion of procurement officers involved will only ask a few suppliers for the prices of goods and services¹⁷. An assessment of the procurement system in Kenya undertaken by the then Public Procurement Oversight Authority (PPOA) in 2007 established that procurement planning is not carried out systematically. It was noted in the assessment that, although procedures supporting systematic procurement planning have been established, data from the compliance and performance indicator (CPI) survey indicated these were far from always being complied with. Review of procurement plans by the PPOA over the past decade or so as required by PPOA Circular No.1/2014 and PPOA 4/2009 identified failure by majority procuring entities assessed to submit procurement plans as required.

¹⁵All the PEs assessed had established procurement functions...some of the procurement functions were understaffed while a few of the staff were not members of Kenya Institute of Supplies Management.” PPRA Annual Report 2018, Page 27

¹⁶OAG Audit Report 2017/2018 FY for Elgeyo Marakwet County

¹⁷EACC. February, 2015. An Evaluation of Corruption in Public Procurement: A Kenyan Experience

Table 1. Number of Procuring Entities that submitted Annual Procurement Plans

S. No	National Government Entities	Number of Procuring Entities (PEs)									
		FY 08/09	FY 09/10	FY 10/11	FY 11/12	FY 12/13	FY 13/14	FY 14/15	FY 15/16	FY 16/17*	FY 17/18
						3	4				
1.	State Corporations	☞	☞	*	*	*	✓	☒	✓	*	95
2.	Constitutional Commissions and Independent Offices			*	*	*	✓	☒	✓	*	21
3.	Public Colleges/Technical Training Institutions	☞	☞	*	*	*	✓	☒	✓	*	26
4.	Public Universities	☞	☞	*	*	*	✓	☒	✓	*	21
5.	Ministries and State Departments	☞	☞	*	*	*	✓	☒	✓	*	8
Country Government Entities											
6.	County Executives	⓪	⓪	*	*	*	✓	☒		*	2
7.	County Assemblies	⓪	⓪	*	*	*	✓	☒	✓	*	1
8.	Total ^⓪										174

Source: Public Regulatory Authority Annual Reports, June 2008- June 2018

*The Total number of procuring entities which submitted Annual Procurement Plans is 174 and not 153 as given in the PPRA Annual Report, 2018.

☞ The PPOA was in its infancy having been established by the Public Procurement and Asset Disposal Act which became operational in January 2017

* No Annual reports posted in the PPRA Website.

⓪ County Government Entities were not in existence prior to the promulgation of the Kenya Constitution, 2010.

✓ Most Procuring Entities were assessed and reviewed for compliance with the law but there were no indications that they submitted their annual procurement plans to the Authority. The institutions also faced major challenges, among others, including compositions of the institutions themselves.

☒ Procurement reviews were undertaken by the Authority but there was no evidence of reporting to the Authority by the procuring entities reviewed, including reporting on procurement plans.

It can be noted from the table that availability of the annual reports are not consistent over the period under review. Reports for the Fiscal Year 2010/2011 to 2012/2013 were not posted on the PPRA's

website and, therefore, not available for review. Moreover, reports for 2018/2019-2020 were also missing from the website for reasons not known.

Analysis of the table also shows that the reporting with regard to submission of annual reports to the Authority by the procuring entities has not been consistent over the years and has only been undertaken once, for the Fiscal Year 2017/2018. This particular report shows that annual procurement plans submitted by 174 procuring entities and only **8 Ministries and State Departments** (out of 21 Ministries and 38 State Departments) and 3 county governments out of 47 county governments procuring entities submitted their annual procurement plans as required. This could be indicating many things: either that there are challenges with regard to procurement planning among the procuring entities or it is the Authority which failed to provide details in their reporting.

The observations are consistent with prevailing situation in terms of institutional capacity challenges in the entire public procurement arena. With the enactment of the Public Procurement and Asset Disposal Act, 2005, the Authority has faced a myriad of challenges. As of Fiscal Year 2008/2009, the Authority had been in existence for only two years and still nascent in undertaking the reform measures brought about by the initial enactment of the Law. Amendment of all laws relating to public procurement in public procurement entities and bringing them under the ambit of the new law widened the scope of oversight and enforcement for the Authority. This brought about challenges, among them, streamlining of the procurement function, developing capacity and personnel internally and in the procuring entities, developing operational manuals and reviewing standard procurement documents and sensitizing the procuring entities and undertaking assessments and reviews for compliance by the procuring entities. The task became onerous with the creation of the two-tier governance structure with the onset of Constitution of Kenya, 2010. As of 2018, the Authority had only 63 staff members against an establishment of 115. The staffing level is inadequate relative to the scope of the expanded mandate to regulate public procurement at both levels of government, monitoring performance of the public procurement and asset disposal system, among others. Dealing with these challenges has been progressive and discernible in the Authority's annual reporting.

3.1.3. Developing of contract specifications/project design and drafting the call for bids:

Every contract should specify what is expected of a contractor. Developing effective contracts, therefore, requires development of clear specifications and scope of work. This allows the contractor to be clear on their roles and responsibilities. Moreover, this allows both the procuring entity and the contractor to determine when the contractual obligation has been fulfilled. In addition, a well-written contract should specify what the end product should include, delivery requirements, milestone completion dates as well as what the end product should look like once the contract is complete¹⁸.

¹⁸Baker Tilly Int. Limited, Developing effective contracts for the public sector, 2020

Section 60 of the Public Procurement and Asset Disposal Act, 2015 (Rev. 2016) requires accounting officers of procuring entities to prepare specification requirements relating to the goods, works or services being procured that are clear, that give a correct and complete description of what is to be procured and that allow for fair and open competition among those who may wish to participate in the procurement proceedings. The specific requirements shall include all the procuring entity's technical requirements with respect to the goods, works or services being procured.

