

**GOVERNMENT TO GOVERNMENT PROCUREMENT AND ITS USE IN KENYA: AN
ANALYSIS OF THE PROCUREMENT OF BIOMETRIC VOTER REGISTRATION
DEVICES FOR THE 2013 KENYAN GENERAL ELECTIONS**

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DECLARATION

This project paper is my original work and has not been presented for a degree in any other university.

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I confirm that the project paper was prepared by the candidate under my supervision as university supervisor.

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Professor Attiya Waris

DEDICATION

This project paper is dedicated to my family including my fiancé who have been my support throughout.

ACKNOWLEDGMENT

I would first like to thank my supervisor, Professor Attiya Waris for her indulgence and providing me the necessary guidance to undertake and complete this project paper.

I would also like to thank my classmates, friends and colleagues who have stood with me as I went through this process.

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ABSTRACT

The recent adoption by Kenya of the procurement method known as “government-to-government procurement” which is a method of procurement that occurs where a bilateral or multilateral agreement is entered into between the Government of Kenya and a foreign government, agency, entity or multilateral agency. Usually, such an agreement would be a financing agreement such as a concessional loan or grant with respect to a project or supply of goods and services. It is normal for such an agreement to provide that a specific supplier shall undertake the project or supply the goods and services that is being financed under the agreement. The method is not regulated under Kenyan procurement law and raises queries in relation to its compliance with the minimum requirements of a public procurement system set out in the Constitution of Kenya. Under the Constitution of Kenya, a public procurement system ought to be fair, equitable, transparent, competitive and cost-effective. This project paper reviews the procurement of the Biometric Voter Registration (BVR) kits for the 2013 Kenyan General Elections as a case study for the use of government-to-government procurement process. The study’s main focus was whether government to government procurement process is a cost-effective procurement method as is required under the Constitution of Kenya. The study found that government-to-government does not comply with the constitutional requirement of procurement processes being cost-effective. Specifically in such an arrangement, the resulting contract is not on the best available terms to Kenya and therefore value for money is not attained. This project paper has recommended *inter alia* that Kenyan procurement legislation should be reformed in order to regulate this mode of procurement.

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Case Law

Okiya Omtatah Okoiti & 2 others v Attorney General & 3 others [2014] eKLR (High Court of Kenya)

ABBREVIATIONS AND ACRONYMS

€	Euros
OAG	Office of the Auditor General of Kenya
BVR	Biometric Voter Registration
ECK	Electoral Commission of Kenya
G to G procurement	Government to Government procurement
ICT	Information Communication Technology
IEBC	Independent Elections and Boundaries Commission
IIEBC	Interim Independent and Boundaries Commission
PPAD 2015	Public Procurement and Asset Disposal Act 2015
PPDA 2005	Public Procurement and Disposals Act 2005 (now repealed)
UNCITRAL	United Nations Commission on International Trade Law

CHAPTER ONE: INTRODUCTION

1.1. Background of the Study

Kenya has recently adopted a method of procurement known as “government-to-government procurement” (G to G procurement).¹ This method occurs where a bilateral or multilateral agreement is entered into between the Government of Kenya and a foreign government, agency, entity or multilateral agency.² Usually, such an agreement would be a financing agreement such as a concessional loan or grant with respect to a project or supply of goods and services. It is normal for such an agreement to provide that a specific supplier shall undertake the project or supply the goods and services that is being financed under the agreement.³ Such procurement would not be subject to Kenyan procurement law by virtue of such procurement being excluded pursuant to the provisions of the Public Procurement and Asset Disposal Act 2015.

Kenya has come a long way in formulating a legal framework for procurement. Up to the early 1970s, the British firm Crown Agents undertook most of Kenya’s public procurement on the basis that at the time in Kenya, local supplies were not adequate plus the new government could only obtain most of its needs from foreign sources. In the 1970’s, Kenya set up supplies offices which were offices were within ministries and departments. The supplies system was decentralised. Each

¹ Cynthia Olotch, ‘Kenya’s New Railway and the Emergence of the “Government-to-Government Procurement” Method’ (2017) <<http://blogs.worldbank.org/ppps/kenya-s-new-railway-and-emergence-government-government-procurement-method>> accessed 12 March 2017.

² *ibid.*

³ *ibid.*

supplies office was independent and autonomous but in any case were subject to oversight by a Central Tender Board where procurement exceeded prescribed amounts. The Ministry of Finance had control over ministerial procurement and exercised this control through issuing circulars and guidelines to procurement officers within the ministries, local authorities or other procuring entities. The use of such circulars was so frequent that they overshadowed the existing supply guidelines. Therefore, corrupt civil servants could easily manipulate the procurement process.⁴

The first set of procurement regulations were put in place in the year 2001 through the enactment of the Exchequer and Audit (Public Procurement) Regulations. These regulations, which empowered the Minister for Finance to develop regulations that govern public procurement, were promulgated under the Exchequer and Audit Act (now repealed) due to the lack of political will to quickly enact a law that provides for a stringent procurement system.⁵

In 2002, Kenya began the exercise of drafting a new set of public procurement legislation based on the UNCITRAL Model Law on Procurement of Goods, Construction and Services with Guide to Enactment (1995). Following discussions of the drafts with stakeholders, the Public Procurement and Disposal Act 2005 (PPDA 2005) was approved by Parliament.⁶ The Act was

⁴ W Odhiambo and others, *Public Procurement: Lessons from Kenya, Tanzania and Uganda* (OECD Development Service 2003) <<https://books.google.co.ke/books?id=X1mHNQEACAAJ>>.