These documents are required to describe what is needed, and should be clear enough to avoid confusing suppliers, contractors, service providers or the evaluation panel. The Government with the support of the United States Agency for International Development (USAID), as part of the reforms in public procurement, developed a Manual for Procurement and Management of Projects and another one for Works in 2009. The Manuals details the standards and procedures to be followed in the procurement of works within the public sector. These standards and procedures are designed to provide uniform procedures for the procurement of works; ensure transparency and accountability in all operations, and consistency with the guidelines of donors where projects are donor funded; ensure the consistent application of the provisions of the Act and Regulations; and promote the consistent application of best procurement practices and international standards. These inadequate specification in bid documents remain a challenge within the public procurement system in Kenya as attested to by annual assessment reports undertaken by PPRA where it is highlighted, among others, that **“bid documents do not contain adequate specification of requirements.”**¹⁹ The challenge in preparing bid specifications and, therefore, the reason for delay is usually lack of expertise in preparing these documents, or failure to realise the extent of the information and research that may be needed to complete them. Other challenges may include: delay by the staff of the procuring entity in preparing technical specifications, scope of work, or terms of reference and the specifications being tailored for a specific company or entity. Additionally, failure to start the procurement process on time is a very common cause of delay despite the availability of an approved procurement plan and a procurement schedule. The schedule is overlooked or not taken into consideration and the procurement process begins later than intended. Such anomaly lead to a breach of contract, when a contractor failed to complete a cafeteria 18 months after expiry of contract. This situation resulted in the equipment for the cafeteria ending up in storage awaiting completion of the building²⁰.

3.1.4. Procurement method and Bidding Procedures

Determining the most fit-for-purpose procurement method and bidding procedures for each contract package is an important consideration in public procurement. In jurisdictions where public procurement is a strategic activity, procurement staff of the procuring entities determine the most fit-for-purpose procurement method and bidding procedures for each contract package for efficiency and effectiveness. In Kenya, the methods for procurement of goods, works and services provided

¹⁹PPRA Annual Report, 2016

²⁰OAG Audit report, 2017/2018 for Elgeyo Marakwet County Assembly

for in the Act include: open tender; two-stage tendering; design competition; restricted tendering; direct procurement; force account; competitive negotiations; request for proposals; electronic reverse auction; low value procurement; force account; competitive negotiations; framework agreements; and any other procurement method and procedure as prescribed in regulations and described in the tender documents. These methods are further elaborated in the Public Procurement and Asset Disposal Regulations 2020. Open tendering is prioritized by law as the preferred method of procurement for goods, works and services²¹ and all the other methods need to be justified by special circumstances by the procuring entity²².

The open tendering is the most preferred option in most cases because it offers a fair and competitive type of procurement²³. The preference of this method is premised on the idea that where tenders are open, anybody who may wish to apply could apply. The accounting officer of a procuring entity is obligated by law to take such steps as are reasonable to bring the invitation to tender to the attention of those who may wish to submit tenders. Fair and transparent rules of participation which are key elements of a sound procurement framework and are embedded in the Act and Regulations, which also give effect to Article 227 of the Constitution to provide procedures for efficient public procurement and for assets disposal by public entities and for connected purposes. The main concerns often cited as possible sources of integrity risk in the choice of procurement method and bidding procedure used include: use of non-competitive procedures, misuse of non-competitive procedures on the basis of legal exceptions and abuse of emergency situations.

An assessment done soon after the Public Procurement and Asset Disposal Act, 2005 came into force in January, 2007 indicated that there was excessive use of quotations by the procuring entities at **89.2 percent and only 1.3 percent were open tenders**²⁴. However, this contrasts with the findings of recent assessments which indicate a decline over time in the use of quotations and increase in the use of the open tendering method. For example, findings of an evaluation of corruption in public procurement in the country undertaken in 2015 by the Ethics and Anti-Corruption Commission indicated that **58 percent** of contracts involved open tendering method followed by quotation at **31 percent** while restricted and direct tendering methods were favoured by **2.7 percent and 1.3 percent** of the respondents, respectively²⁵. The mandatory reporting by the Public Procurement Oversight Authority (PPOA) now PPRA took cognizance of the use of non-competitive methods and bidding procedures, including failure to provide bidders with adequate time to prepare their bids, unjustified

²¹Article 91 of the Public Procurement and Asset Disposal Act, 2015 (Rev. 2016)

²²Article 92 of the Public Procurement and Asset Disposal Act, 2015 (rev. 2016)

²³Strategic Procurement Planning: Guidance Note on Procurement, Asian Development Bank, 2018

²⁴Assessment of procurement System in Kenya, OECD, 2007

²⁵The evaluation was done by the Ethics and Ant-Corruption Commission (EACC) in 2015 following first review of the Public Procurement and Asset Act in 2010

use of restricted tendering and direct procurement methods, and flagged them out in their annual report²⁶. PPRA in its annual report of 2016 further identified the same as common areas of weaknesses of the procurement processes as use of alternative procurement methods, mainly restricted tender and requests for quotations without fulfilling the conditions for use of such methods²⁷. This is a source of integrity risk in the public procurement cycle and should be addressed. An assessment on finding three (3) major gaps between the country's procurement legislation requirements and their implementation in practice with regard to procurement method/bidding procedures also found that limitation to the use of restricted tendering and direct procurement methods were weak leading to abuses of the procurement process²⁸. Situations such as these are cited in the Auditor General Report where a procurement entity opted to procure LPG product from a quote that was much higher resulting in an opportunity cost of Kshs. 84.3m²⁹. This was not value for money.

3.1.5. Request for proposal and Bidding (Tendering)

Tenders are received from bidders and opened as stated in the bidding documents by a tender committee and in the presence of bidders. In the invitation of tenders, the method selected will influence the choice of bidding procedure. Previous studies have found that in the request for proposals in the tendering process, there are cases where public notice for invitation to a bid are absent, evaluation and award criteria are not announced and procurement information is not disclosed or made public³⁰. Bid documents lacking adequate specification of requirements, non-adherence to evaluation and criteria not specified, use of restricted tendering and request for quotations without fulfilling the conditions for use of such methods, unsuccessful bidders not notified or not given reasons for being unsuccessful in the tender and delays in payment of supplies³¹ are common cases reported in the annual procurement reviews which comprehensively audit procuring entities procurement and asset disposal activities to ascertain their compliance with the procurement law.

In open tendering, however, the Public Procurement and Asset Disposal Regulations (2020) provides that the procedure for open tender method shall be in accordance with Sections 96, 97 and 98 of the Act. These sections provide for advertisement of the tender, publicizing invitations for the attention of those who may wish to submit tenders, providing adequate time for preparation and submission of tenders to procuring entities in accordance with the invitation of tender. The sections also provide for the uploading of tender documents on the government procurement portal and specific websites of procuring entities.