⁵ JM Migai Aketch, 'Development Partners and Governance of Public Procurement in Kenya: Enhancing Democracy in the Administration of Aid' <<http://www.iilj.org/wp-content/uploads/2016/08/Akech-Development-Partners-and-Governance-of-Public-Procurement-in-Kenya-2006-2.pdf>>.

⁶ Njuguna Humphrey Kimani, Justice Prof James Otieno Odek and Dr Attiya Waris, 'The Influence of Political Patronage on the Legal and Institutional Framework in Public Procurement Sector' (2016) 2 2016.

operationalised on 1st January, 2007 following gazettment of the Public Procurement and Disposal Regulations of 2006.

The enactment of the PPDA 2005 introduced, for the first time, a specific Act of Parliament covering the procurement of goods, works and services, as well as contract management, supply chain management and disposal by a public entity of stores and equipment that are unserviceable, obsolete or surplus.⁷ The PPDA 2005 established the Public Procurement Oversight Authority as the regulator for public procurement.

The Constitution of Kenya was promulgated in 2010 and with this, the minimum requirements of a procurement system were constitutionally enshrined. The Constitution provides that a state organ or any other public entity shall contract for goods or services “in accordance with a procurement system that is fair, equitable, transparent, competitive and cost-effective”.⁸ The Constitution further empowered Parliament to “prescribe a framework within which policies relating to procurement and asset disposal shall be implemented”⁹. In order to give effect to the provisions of the Constitution, the Public Procurement and Asset Disposal Act 2015 (the PPAD 2015) was enacted and commenced with effect from 7th January 2016. The PPAD 2015 repealed the PPDA 2005. The PPAD 2015 further establishes the Public Procurement Regulatory Authority as the

⁷ Public Procurement and Disposal Act (Act No. 3 of 2005, Laws of Kenya) s 4.

⁸ Constitution of Kenya 2010 Article 227.

⁹ *ibid* Article 227.

main regulator. This authority is the successor to the Public Procurement Oversight Authority established under the repealed PPDA 2005.

1.2. Statement of Problem

One interesting aspect to note is that despite Kenya currently having procurement legislation in place for over ten years, G to G Procurement has not been adequately regulated. The repealed PPDA 2005 did not contemplate such G to G procurement arrangements while the PPAD 2015 explicitly excludes such procurement from the provisions of the Act by stating as follows:

“(2) For avoidance of doubt, the following are not procurements or asset disposals with respect to which this Act applies—¹⁰

...

(f) procurement and disposal of assets under bilateral or multilateral agreements between the Government of Kenya and any other foreign government, agency, entity or multilateral agency unless as otherwise prescribed in the Regulations.”¹¹

¹⁰ Public Procurement and Asset Disposal Act (Act No. 33 of 2015, Laws of Kenya) s 4 (2).

¹¹ *ibid.*

By excluding G to G procurement from procurement law, Kenya ends up with a scenario where direct procurement of goods and services would be conducted without regulation including oversight from the Public Procurement Regulatory Authority.

The exclusion of G to G procurement from the provisions of Kenyan public procurement law leads to the direct procurement of goods and services by public entities without regulation or any proper oversight. This raises issues related to its transparency, accountability, competitiveness and cost-effectiveness which are the key requirements of a public procurement system under the provisions of Article 227 (1) of the Constitution of Kenya. It would be expected that any goods and services procured by way of G to G procurement would be more costly than goods and services procured using procurement methods provided under public procurement law such as open tendering.

Therefore, the G to G procurement process is not in accordance with a system that is cost-effective as is required under the Constitution of Kenya. Specifically in such an arrangement, the resulting contract is not on the best available terms to Kenya and therefore value for money is not attained.

1.3. Hypothesis

The G to G procurement process does not achieve the best available terms in the procurement of goods and services and therefore is not in accordance with a system that is cost-effective as is required under the Constitution of Kenya.

1.4. Statement of Objective

This study aims to analyse the use of G to G procurement process to determine whether such process is cost-effective. The analysis will focus on the achievement of the best available terms as part of the larger objective of obtaining value for money.

1.5. Research Question

The study mainly seeks to answer the following question: Does G to G procurement as currently used by Kenya achieve the best available terms in the procurement of goods and services?

1.6. Justification of the Study

G to G procurement has been marred with controversy with claims such as those relating to the lack of transparency and the exaggerated costs of supplies or projects undertaken through such procurement.

The study will analyse one case where G to G procurement was used in the procurement of goods and services. This relates to the procurement of the Biometric Voter Registration (BVR) kits for the 2013 Kenyan General Elections (where a special audit report by the Office of the Auditor General of Kenya found that Kenya lost about 36,989,937.52 Euro or about 4 billion Kenya shillings in the process¹²).

¹² Office of the Auditor General of Kenya, 'Special Audit on Procurement of Electronic Voting Devices for the 2013 General Election by the Independent Electoral and Boundaries Commission' (2014)

1.7. Limitations

The main limitation is with respect to the difficulty in obtaining adequate material on the focus of the study. Although there is a lot of literature on procurement processes, very few writers have specifically written on or analysed G to G procurement.

Another limitation is ascertaining the instances where G to G procurement process has been used. Ordinarily, any procurement undertaken by a procuring entity is required to be reported to the Public Procurement Regulatory Authority and the authority must publish on its website all notices of the reports on contract awards from procuring entities.¹³ However, on the basis that G to G procurement is excluded from the provisions of Kenyan procurement law, such contracts are not published on the authority's website. The public would only come to hear of the use of G to G procurement process through the media or if the relevant body happens to announce that it would undertake the G to G procurement process.¹⁴ There is a possibility that there are many other contracts that have been undertaken by way of G to G procurement but which have not been publicised.