²⁶PPOA Annual, 2015

²⁷PPRA Annual Report, 2016

²⁸Assessing of the Procurement Practice in Kenya, PPRA, 2017

²⁹OAG Report 2016/2017 FY for National Government in respect to Ministry of Defence

³⁰Public Procurement in Kenya: Analysis of the Auditor General's Reports, 2018

³¹PPOA Annual Procurement Report, 2016

Modifications to tender documents is an area of integrity risk in public procurement process. Such modifications are provided for under the Act³². A procuring entity may amend the tender documents at any time before the deadline for submitting tenders by issuing an addendum without materially altering the substance of the original tender. However, the challenge is that adherence to the requirements of the Act under Sections 96, 97 and 98 on the tendering process could be compromised by Section 75 of the Act which allows for modification of tender documents at any stage by the procuring entity. For instance, whereas an amendment may be made on the procuring entity's own initiative or in response to an inquiry by a candidate or tenderer, due to inefficiencies in communication, the information on the amendment may not reach all the tenderers in time to allow them to prepare for the tender despite the provisions of Section 75 (5) of the Act for extension of the time if the tender documents are amended. Some of them might not afford to meet the new deadline for submission of their bids.

Ensuing from observations above, major gaps between the country's procurement legislation requirements and their implementation in practice is amply demonstrated by the weak restrictions of restricted tendering and direct procurement methods" which lead to abuses³³. Some of these areas that are exposed to abuse include:

3.1.5.1. Extension of tender validity period

This presents an area of integrity risk in open tendering. It is provided in the Act³⁴ that before the expiry of the period during which tenders shall remain valid, the accounting officer of a procuring entity may extend that period through a notice of an extension to each person who submitted a tender. Extension of bid or proposal submission date is a weakness which may cause a delay in the tendering process and awarding of contract. The bid or proposal submission period may need extending for genuine reasons which may include: mistakes in the solicitation (bid or proposal) documents; prospective bidders requesting for more time for submission and it is granted; poor response to invitation for bids or call for proposals; unforeseen event such as natural disaster, emergency situation, mass demonstrations.; and request for clarification results in an amendment to the solicitation documents, which requires an extension of submission period for bidders to take the amendment into account in their bids or proposals. On the other hand, amendment and extension of submission date could also be prompted by a conflict of interest to achieve a predetermined outcome in the procurement process. The procuring entities failing to indicate bid submission deadline or opening date are also areas which have been flagged in compliance review by the PPOA (PPRA)³⁵.

³²Article 75 of the Public Procurement and Asset Disposal Act, 2015 (Rev. 2016)

³³Assessment of the Public Procurement System in Kenya, OECD, 2007

³⁴Article 88 of the Public Procurement and Asset Disposal Act, 2015 (Rev. 2016)

³⁵PPOA Annual Report, 2015.

Bid submission and receipt of tender as part of the public process is an area where integrity risks may occur and, therefore, an area of weakness. Such risk involves lack of competition or cases of collusive bidding (cover bidding, bid suppression, bid rotation, market allocation). Access to procuring entity's estimated price could be exploited by both internal and external actors to who are contractors, suppliers to cooperate to defeat the competitive bidding process in order to influence the tendering their favour by suppressing the bid through artificially inflated prices.

3.1.5.2. Bid evaluation

The procuring entity organizes the evaluation process through an ad hoc Evaluation Committee established under Regulation 28 of the Public Procurement and Asset Disposal Regulations, 2020, pursuant to section 46 of the Act, for the purposes of carrying out the technical and financial evaluation of the tenders or proposals. In discharging its mandate, members of the evaluation committee are expected, among others, to adhere strictly to the compliance and evaluation criteria set out in the tender documents, perform the evaluation or negotiation with due diligence and conduct the evaluation within the periods specified in the Act. According section 46 (4) of the Act, the evaluation committee established under 46 (1) is expected, among others, to adopt a process that shall ensure the evaluation process utilized adheres to Articles 201(d) and 227 (1) of the Constitution that speaks to prudent and responsible use of public money and in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.

However, this seldom happens all of the time for various reasons. A member or members of the committee may not be available to enable the start of the evaluation process, unreliability in participation in an ongoing evaluation process by a member due to other commitments or for other valid reasons. Inappropriate conduct due to conflict of interest and corruption in the evaluation process in contravention of the clear provisions of the law could also come about as a result of familiarity with bidders over time, personal interests and ineffective implementation of transparency, good management, prevention of misconduct, accountability and control in order to enhance integrity in public procurement. Cases of procuring entities not adhering to the evaluation criteria (unfair evaluation) or using criteria not specified in the tender documents is a recurrent feature in annual procurement assessments and reviews³⁶. The Authority is mandated under sections 9(1)(c) and (h), 35 and 45 of the Act to act on complaints received on procurement and asset disposal proceedings and to undertake investigations and debar a person from participating in procurement and asset disposal proceedings. Out of 613 complaints handled, 46 percent were in respect to flaws in respect to tender evaluation and specification for the reporting period end June 2018³⁷.

³⁶PPRA Annual Report, 2016

³⁷PPRA Annual Report, 2018

3.1.5.3. Award of Contract

Award of contract effectively commences upon receipt by accounting officer of the procuring entity of the evaluation report from the Evaluation Committee start as prescribed under regulation 79 of the Public Procurement and Asset Disposal Regulations 2020. Among others, Section 79 (1) states, "... upon receipt of the evaluation report and professional opinion, the accounting officer shall take into account the contents of the professional opinion and shall within a day, in writing — (a) approve award to the successful tenderer; (b) seek clarification from the head of the procurement function or the evaluation committee prior to approving or rejecting the award; or (c) reject the recommendations."

Furthermore, the Act and Regulations provide clear guidance on what should be done before an award for tender is approved or rejected [Regulation 79 (1) and (2), Regulation 79 (3) pursuant to section 68(2)(g) of the Act] and Regulation 80 pursuant to Sections 55 on eligibility to bid and Section 86 of the Act on successful tender. Awards should be made to the lowest bidder for standard off-the-self items and to the best evaluated bidder for specialized items.

Weaknesses in the awarding of tender include: vendors failing to disclose accurate cost or pricing data in their price proposals, resulting in an increased contract price; conflict of interest and corruption in the approval process involving external factors such as politicians; and lack of access to records on the procedure. Due to the huge financial flows involved in public procurement, evaluation it's is prone to corruption. For instance, there were a total of **2,377 tenders awards worth Kshs. 60, 343, 320, 301 during the financial year 2019-2020**³⁸. This is a huge amount of money but, obviously, indications are that not all information on tenders were posted in the Public Procurement Information Portal ([www.https://tenders.go.ke](https://tenders.go.ke)) judging by the total value of tenders declared. Some of the issues of integrity associated with award of contracts include failure to disclose accurate pricing information in bidding, conflict of interest and corruption in the procurement and lack of access to records³⁹. Additionally, unfair evaluation of bids, external influence, unclear specification of bids to achieve a predetermined outcome, opacity in terms of access to information, use of alternative procurement methods other than the competitive methods, documentation and access to information influences award of tender in many cases, (EACC et al).

An evaluation by EACC indicated that 13 percent of procurement officers and 43 percent of suppliers interviewed during their study agreed that they were aware of cases where procurement decisions were influenced by external actors⁴⁰. The study also identified politicians, senior civil servants, procurement officers and those working in procurement offices as the main culprits. These factors affect the integrity and transparency of the procurement process and negatively impacts stakeholder participation and accessibility, competitiveness and accountability in the procurement process. A

³⁸Public Procurement Information Portal (PPIP), <https://www.tenders.go.ke/website>

³⁹Corruption in Public Procurement, OECD, 2016

⁴⁰An Evaluation of Corruption in Public Procurement in Kenya, 2015.

procurement entity the Ministry of Education awarded the supply of sanitary towels to 6 bidders who had quoted higher thus occasioning a possible loss of upto Kshs. 25.2m contrary to section 80(2) of the PPADA⁴¹. Further as reported variously including in the mainstream media on the procurement malpractices by Kenya Medical Supplies Agency (KEMSA) during the emergency purchases for medical equipment in respect to COVID-19 Pandemic, it has been noted that the Law on procurement and other law were breached in entirety. To begin with, there were reported incidences of bid rigging, setting of prices with the whole process controlled by external forces using proxies. The law was violated across, with no regard to getting value for money. By the time of submitting this report, the Accounting Officer responsible for KEMSA as a procurement entity, had appeared before Parliament and admitted to being influenced externally on how to process the tenders. Awards were cancelled and reissued without consideration of the law. In the process, the government lost money through wastage by paying shadowy persons exorbitantly, some for supplying nothing.

3.1.5.4. Contract management

Contract management in public procurement involves managing contracts that are made as part of a legal documentation of forging work relationships with tenderers, vendors or even partners. The contract form, contract terms and conditions are included in and constitute an integral part of the tender document. The bidder should be familiar with the type of agreement entered into, in the event of an award⁴². Project procurement and management, therefore, requires procuring entities to have advanced technical expertise in project design and implementation, considerable human, financial and material resources, advance contracting and negotiations skills, strong knowledge dealings with international contractors. Contract management, therefore, comprises negotiating the terms and conditions in contracts including certifying compliance with the terms and conditions, as well as documenting, agreeing on any changes or by both parties. It plays a crucial role in service delivery as it provides an important step in any public procurement undertaking.

The country, for instance, has lost substantial amounts of tax payers' money through cancelled contracts, unfinished projects, poor service delivery, corruptions and extended contract periods. According to OAG Report during 2016/2017 FY for National Government, A contractor who had breached a contract with the State Department Devolution was paid a total of Kshs. 32.2m an overpayment of Kshs. 16.8m for doing only 5% of the work required in the construction of Wajir Sewerage Project. Clearly the process of inspection by a project manager as determined by law and the issuance of completion certificates was overlooked.

The public procurement law requires that for each contract entered to, the procuring entity must designate a member of staff, or a team of staff, as the Contract Administrator responsible for

⁴¹OAG Report 2016/2017 FY for National Government

⁴²Manual of Procurement and Management of Projects, First Edition, PPOA, 2009

administering the contract and such management be approached as a team considering the bulk of corrupt practices in Kenya occur in public procurement (J.M Migai Akech, 2006). It is thus understandable why public procurement has been at the centre of corruption with bribery in public procurement estimated to be adding 10-20 percent to total contracts costs.

Public Procurement Oversight Authority, the precursor to the Public Procurement Regulatory Authority, in 2007 estimated that procuring entities were buying at an average price of 60 percent above the prevailing market price, an indication that public procurement in Kenya does not receive the benefit of competitive procurement.

3.1.5.5. Order and Payment

A study on factors affecting payment of suppliers in the public sector identifies procurement regulations, urgency of transaction, incomplete or illegible vendor address, internal processes and ethics as some of the drivers affecting payment of suppliers involved in public procurement⁴³. Issues of ethics and integrity feature most of the time, more so when there is delay in the payment of a supplier. This arises as a result of poor separation of financial duties or lack of supervision of public officials of the procuring entity which may lead to false accounting and cost misallocation or cost migration between contracts, late payments for services rendered, or even payment for goods and services not supplied⁴⁴. Delay in processing payments is also claimed to be a tactic use by procurement officials to solicit bribes. This is attested to by a study which evaluated corruption in public procurement where it was realised that 63 percent of suppliers indicated that it takes 1-5 times than normal that processing payment was delayed⁴⁵. The economic consequences of postponement of payment to suppliers could also lead to price reviews so as to increase the economic value of the contract. This kind of behaviour goes against the requirements of the Public Procurement Regulatory Authority's Public Procurement Code of Ethics for Procuring Entities.

3.2. Regulatory Compliance

3.2.1. Compliance to Procurement Procedures

Compliance to procurement procedures is the most important factor in ensuring optimum utilization of the scarce budgetary resources in order to ensure value for money is achieved. Section 9 of the PPAD Act mandates the Authority to guarantee compliance with procurement procedures under the Act. Broadly, compliance monitoring includes: review of annual procurement plans; review of mandatory reports; procurement assessments; procurement reviews; follow-ups on action plans; procurement inspections; and audit of procurement contracts. This is an onerous task to the Authority

⁴³Anne Njeri Karanja, Factors Affecting Payment of Suppliers in the Public Sector, October, 2006

⁴⁴Corruption in Public Procurement, OECD 2016

⁴⁵EACC, An Evaluation of Corruption in Public Procurement in Kenya, 2015

in monitoring and reporting the overall functioning of the public procurement system considering the numerous procuring entities to be covered is estimated at about 40,000.