<http://www.oagkenya.go.ke/index.php/reports/doc_download/148-iebc-special-audit-report-on-procurement-of-evds> accessed 27 October 2017.

¹³ See Public Procurement and Asset Disposal Act (Act No. 33 of 2015, Laws of Kenya) s 138.

¹⁴ Examples are in the procurement of the standard gauge railway project and the procurement of the Electronic Voting Devices for the 2013 Kenyan General Elections where the public only happened to know about the procurement process because they were highly publicized.

Another limitation is that it is extremely difficult to obtain information on how G to G procurement is actually conducted. G to G procurement is not entirely regulated and involves exchanges or correspondence at a diplomatic level (which information is generally not availed to the public due to its sensitivity). In “*Okiya Omtatah Okoiti & 2 others v Attorney General & 3 others* (2014) eKLR”, which was a case challenging the legality and constitutionality of the construction of the Standard Gauge Railway, the petitioners relied on documentary evidence they claimed that they obtained from civil servants who were whistle blowers and who they could not disclose their identities due to the sensitivity of the matter. The court however declined to accept the evidence. This case brings to forefront the difficulty in accessing information on G to G procurement process.

1.8. Theoretical Framework

A country would usually put in place a procurement legal framework for purposes of achieving ‘domestic’ objectives such as obtaining value for money, preventing corruption or promoting industrial or social policies.¹⁵

This study will first be guided by the agency theory. The agency theory can be used as a model or a prism for purposes of explaining an organization’s successes and failures in its structure, and further to provide an understanding of the system of procurement and its rules.¹⁶ The theory picks

¹⁵ S Arrowsmith, J Linarelli and D Wallace, *Regulating Public Procurement - National and International Perspectives* (Springer Netherlands 2000) 15.

¹⁶ Christopher R Yukins, ‘A Versatile Prism: Assessing Procurement Law through the Principal-Agent Model’ (2010) 40 *Public Contract Law Journal* 63, 63–64.

up from the classic principal-agent model where a principal engages an agent to undertake the goals of the principal on the assumption that there are some comparative advantage accorded to the agent in the performance of the goals.¹⁷ If the agent's interests and the principal's interests diverge, this would lead to the divergence of the goals of the agent and in that scenario, a conflict of interest may be imputed on the agent. One thing to note is that the risk that such a conflict (or rather, a divergence in goals between the agent and the principal) will be material or will impair the principal, would increase when an imbalance of information tilts in the agent's favour, that is to say, in those situations where more information is in the hands of the agent holds as compared to the principal, or when a particularly robust "moral hazard" entices the agent from the goals of the principal.¹⁸

The study will therefore apply the agency theory to ascertain whether there is a divergence of the goals of the agent and the principal. In this case, the public (as the principal) would like to ensure that any procurement undertaken by a public entity (the agent) by way of G to G procurement would align with the public's goal of such procurement process being cost-effective.

The second theory that this study will be guided by is the theory of legitimacy. The theory of legitimacy is a theory that places an emphasis on how institutional management would react to the expectations of a community. There is a notion that the various community stakeholders have opinions on the activities which in their view, they consider acceptable and therefore the

¹⁷ *ibid* 64.

¹⁸ *ibid*.

community members (including institutions) are placed with the expectation of undertaking any activity within the limits of what the community considers acceptable.¹⁹ It is important to note that within the area of social and environmental accounting, the legitimacy theory has become one of the most referenced theories.²⁰

The legitimacy theory will therefore be applied in this study in order to ascertain whether G to G procurement is acceptable to the expectations of the community by being a cost-effective mode of procurement.

1.9. Literature Review

There are reasons why a country would formulate a legal framework for procurement. There is also a basis for having a procurement system which is cost-effective as stipulated in the Constitution of Kenya.

Procurement regulation is purposive as it is an instrument of public policy. A government is supposed to represent the public interest and is therefore entrusted with the responsibility of

¹⁹ Trevor D Wilmshurst and Geoffrey R Frost, 'Corporate Environmental Reporting: A Test of Legitimacy Theory' (2000) 13 Accounting, Auditing & Accountability Journal 10, 11.

²⁰ MV Tilling, 'Refinements to Legitimacy Theory in Social and Environmental Accounting. Commerce Research Paper Series No. 04-06' [2004] Adelaide, South Australia, Flinders University.

achieving and promoting certain policies which are expected to be in public good and reflect public interest.²¹

According to Arrowsmith *et al*, there are reasons why countries try to put in place a proper procurement system. The main objective of such a system is to achieve value for money – that is to say, having the government successfully acquire any goods, works or services required by it on the best available terms. Value for money entails three things. First, it entails making sure that the goods, services or works that are being acquired are “*suitable for requirements*”. An example is where a procuring entity requires a very sophisticated information communications system to undertake a function. In that scenario, the procuring entity may not have the expertise to ascertain the requirements of that system and would need guidance from the private sector in formulating such requirements. Therefore, the government must be careful when coming up with any contract specifications and should consider having consultations occur between procurement officers and end-user. This is because a lot of times the procuring entity would not have the knowledge or the market information to devise a clear specification and would therefore require assistance in defining its requirements.²²

Secondly, value for money requires any contract should be concluded on the best available terms. This does not imply that the procuring entity should only accept the lowest price but in addition,

²¹ PA Trepte, *Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation* (Oxford University Press 2004) 47.

²² Arrowsmith, Linarelli and Wallace (n 15) 28–29.

the procuring entity should also consider other features of the contractor's product such as quality. This objective implemented a lot in large procurement contracts through the competitive tendering processes where several bids are submitted by various contracts and such bids are compared on the basis of price and other relevant criteria through an evaluation process.²³

Finally, with respect to value for money, the procuring entity must make sure that the contractor selected is "*able to provide what is required on the terms agreed.*" This means that in addition to submitting an acceptable offer, the contractor should be in a position to deliver. Any failure to deliver may have consequences on the procuring entity and the public including causing considerable financial loss to the procuring entity and serious inconvenience to the public.²⁴

Efficiency is the second reason for putting in place a proper procurement system according to Arrowsmith *et al.* Efficiency ensures that the process of awarding any tender is undertaken in a timely and cost-effective manner through the formulation of proper procurement procedures and balancing financial plus any other costs of undertaking procurement against the benefits that the procuring entity would obtain in terms of value for money.²⁵ Probity (or integrity) is another reason for having a proper procurement system. Probity primarily involves two aspects: prevention of actual corruption (examples being bribery or award of contracts on the basis of personal interest) and ensuring that there is an appearance of probity which would limit influences of actual

²³ *ibid* 29.

²⁴ *ibid* 30.

²⁵ *ibid* 31–32.

corruption and ensure that participants in the procurement process and the general public have the confidence or faith in the process.²⁶

According to Roberto Hernandez Garcia²⁷ government procurement is always filled with complex issues due to trying to achieve an equilibrium between public and private sector interests. Therefore, regulations are likely to accord an advantage for one party at the expense of the other. Garcia further highlights that government procurement rules and practises impact massively on domestic economies plus national and international trade. Putting in place clear procurement rules and transparency would strengthen both national and international markets.²⁸

1.10. Research Methodology

The study is largely analytical as it will entail reviewing the G to G procurement process. It will also undertake a legal analysis of Kenyan procurement law including the provisions of the Constitution of Kenya.

This project paper reviews the procurement of the Biometric Voter Registration (BVR) kits for the 2013 Kenyan General Elections as a case study for the use of G to G procurement process. When

²⁶ *ibid* 32.

²⁷ RH García, *International Public Procurement: A Guide to Best Practice* (Globe Law and Business 2009) <<https://books.google.co.ke/books?id=pMtuPgAACAAJ>>.

²⁸ *ibid* 9.

developing the method of obtaining data, the initial intention was to obtain primary data on the case study. However, this mode of obtaining data was reconsidered for the following reason.

It is important to note that in Kenya, matters concerning procurement and the conduct of election matters are extremely sensitive and undertaking any investigation or study could prove risky. The case study covers both of these sensitive fields of procurement and elections. An initial interaction with persons engaged in these field provided an insight on the sensitivity in the collection of primary data concerning the procurement of BVR devices in the 2013 general elections.²⁹ Further, procurement officers have alluded to how difficult their lives are to the extent that the consequences of their decisions could either be life threatening, affect their job security or lead to the officer being brought before court.³⁰

It was also noted that another obstacle in collecting primary data on the case study was that during the period of study, all heads of procurement and accounting situated within public bodies such as ministries, departments within ministries, state agencies and state corporations were ordered by the government to step aside.³¹ With respect to elections, on 29th July 2017, days before the August 8th 2017 General Election, an information and communication technology manager at the IEBC

²⁹ When formulating the research method, the writer interacted with a few officials from the Kenya election body who had intimidated that the matter on the procurement of BVR devices was quite sensitive.

³⁰ ‘Between the Hammer and Anvil; Tough Life of a Procurement’ *Daily Nation* (10 July 2018) <<https://www.nation.co.ke/news/Between-the-hammer-and-anvil--tough-life-of-procurement-officers/1056-4604354-tkqbhz/index.html>> accessed 29 July 2018.

³¹ ‘Press Statement on Presidential Proclamation on Fresh Vetting of Public Officers’ <<http://www.interior.go.ke/index.php/2015-02-28-06-43-54/news/168-press-statement-on-presidential-proclamation-on-fresh-vetting-of-public-officers-by-mwenda-njoka>> accessed 2 October 2018.

was tortured and killed in what circumstances many believe had to do with his key role in overseeing those elections.³² Undertaking any collection of primary data would have entailed collecting information directly from procurement officials and election officials which in the circumstances would have been difficult and prove risky due to the sensitivity issues highlighted above. In light of the foregoing, the study will review reliable secondary data.

In reviewing the procurement process of the BVR Devices for the 2013 General Election, the study will heavily rely on the findings of the Special Audit on Procurement of Electronic Voting Devices for the 2013 General Election by the Independent Electoral and Boundaries Commission (2014) by the Office of the Auditor General (the OAG). The report by the OAG was prepared following a request by the National Assembly to audit the procurement of the BVR devices procured for utilisation in the Kenyan elections held in March 2013 on the basis that the devices did not work during the elections.³³ This report did an excellent job in collecting the required information on the procurement of the election devices including conducting interviews with the concerned persons both within Kenya and in other countries being Canada and France, reviewing government documents or correspondence, and making an assessment one whether there was any loss to the taxpayer. When reviewing the report by the OAG, one would realise that the review of the procurement of the BVR devices required immense resources and unrestricted access which the

³² Dennis Onsarigo and Moses Michira, 'Slain Electoral Agency Manager Chris Msando Was Picked up in South B before Torturous Death' (*The Standard*) <<https://www.standardmedia.co.ke/article/2001264645/slain-electoral-agency-manager-chris-msando-was-picked-up-in-south-b-before-torturous-death>> accessed 29 July 2018.