Analysis of the Annual Reports for the period 2008/2009 to 2017/2018 indicates mixed results. On procurement assessments, the compliance level for the assessed procuring entities was only **12 percent** during the Fiscal Year 2008/2009. When the Authority evaluated the level of compliance with the Act by the procuring entities against pre-set criteria in the Compliance Monitoring Manual, the compliance rating improved to **55.5 percent** by Fiscal Year 2017/2018. This was considered a moderate compliance level given the compliance rating was below the cut-off score of **60 percent**. In the same assessment, the risk rating was also found to be moderate at only **44.5 percent**. The low compliance rating demonstrated a high risk rating which required urgent risk mitigation measures by management of the procuring entities in order to address the issue of non-compliance with law. Other causes for non-compliance cited in the assessments were failure by procurement entities to use appropriate procurement methods in their procurement processes. Bid documents were also found to be lacking adequate specification of requirements, non-adherence to evaluation criteria and use of alternative procurement methods including restricted tender and request for quotations without fulfilling the conditions for use of such methods.

On Mandatory Reports, compliance issues identified include, failure by procuring entities to submit mandatory reports to the Authority, late submissions of the mandatory reports, submission of incomplete reports with incomplete information and no attachments, failure to submit the reports in prescribed format, use of direct procurements and termination of procurement proceedings which do not meet thresholds set in law. However, the Authority put in place a mechanism to remedy the situation by developing simpler user friendly reporting templates, providing technical support to procuring entities in need and enforcing compliance by rejecting non-compliant and late reports.

Average compliance level on procurement inspections of procuring entities averaged **55.9 percent** which is considered marginally compliant with a moderate risk score of **44.1 percent** by Fiscal Year 2017/2018. The main compliance issue being failure to maintain complete procurement files and failure to submit mandatory reports to the Authority. Procurement Audits are compliance requirements which are undertaken to ensure that procurement systems and processes are complied with as provided in the Law. Key indicators include institutional arrangements, procurement processes and management of contracts. Audits were for the 47 County Governments and Country Assemblies during the Fiscal Year 2017/2018. The average compliance score was **39.7 percent** which is considered non-compliant and a high risk level of 60.3 percent for County government. The score of **46.6 percent** on compliance with procurement audits and a risk score **53.4 percent** for County Assemblies.

With regard follow-up on plans to ascertain the implementation status of recommendations made during previous year's assessment, an averaged a score 75.8 percent was achieved during Fiscal Year 2017/2018. This is an improvement in terms of implementing recommendations of previous assessments.

From the analysis, the compliance to the law is still very low and the Authority needs to address this as a matter of priority. Substantial amount of Government revenue is spent on procurement and it is only just that Tax Payers get value for money.

Table 2: Compliance Review rating and Risk Scores for Procuring Entities

No.		Review Period	No. Procuring Entities	Level of Compliance	Risk Level	Recommended Action
1.		2008/2009	5	Level of compliance not indicated	Risk level not indicated	No corrective actions recommended.
2.		2009/2010	16	59%	Risk level not indicated.	No corrective actions recommended.
3.		2010/2011	*	-	-	-
4.		2011/2012	*	-	-	-
5.		2012/2013	*	-	-	-
6.		2013/2014	22	Level of compliance not indicated	Risk level not indicated	No corrective actions recommended
7.		2014/2015	14	Level of compliance not indicated	Risk level not indicated	Entities advised to take corrective actions to remedy the weaknesses identified. Entities also signed action plans detailing specific actions to be taken to address the non-compliance issues.
8.		2015/2016	10	Level of compliance not indicated	Risk level not indicated	Entities advised to take corrective actions to remedy the weaknesses identified. Entities also signed action plans detailing specific actions to be taken to address the non-compliance issues.
9.		2016/2017	*	-	-	-
10.		2017/2018	14	59.8%	40.2%	Corrective actions recommended.
11.		2018/2019	*	-	-	-
12.		2019/2020	*	-	-	-

Source: PPRA Reports

* Annual Report not available

From the table, it can be deduced that the Authority was not consistent in detailed reporting on key variables while undertaking the review. It is also clear that the periodic reporting had gaps to do with overall reporting framework by way of annual reports. Annual Reports covering and including the

period 2010 up to 2013 were not readily available for information. For the reason that procurement reviews are detailed and comprehensive audit of the procurement and disposal activities of the procuring entities to ascertain their level of compliance to the procurement law, the absence of review information on key variables points to a strong weakness in oversight and enforcement by the Authority on public procurement processes. Compliance reviews are also meant to ensure that value for money is achieved by procurement entities. Furthermore, the reviews assist in identifying integrity risks which occur at every stage of the procurement process and assist the procuring entities to plan for risk mitigation measures. The reviews also indicate levels of efficiency and sensitivity to the economy by the procuring entity. Last but not least, the reviews expose the capacity needs of the procuring entities with regarding reporting and inventory management. It is thus evident from the compliance review reports that the procuring entities face various weaknesses and or challenges in the procurement process, among others, including: requisitions not having adequate information and estimated prices; not using standard procurement documents or undertaking necessary modifications; failure by tender committees to tender opening procedures and failure to adhere to evaluation criteria. Addressing these challenges requires consistency in reporting on all the key variables and regularly as provided in law.

3.2.2. Implementation of the 30% Preference and Reservation Scheme in the Award of Contracts

The Authority, having the mandate to oversee implementation of the 30% Preference and Reservation Scheme under the broader oversight on the public procurement, has reported progressively and consistently on its implementation since 2013 even though regulations on the same became effective since 18th June, 2011. This is also in line with the directive to the Accounting Officers to submit the stated report by 14th day of July and 14th January of each financial year following coming into force of the Public Procurement Act, 2015 with effect from 7th January, 2016. Annual reports for the Fiscal Years 2016/2017, 2018/2019 and 2019/2020 were not available to inform an analysis for these periods.

Table 2 below provides information on the implementation Preference and Reservation Scheme which is based on the Law and Presidential Directive that 30% of all Government Tenders be allocated to women, youth and people with disabilities.