³³ (n 12) 9.

OAG enjoys. It would be extremely difficult for any one individual to gain access to procurement information in order to review it due to the sensitivity of this matter and the amount of time and resources required.

In addition to the report by the OAG, the study will also rely on library research and will borrow from a wealth of materials from past and present authors who have researched and commented on the procurement process and procurement legislation. Other materials to be referred to include international conventions and instruments, judicial decisions of Courts, newspaper articles, books and booklets, conference papers and journals, reports on studies by various scholars and publications by relevant organizations.

1.11. Chapter Breakdown

The proposed chapter breakdown is as follows:

Chapter one will be the introduction. This chapter provides an overview and background of the study. It also introduces the theme of the study by providing the statement of the problem, justification of the study, statement of objective, research question, theoretical framework on which the study is founded, research methodology used in carrying out the study, limitations of the study and a review of the literature relating to procurement.

Chapter two shall cover the theoretical framework. This chapter addresses the theories in public procurement that have been applied in undertaking the study.

Chapter three is the case study. This chapter focuses on the procurement of the biometric voter registration devices for the 2013 Kenyan General Elections as case study in analysing the use of the G to G procurement process.

Chapter five shall be the conclusion. This chapter is a summary of the findings of this study and provides a conclusion.

Finally, chapter six shall be the recommendation. This chapter suggests possible solutions and recommendations in order to address the issues identified as arising out of the case study undertaken in the previous chapter.

CHAPTER TWO: APPLICABLE THEORIES IN PUBLIC PROCUREMENT

2.1. Theoretical Framework in Public Procurement

The public procurement system in Kenya has undergone major developments. This can be evidenced from the time the system was one that was not regulated from the 1960's, to the use of circulars issued by the National Treasury from the 1970's to 1990's, to the enactment of the Exchequer and Audit (Public Procurement) Regulations 2001, and thereafter the enactment of the Public Procurement and Disposal Act of 2005, the Constitution of Kenya 2010 and the Public Procurement and Asset Disposal Act 2015.

It is important to note that whereas there have been broad efforts to reform procurement systems, there is no point, however, where there has been a major model, prism or a theory pursuant to which one can make an assessment of the procurement system or the reform of the procurement system.³⁴ However, there are a few applicable theories through which one can assess the system of procurement or reform. The Agency theory is a theory that provides a theoretical model for purposes of making such assessment. The other theory is the theory of legitimacy. The application of these theories have been discussed below.

2.1.1. Agency Theory

The agency theory has been established for quite some time in the field of economics and the other social sciences. It is a theory that can be used as a model or a prism for purposes of explaining an

³⁴ Yukins (n 16) 63.

organization's successes and failures in its structure, and further to provide an understanding of the system of procurement and its rules.³⁵ The theory picks up from the classic principal-agent model where a principal engages an agent to undertake the goals of the principal on the assumption that there are some comparative advantage accorded to the agent in the performance of the goals.³⁶ If the agent's interests and the principal's interests diverge, this would lead to the divergence of the goals of the agent and in that scenario, a conflict of interest may be imputed on the agent. One thing to note is that the possibility that such a conflict (or rather, a divergence in goals between the agent and the principal) will have some materiality or will lead to the impairment of the principal, would increase in the event of an imbalance of information in the agent's favour, that is, in scenarios where more information is in the hands of the agent holds as compared to the principal, or in the event a particularly robust "moral hazard" entices the agent from the goals of the principal.³⁷

In order to alleviate that conflict of interest or rather maintain the alignment of the agent's interests with the goals of the principal, the principal tends to rely on strategies of a supervisory nature which are sometimes known as monitoring and bonding.³⁸ Monitoring refers to the principal's efforts to keep track of the actions of the agent so that the principal can make certain that the agent

³⁵ *ibid* 63–64.

³⁶ *ibid* 64.

³⁷ *ibid*.

³⁸ *ibid* 65.

strives to achieve the ends of the principal.³⁹ On the other hand, bonding, is understood in agency theory as the voluntary and mostly self-constraints on the discretion of the agent that are imposed under contract.⁴⁰ When looking at it in the realm of procurement, although, it might be better to term bonding as "sanctions" or "punishment" since the agent has bonded himself to only undertake the ends of the principal, and in the event the agent strays, the bond must be forfeited by the agent some sort of sanction which sanction could take the form of a penalty under contract, or a civil liability, or the forfeiture by the agent of its liberty by way of imprisonment.⁴¹

Agency theory concludes by stating that there will inevitably be a "residual loss" in any a relationship between a principal and agent or the agent might be engaged in some unpreventable and residual deviation from the ends of the principal and this cannot be avoided by way of bonding or monitoring. This residual loss may, ostensibly, imply that the principal is always in a losing proposition when using an agent or, when we analyse this implication in the context of procurement, that no function of procurement should ever be contracted out. It is important to note that the intuitive illogic of that extreme solution points out the other costs (for example, the opportunity costs of not enlisting a qualified agent,) that one must consider when comparing the costs and benefits of engaging an agent.⁴²

³⁹ *ibid.*

⁴⁰ *ibid* 66.

⁴¹ *ibid.*

⁴² *ibid.*

The application of this agency theory (the principal-agent model) appears to be straightforward. In line with this model, it may be said that the procuring official would be acting as an agent for a principal (or principals). The principal may change depending with the political culture to another.⁴³ In Kenya for example, taxpayers or the public, the executive branch of the government, or Parliament may in various instances be seen as the principal.