Table 3: Implementation of the 30% Preference and Reservation Scheme

No.	Category	Award out of Top Ten Contracts of the Authority by Value (%)									
		08/09	09/10	10/11	11/12	12/13	13/14	14/15	15/16	16/17	17/18
1.	Youth	-	-	*	*	*	54	57	42	*	51
2.	Women	-	-	*	*	*	45	4	50	*	46
3.	PWD	-	-	*	*	*	1	3	8	*	3
4.	Total	-	-	*	*	*	100	64	100	*	100

Source: Author's Computation, 2020

- No information of implementation of the Directive on Preference and Reservation Schemes as it was not part of annual reporting during this period.

* Annual Reports were not available

The Table 3 shows consistency in award of top ten contracts to youth, women and people with disabilities. The youth have continued to dominate contract awards under the scheme and this may be attributed to the fact that youth may also be women. Each category has seen their share of contract decline over time with the youth recording some minor increase during Fiscal Year 2017/2018. In Fiscal Year, 2015/2016, **917 out of 131** procuring entities reviewed did not reserve **30 percent** of their procurement budget for the youth, women and people with disabilities as required under the law⁴⁶. Cumulatively, the National Government and County governments reserved Kshs. **46,869,469,839/-** for the target group out of an aggregated total annual planned procurement budget of Kshs. **256,199,255,070/-**

3.2.3. Professional Competence

Inadequate competence amongst procurement personnel is cited as a material important blockage for further improvements in the procurement system. There are great disparities across government. Some Ministries have highly professional units and procure for large amounts on a yearly basis, whereas others are in dire need of assistance (OECD, 2007). This disparity is affirmed by the findings of the annual assessment and reviews undertaken by the PPRA over a period of five years, which indicated that out of 14 procuring entities assessed for the reporting period ending June 2018, all had established procurement functions as required except 1 and some of the procurement functions were under staffed while a few of the staff were not members of Kenya institute of Supplies Management meaning they were not professionally qualified at the time of the assessment. Sometimes, due to low competency levels, special expertise may be needed to prepare the technical specifications, scope of work and terms of reference. This situation, if not addressed many lead into huge delays as periods taken in identifying and hiring an expert is another independent activity.

On a stronger and positive note however, the government has, in addressing the challenges of inadequate professionalism in procurement competencies taken important steps in recent years to establish a sound basis for a professionalised procurement discipline. One example is the introduction of the Revised Scheme of Service for Supply chain management Personnel in which clear provisions for the qualifications, skills and experience required for appointment of procurement professionals at various levels are made. The Scheme is used in the recruitment of procurement officers by the Public Service Commission. Capacity building programmes for the County governments as provided in the PPDA is also being implemented by The National Treasury and Planning since 2018 in collaboration with

⁴⁶PPRA, Annual Report, 2016

the PPRA. Under the programme, sensitisation of all the 47 Counties' leadership, both at Executive and Assembly levels, and the Public Finance Management Staff has been undertaken between 2014 and 2018 with participants drawn from officers of procurement entities, Special Interest Groups and SMEs totaling 39,545 being sensitized⁴⁷.

⁴⁷Public Procurement Regulatory Reports, 2014-2018

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4.0 Policy Recommendations

Public procurement reforms have played a critical role in streamlining this critical function of the public service. The basis for having a functional public procurement support is evident in legislation and established institutional framework. Kenya has implemented the procurement process based on a law that is sound, having been modeled from the UNICITRAL procurement model law. That notwithstanding, the revised Public Procurement Assets and Disposals Act, 2015 has improved on the loopholes experienced post constitution promulgation and beyond.

An interview held with a key person involved in the day to day operations of a procurement entity domiciled in one of the security organs with government confirmed that for them, the procurement process is followed to the letter and spirit of the law. Delays across the practice is minimal, unlike 15 to 20 years ago, when issues of glaring malpractice were common. These have reduced tremendously. Needs assessments are conducted by the user service and the procurement process conducted without delay. This was noted in the OAG Report for National government

However, from the reports reviewed, challenges still exist mainly due capacity issues both at the Regulator point of view and procurement entities. Enforcement of the Law is weak and uptake of reform is slow. In conclusion below are the policy recommendations:

4.1. Enhancement of e-Procurement

Automation of processes not only saves time but cut costs as it is efficient. Reengineering through an online platform will enable accuracy in monitoring and reporting which are a big component of regulation in public procurement. Economies that have advanced e-procurement platform, not only have improved performances but have a range of services offered. Transparency and Accountability is increased when there is less interaction with humans and this results in trust of the practice.

4.2. Enhanced Monitoring and Reporting

Monitoring and reporting is at the core of regulation of public procurement. As has been observed in this analysis, the body that is vested with regulating the procurement system in the country seems to lack capacity to adequately implement this function. The PPRA should learn from the Banking

sector which has succeeded in monitoring processes through guidelines and very close supervision. To buttress on this, there is need to commission a study on the socio-economic performance of the public procurement in Kenya to guide in focusing public policy better.

43. Strict Enforcement of the Law

Law is not developed and enacted in vain. Why is it difficult to fully implement the Public Procurement Law and related legislation? Was a Regulatory Impact assessment undertaken to establish the workability of the Law? Citizens need to hold responsible offices to account when legislation is breached.

4.4. Citizen Awareness and Education

It is Government responsibility to provide civic education to its people. This is a practice that is lacking in Kenya generally, the issue always being lack of resources to conduct citizen empowerment programmes. However, Civil Society Organizations (CSOs) having played a big role in informing citizen on issues of accountability, need to continue filling this gap. Without an informed citizen, government cannot be held to account which then gives room to continued impropriety.

4.5. Improved procurement planning

- i. Deepen capacity building for procurement entities for effective planning in procurement. National Treasury and PPRA have the mandate to ensure capacity development initiatives across Government, including County governments through a comprehensive strategy.
- ii. Ensure that procurement officials meet high professional standards for knowledge, practical implementation of the law and integrity by providing a dedicated and regularly updated set of tools. This can be done through recognition of public procurement officials as a specific profession, certification and regular trainings.
- iii. Identify and establish a central unit or team with a mandate to analyse public procurement information, monitoring and professionally document the performance of the public procurement system.
- iv. Implement general public sector integrity tools and tailor them to the specific risks of the procurement cycle as necessary.
- v. Develop integrity training programs for the procurement stakeholders, both public and private, to raise awareness about integrity risks, such as corruption, fraud, collusion discrimination and develop knowledge on ways to counter these risks to foster a culture of integrity.
- vi. Provide attractive, competitive and merit-based career options for procurement officials, through the provision of clear means of advancement, protection from political interference in the procurement process.

- vii. Promote collaborative approaches with knowledge centres such as universities, think-tanks or policy centres to improve skills and competences of the procurement workforce. The expertise and pedagogical experience of knowledge centres should be enlisted as a valuable means of expanding procurement knowledge and upholding a two-way channel between theory and practice, capable of boosting application of innovation to public procurement systems.
- viii. Rationalise public procurement spending by combining procurement processes with public finance management to develop better understanding of the spending dedicated to public procurement, including the administrative costs involved.
- ix. Encourage multi-year budgeting and financing to optimise the design of the public procurement cycle. There is flexibility in multi-year financing options which help prevent purchasing decisions that do not properly allocate risks or achieve efficiency due to strict budget regulation and inefficient allocation.
- x. Harmonise public procurement principles across the spectrum of public services delivery as appropriate, including for public works, public-private partnerships and concessions.
- xi. Support proper allocation of resources by using public procurement as a strategic tool.

4.6. Improved Capacity in Developing Contract Specifications and drafting the call for bids:

- i. Inter-agency cooperation with a view to getting special technical expertise to assist with the development of technical specifications, scope of work and terms of reference. Getting such expertise, if not readily available, may involve having to hire a person or team. This in itself may result in a procurement process which also needs to be taken into consideration to ensure hiring the needed expertise and getting the documents prepared in order to start the procurement process on time.
- ii. Adherence by procurement officials to the deadlines on the procurement schedules, especially the start date of the procurement process.
- iii. Engagement of special expertise should be integrated in the budget and procurement process to help with preparation of technical specifications, scope of work and terms of reference where necessary.
- iv. The National Treasury and the Public Procurement Regulatory Authority should build capacity of procuring entities on effective development of objective specifications and evaluation of tenders amongst other areas of the procurement process.
- v. Conduct regular procurement assessments and reviews in procuring entities to ascertain compliance with the law and recommend remedial measures.
- vi. Deepen compliance to the procurement law by upholding decisions of the procuring entities that have followed the law and nullifying tenders and contracts that have been done in violation of the Act and Regulations.

4.7. Procurement method and Bidding Procedures

- i. Build capacity of the procuring entities on effective development of objective specifications and evaluation of tenders.
- ii. Demand for high standards of integrity for all stakeholders in the procurement cycle. Standards embodied in integrity frameworks or codes of conduct applicable to public-sector employees (such as on managing conflict of interest, disclosure of information or other standards of professional behavior) could be expanded (e.g. through integrity pacts).

4.8. Professionally designed Request for Bids (Invitation of tenders)

- i. In order to address integrity risks involved, procuring entities should consistently implement requirement for internal control, compliance measures and anti-corruption programmes for suppliers, including appropriate monitoring as provided in the Public Procurement and Asset Disposal Act, 2015 and the Public Procurement and Asset Disposal Regulations, 2020.

4.9. Tender validity period

- i. Procuring entities should prepare comprehensive bidding documents and make submission periods long enough to allow bidders adequate time for bid preparation and to avoid delay in the tendering and awarding of the contract.
- ii. Procuring entities should consistently implement requirements for internal controls, compliance measures and anti-corruption programmes for suppliers, including monitoring as provided by the Public Procurement and Asset Disposal Act, 2015 (Rev. 2016) and the Regulations.

4.9.1. Improved Bid Evaluation

- i. Personnel assigned as members of the evaluation committee should be allowed to focus exclusively on the evaluation process.
- ii. The procuring entity should also ensure that members of the evaluation panel are people of integrity, available and committed to the evaluation schedule in order to avoid delaying of the contract award.
- iii. Procurement Entities should always seek assistance from the PPRA or National Treasury or retain external technical experts to assist and ensure they meet the agreed evaluation deadline.

4.9.2. Recommendations on Award of Contract

- i. Integrity issues associated with award of contract could be addressed through a holistic risk mitigation and corruption prevention measures given that integrity risks exist throughout the public procurement process. Focus on integrity measures should be in all stages in the procurement cycle and all types of risks should be identified and addressed as well in order to achieve administrative compliance and prevent the risk of political interference in the identification of needs, bid-rigging and determination of tender award.

4.9.3. Recommendations on Contract Management/Performance

- ii. Develop requirements for internal controls, compliance and anti-corruption programmes for suppliers, including monitoring.
- iii. Implement contract and supplier management involving completing drafting and finalizing the contract while ensuring all obligations are filled and defined within the document.
- iv. Develop a plan for meeting quality and other inspection requirements to ensure acceptance.
- v. Ensure oversight and control of inventory and making sure the product is in the right place at the right time.
- vi. Designate Project Manager with required expertise to carry out the day-to-day contract management and supervision and to perform the duties of a contract administrator.

4.9.4 Recommendation for enhancing integrity and curbing corruption in all stages of the public procurement cycle

- vii. Employ a holistic approach by enhancing integrity and curbing corruption in public procurement by focusing integrity measures in all steps in procurement process in order to reduce risks in all stages including implementing mutually supportive principles which may, directly or indirectly, prevent corruption and stimulate good governance and accountability in public procurement. These principles include: Integrity; Transparency; stakeholder participation; accessibility; e-procurement; and oversight and control.