When acting on behalf of that principal (however the principal is defined), the goals of the procuring official (or the “agent”) may diverge from the goals of the principal. This conflict of interest must be managed through the act of monitoring (that is, providing the requisite oversight in relation to a procurement system) and the act of bonding (that is providing the various forms of sanctions that are requisite when the official or the agent deviates from the principal’s goals because of the agent’s own interests). It also follows that where the more sophisticated the agent or the official is when compared to the principal (the public, Parliament etc.), the more likely there is an asymmetry or imbalance of information, and therefore, the more severe the requirement for control in the principal-agent relationship.⁴⁴

It is possible to extend the principal-agent model to cover the contractor in procurement. Where the sovereign (as the proxy) is the principal, with the contracting official being an agent, the next

⁴³ *ibid* 66–67.

⁴⁴ *ibid* 67.

logical assumption would be to consider the contractor as a subagent of the contracting official.⁴⁵ Even though the distracted contracting official might not act in accordance with the goals of the principal, the entire procuring entity may be diverted by the contractor's (of rather, the subagent's) own conflicts of interest to the extent that the procuring official (as the agent) has in turn vested the contractor (as the subagent) with his authority.⁴⁶ The symmetries or imbalances of information that would occur between the principal, the agent (procurement official), and the subagent (being the contractor) again only increase the risk of abuse of the situation by the contractor with a view of the advancement by the contractor of his own ends as opposed to the ends of the principal.⁴⁷

2.1.1.1. The Desiderata of Agency Theory

There has been a difficulty integrating the conceptual structure as advanced by the agency theory with accepted and existing structures in the system of procurement. Professor Steven Schooner in his 2002 paper spoke about certain elements that must be present in any successful system of

⁴⁵ See Kenneth R. Mayer & Anne M. Khademian, Bringing Politics Back in: Defense Policy and the Theoretical Study of Institutions and Processes, 56 Pub. Admin. Rev. 180, 184 (1996). , Mayer and Khademian state the following when 'applying agency theory to the process of defense procurement in the US:

“Public managers are the agents in a chain of accountability that begins with congressional delegation of authority and extends through intermediaries (the executive branch and structures within the Department of Defense [DOD]) who, depending on context, act sometimes as principals and other times as agents. At each stage, the key analytical task is to identify what the principals want from their agents and then explain why certain types of control structures emerge. The issue is control: who, as principal, has the authority to decide what the bureaucracy (the agent) will do, and how does the principal monitor and control behaviour to deter mine if, and ensure that, the agent is acting in accordance with his or her wishes?”

⁴⁶ Yukins (n 16) 68.

⁴⁷ *ibid.*

procurement which he aptly referred to as the “desiderata.”⁴⁸ He further pointed out that the three elements which are key are competition, integrity, and transparency while others include efficiency, uniformity, customer satisfaction, best value, and risk avoidance.⁴⁹ All these desiderata are assessed from the point of the principal-agent model.⁵⁰

2.1.1.2. Satisfaction by the Customer and Best Value

Professor Schooner's 2002 article speaks about the concepts “customer satisfaction” and “best value” as important or crucial desiderata in the field of procurement.⁵¹ He starts by stating that the term “customer satisfaction” refers to the satisfaction by the end users’ with the goods, works or service acquired through the undertaking of a procurement process while on the other hand, “best value” refers to the fact that the good, works or service has been provided at an optimal value for price.⁵²

The question has always been whether end users in government should be “satisfied” with “best value,” to the extent any other normal consumer would usually be. The response to this is that most in reality, the end users in government are usually not keen on the best value satisfaction. An

⁴⁸ Steven Schooner, ‘Desiderata: Objectives for a System of Government Contract Law’.

⁴⁹ *ibid.*

⁵⁰ Yukins (n 16) 68.

⁵¹ Schooner (n 58).

⁵² *ibid.*

example is usually given where a soldier in the field, is rarely concerned whether the equipment was purchased at “best value”: this illustrates a divergence of interests between the principals and the stakeholders.⁵³ The term “best value” with respect to a taxpayer might refer to minimizing or reducing the cost in order to attain good value. However, an end user such as a soldier or an aviation pilot, whose life is dependent on the use by him of the very best aircraft or any other equipment, may be content only with having the very highest-quality equipment, item or service without having any concern for the cost.⁵⁴ Schooner points out a paradox in procurement by pointing out that the satisfaction by a customer and the attainment of best value are not the same but different and this in turn points out that there is a central disconnect in the principal-agent model: there can, in fact, be many principals who are all competing for dominance when controlling the system of procurement.⁵⁵

This view by Schooner that several principals might be duelling to control the system of procurement leads to several questions. The first question relates to the process of identification and the assessment of the various principals’ (or the stakeholders’) roles in determining the system of procurement. Another question would be how to undertake the process of converging the several principals into one. This would invariably mean that hypothetically “best value” would equate to “customer satisfaction” and therefore the logic is that the principal who is able to demand the best

⁵³ Yukins (n 16) 73–74.

⁵⁴ *ibid* 74.

⁵⁵ *ibid*.

value together with the principal or the end user who wants to attain “customer satisfaction” would be one and the same principal.⁵⁶

It has been argued that there are several logical avenues to convergence. One way is to completely bypass or ignore the procurement supply chain and accord the authority to purchase goods or services to program officials (and not procurement officials) and to permit the program officials to purchase the requisite goods, works and services directly in the open market.⁵⁷

Another approach would be to enhance transparency to the system of procurement and to empower the ultimate beneficiaries or end users of that system of procurement. In this case, the actual end-user would have a say on what will be purchased on their behalf.

Professor Schooner’s concepts on customer satisfaction and the attainment of best value could be applied to the G to G procurement process. As with all procurement processes, it would be important to ascertain whether end users would be “satisfied” with the attainment of value for money when the process of procurement of goods, works or services is undertaken through G to G procurement.

⁵⁶ *ibid.*

⁵⁷ *ibid.*

2.1.2. Theory of Legitimacy

The theory of legitimacy is a theory that places an emphasis on how institutional management would react to the expectations of a community. There is a notion that the various community stakeholders have opinions on the activities which in their view, they consider acceptable and therefore the community members (including institutions) are placed with the expectation of undertaking any activity within the limits of what the community considers acceptable.⁵⁸ It is important to note that within the area of social and environmental accounting, the legitimacy theory has become one of the most referenced theories.⁵⁹

Mark Suchman in his article, “*Managing Legitimacy: Strategic and Institutional Approaches*”, defines legitimacy as “a generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions”.⁶⁰

Within the legitimacy theory, there is a ‘macro-theory’ of legitimation, known as the institutional legitimacy theory which is concerned with how structures of an organisation as a whole (such as government) have been accorded a level of acceptance in the society.⁶¹ Suchman states that within

⁵⁸ Wilmshurst and Frost (n 19) 11.

⁵⁹ Tilling (n 20).

⁶⁰ Mark C Suchman, ‘Managing Legitimacy: Strategic and Institutional Approaches’ (1995) 20 *Academy of management review* 571, 574.

⁶¹ Tilling (n 20).

the tradition, there is synonymy between institutionalization and legitimacy and further that these two phenomena embolden organizations primarily by making the organisations seem meaningful and natural within the society.⁶²

In light of a growth in the concern and awareness in the community, legitimacy theory advances that firms will undertake measures with a view of ensuring that their performance and activities are acceptable to the society or community.⁶³ Institutions (especially if it is a public entity) have the obligation to explain their operations to their respective key actors and should state its benefits to the society.⁶⁴

Based on the foregoing, it is possible to apply the principles of the legitimacy theory to matters relating to public procurement. Public entities have an obligation to undertake all their operations in a manner that is acceptable to the public. Public procurement entails the use of public resources and therefore the legitimacy theory would affirm that public entities must be accountable and should be able to justify the benefits to the public whenever undertaking a procurement process. The study therefore employed the legitimacy theory with a view of establishing whether the government can justify the procurement of goods, works and services by way of G to G procurement process.

⁶² Suchman (n 70) 576.

⁶³ Wilmshurst and Frost (n 19) 11.

⁶⁴ *ibid.*

**CHAPTER THREE: ANALYSIS OF THE USE OF GOVERNMENT TO GOVERNMENT
PROCUREMENT IN KENYA – CASE OF BIOMETRIC VOTER
REGISTRATION DEVICES FOR THE 2013 KENYAN GENERAL ELECTIONS**

3.1. The Need for BVR Devices

The post-election violence that occurred in 2007/2008 culminated in a recommendation of disbanding and replacing the Electoral Commission of Kenya (ECK) and further, putting in place electronic devices in the administration and conduct of the process of elections in Kenya.⁶⁵

The 2007 general elections was marred with irregularities and substantial claims of rigging. The feeling at the time was that the whole process of elections was not transparent which made it easy to manipulate the process.⁶⁶

In order to address the above two concerns, the Government of Kenya undertook the process of disbanding ECK and replacing the same with the Interim Independent and Boundaries Commission (IIEBC).⁶⁷

Pursuant to Gazette Notice No. 1983 in the Kenyan Gazette, the Independent Review Commission (IREC) was formally constituted with a mandate to investigate and report on the various aspects of the issues of concern in the 2007/2008 election and post-election crisis including providing

⁶⁵ (n 12) 83.

⁶⁶ *ibid.*

⁶⁷ *ibid.*

recommendations on electoral and other reforms for purposes of improving future electoral processes.⁶⁸ The IREC was chaired by Justice Johann Kriegler and as such, the commission was commonly referred to the Kriegler Commission with the report of the commission commonly referred to as the Kriegler report.⁶⁹

The Kriegler report pointed out very serious irregularities in the conduct of the general elections held in Kenya in 2007. These included (but not limited to) a register of voters that was defective which register contained names of around 1.2 million deceased people. There was also voter fraud that probably entailed ballot-stuffing or organised impersonation of absentee voters. The Kriegler report also highlighted an electoral system that was defective and lacked integrity in the results announced by the ECK because there was no proper planned system of tallying of votes, recording of votes and the transcribing, transmission and announcement of election results.⁷⁰

The Kriegler report further admonished the ECK for failing to fundamentally review the system by introducing Information Communication Technology (ICT) that was readily available and this failure was grossly neglectful and contributed to the atmosphere of tension, rumour and suspicion which eventually led to the 2007 election violence.⁷¹

⁶⁸ 'Report of the Independent Review Commission on the General Elections Held in Kenya on 27 December 2007' (Independent Review Commission 2008) 3.

⁶⁹ (n 12) 84.

⁷⁰ 'Report of the Independent Review Commission on the General Elections Held in Kenya on 27 December 2007' (n 78) 8–10.

⁷¹ (n 12) 84.