Annexe 1: Benchmarking Public Procurement, Assessing Public Procurement Regulatory Systems

PLC	KAZAKHSTAN		KENYA	
	EUROPE AND CENTRAL ASIA	GNI PER CAPITA (IN USD) \$11,670	SUB-SAHARAN AFRICA	GNI PER CAPITA (IN USD) \$1,280
QUESTION	Answers	Score	Answers	Score
Needs assessment, call for tender, and bid preparation score				
Consultation between procuring entity and private sector for needs assessment	No	70	No	57
Internal market analysis guidelines during market research phase	No			
Open tendering as the default method of procurement	Yes			
Procurement portal(s) dedicated to public procurement	Yes			
Materials publicly accessible online	Procurement plans, Laws, Calls for tender, Tender documents, Award notice			
Elements included in the tender notice and/or tender documents:				
Technical and financial qualifications that bidders must meet	Yes			
Grounds for exclusion of bidders	Yes			
Amount of bid security, if any	Yes			
Form(s) of bid security, if any	Yes			
Criteria against which bids will be evaluated	Yes			
Method used to assess bids	Yes			
Main terms and conditions of the contract	Yes			
Payment schedule under the procurement contract	Yes			
Accessibility of tender documents for free	Yes			
Possibility for bidders to ask questions to procuring entity	Yes		Yes	
Timeframe for procuring entity to address bidders' questions	Yes		Yes	
Answers provided by procuring entity made available to all interested bidders	Yes		Yes	
Bid submission score				
Bidders required to register on a government registry of suppliers	Yes	90	No	69
Foreign firms eligible to submit bids	Yes			
Minimum time period for bid submission	Yes			
Methods for bid submission	Electronic procurement platform			
Form of bid instrument to guarantee bidder's offer	Bid security			
Amount of bid security instrument	Maximum percentage			
Forms of bid security	Cash deposit, Bank guarantee			
Choice for bidders on form of bid security instruments	Yes			
Timeframe for return of bid security instrument	Yes			
			Bid security	
			Maximum percentage	
			Cash deposit, Bank guarantee, Insurance guarantee	
			No	
			Yes	
Bid opening, evaluation and award score				
Bid opening session takes place immediately (precise time of bid submission deadline)	Yes	86	Yes	71
Electronic opening of bids	Always			
If never, entities allowed to attend the opening session	N/A			
If always/sometimes, minutes of the opening session	Published online/Sent electronically to all bidders			
Evaluation criteria	Price and other qualitative elements			
Unsuccessful bidders individually notified of tender results	Yes			
Unsuccessful bidders can obtain feedback on reasons for not winning	Yes			
If no, debriefing organized for unsuccessful bidders	N/A			
Model contracts with standard clauses used when awarding a contract	Yes			
			Bidders or their representatives	
			N/A	
			Price and other qualitative elements	
			Yes	
			Yes	
			N/A	
			Yes	
Content and management of procurement contract score				
Winning bidder can sign the procurement contract through an online platform	Yes	91	No	73
Once the procurement contract is awarded and before it is signed:				
Price renegotiated	No			
Timeframe for delivery renegotiated	No			
Financial aspects renegotiated	No			
Specific procedures to follow for contract variations (once contract is signed)	Yes			
Purchasing entity has the obligation to:				
Inform the other bidders of the post-award contract variations	No			
Publish post-award variations	Yes			
Purchasing entity can unilaterally modify contract during implementation phase	No			
Specific procedures for the acceptance of the completion of works	Yes			
Specific procedures for the termination of the contract established in:	Legal framework and procurement contract			
			No	
			No	
			Yes	
			Legal framework and procurement contract	

QUESTION	KAZAKHSTAN		KENYA	
	Answers	Score	Answers	Score
Performance guarantee score				
Supplier required to provide performance guarantee deposit	Yes	90	Yes	58
Amount of performance guarantee is percentage of the contract value:	Yes		Yes	
Choice for suppliers on form of the performance guarantee	Yes		No	
Forms of performance guarantee	--		Performance bond, Letter of credit	
Timeframe for purchasing entity to return performance guarantee	Yes		Yes	
Circumstances where purchasing entity can collect performance guarantee	Yes		Yes	
Separate entity to oversee decision to withhold the performance guarantee	Yes		No	
Payment of suppliers score				
Supplier can request a payment online through an online platform	No	50	No	37
Legal timeframe for the purchasing entity to process payment	30		No timeframe	
Time to process payment starts from supplier's submission of invoice	No		N/A	
Time for supplier to actually receive payment (calendar days)	Between 0 and 30		Between 31 and 90	
Interests and/or penalties payable in case of payment delays*	N/A		Yes	
Interests and/or penalties automatically paid without a supplier's request	N/A		No	

COMPLAINTS		
QUESTION	Answers	Answers
Structure of the complaints mechanism		
Legal framework on complaints mechanism	Yes	Yes
Description of complaints mechanism	Independent review body and court	Independent review body and court
Choice of the authority before which filing a complaint	No	No
First-tier review		
During pre-award stage, only actual bidders have standing to complaint	No	Yes
Process to complain same for actual and prospective bidders	Yes	N/A
Complaining party has to prove damage in order to file a complaint	No	Yes
Cost to file a complaint before the first-tier review body (USD)*	No cost	>10% cost of contract*
Notification to the procuring entity if complaint filed before a court or an independent review body	No	Yes
If yes, timeframe (calendar days)	N/A	Simultaneously
Filing of complaint leads to suspension	Yes	Yes
If the procurement process is suspended, bidders are notified	Yes	No
Complaint reviewed by same people whose action is challenged (at procuring entity)	N/A	N/A
Mandatory training programs on complaints resolution for agents reviewing complaints	No	No
Procuring entity required to provide first-tier review body with:	A response to the complaint and copies of relevant documents	No
Time for first-tier review body to render a decision (calendar days)	14	21
Legal time limit for first-tier review body to render decision	Yes	Yes
Remedies legally granted by the first-tier review body:	Overturn	Modification; compensation; fees; overturn
First-tier review body decisions are published:	Online	Online
Second-tier review		
Legal framework stipulates conditions to appeal first-tier review body's decisions	Yes	Yes
Time limit to appeal (calendar days)	90	14
Cost to appeal the decision before the second-tier review body (USD)*	6	65
Filing of complaint leads to suspension	Upon request	Yes
Time for the second-tier review body to render a decision (calendar days)	28	120
Legal time limit for second-tier review body to render decision	Yes	Yes
Remedies legally granted by the second-tier review body:	Damages; fees; overturn	Damages; compensation; overturn
Second-tier review body decisions are published:	Online	Online
Post-award complaints		
Process to complain same than for pre-award complaints	No	Yes
Standstill period after contract award to allow filing of complaints	Yes	Yes
Standstill time period (calendar days)	7	14
Standstill period mandated in the legal framework	Yes	Yes
Standstill period set out in the notice of intention to award	No	Yes



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