The Elections Act of 2011 provides that the electoral commission may use technology as it considers fit in the process of elections while ensuring that such technology is simple, accurate, verifiable, secure, accountable and transparent.⁷² In line with this requirement, the Interim Independent Electoral and Boundaries Commission (IIEC) made a comparative study on use of ICT devices where such have been used in foreign countries together with taking into account global best practices.⁷³

The IIEC placed an advertisement on 29 August 2011 in the Daily Nation newspaper inviting several election technology suppliers to a two day election technologies event at the Kenyatta International Conference Centre (KICC) where the suppliers undertook demonstrations of their technologies, supplied various information booklets and packages with a view of illustrating the available solutions in the field of technology and as a reference, supplied a lists of customers. The findings of the report from the conference were utilised by the IIEC to provide a basis of for developing their own election technology specifications.⁷⁴

Following the KICC ICT conference, the IIEC facilitated a workshop in the town of Naivasha where they deliberated the findings in the report and adopted the specifications.⁷⁵

⁷² Elections Act (Act No. 24 of 2011, Laws of Kenya) s 44.

⁷³ (n 12) 84.

⁷⁴ *ibid.*

⁷⁵ *ibid.*

It is important to note that the election devices comprised of the following components, all of which were procured in separate tenders or procurement methods:⁷⁶

- (a) Biometric Voter Registration;
- (b) Optical Mark Reader;
- (c) Universal Polling Kits;
- (d) Electronic Voting Register;
- (e) Electronic Result Transmission System; and
- (f) Electronic Voter Identification Device.

Only the BVR devices were eventually procured through the G to G procurement process. The other component were procured through the various methods under the procurement legislation.

3.2. Procurement process of the Biometric Voter Registration (BVR) Devices

According to the report by the OAG, the procurement of the BVR devices was undertaken in two phases. The first phase, (referred to as “Part 1”) is the initial competitive open tendering process attempted by the IEBC. At the awarding stage, this process was terminated and therefore no supplier was identified through this procurement process.⁷⁷ The second phase (referred to as “Part 2”) is the phase that followed the termination of the competitive tendering process under Part 1. This phase entailed the use of G to G procurement as it was as a result of direct intervention of the

⁷⁶ The Auditor General’s report addresses the procurement of each of these components separately.

⁷⁷ (n 12) 85.

Government of Kenya to solve the gap that occurred following the termination or the failure of the first part in identifying a supplier for the BVR.⁷⁸

3.2.1. Part 1 – Competitive Bidding Process

According to the OAG's report, the process of procurement for the BVR kits was kicked off in February 2012 when a tender for supply and delivery of BVR Kits and solutions was placed in the Daily Nation newspaper on 15th February 2012 and the Standard Newspaper on 22nd February 2012. The bids were scheduled to be opened on 16th March 2012 but pursuant to a pre-bidding conference that was held on 28th February 2012, a subsequent advertisement by the IEBC postponed the tender opening date to 26th March 2012 which was placed in the newspapers on 12th March 2012.⁷⁹

The procurement process underwent the various stages in line with the provisions of the Public Procurement and Disposal Act, 2005 such as the tender opening, evaluation and the adjudication of the tenders.⁸⁰ However, before the tender could be awarded to the successful bidder, the tender was terminated in July 2012 in very unclear circumstances.⁸¹ The cancellation created a crisis as the kits were required for the voter registration process and the subsequent general elections in

⁷⁸ *ibid.*

⁷⁹ *ibid.*

⁸⁰ For more information on the conduct of the phase 1 process, see *ibid* 89–113.

⁸¹ Moses Machira, 'Polls Team Cancels Sh3.9 Billion Voter Registration Tender' *Business Daily* <<https://www.businessdailyafrica.com/news/Polls-team-cancels-Sh3-9-billion-voter-registration-tender-/539546-1467366-jsdad4/index.html>> accessed 5 August 2018.

March 2013. This crisis led to the Kenyan government stepping in to undertake the procurement of the BVR kits by way of G to G procurement.⁸² No reason was provided by the chief executive officer of IEBC for the failure to award the tender but it was apparent that there were persons acting behind the scenes to create a crisis in order to have an excuse to procure the BVR from an already predetermined source and at a higher cost than would have been had the procurement been undertaken in accordance with Part 1.⁸³

3.2.1. Part 2 – Procurement Process for G to G procurement

As indicated earlier, this phase was triggered by the termination of the tender process undertaken in Part 1. Upon termination, the chairman of the IEBC released a press circular and announced that due to time constraints, the IEBC had made the decision to use the Optical Mark Reader (OMR) for the voter upcoming registration process.⁸⁴

According to the OAG's report, it was reported by the chief officer of IEBC that a consultative meeting between the two Principals of the ruling coalition of the Government of Kenya and the

⁸² Bernard Namunane and Lucas Barasa, 'Deal Struck to Buy Biometric Registration Kit' *Daily Nation* (6 August 2012) <<http://www.nation.co.ke/news/politics/Government-steps-in-to-buy-IEBC-voter-kit-/1064-1472950-11bm14tz/index.html>> accessed 19 November 2017.

⁸³ (n 12) 112–113.

⁸⁴ *ibid* 107.

IEBC at Harambee house on 6th August 2012 where the request by IEBC's for the procurement of the BVR equipment on a G to G procurement was agreed and approved.⁸⁵

The OAG stated that the records indicated that the Government of Canada might have been approached before the meeting as the Government of Canada affirmed its support to acquire the required electronic voter registration system equipment.⁸⁶ At a subsequent meeting, the Permanent Secretary within the Ministry of Finance, is reported to have stated that the Government of Canada had given an offer to support IEBC to acquire up to 15,000 BVR kits through a Government to Government borrowing which would not affect IEBC's budget.⁸⁷

The OAG report states that the chief executive officer of IEBC confirmed that 15,000 BVR kits were required by the IEBC which kits had to be supplied to IEBC by mid-September of 2012 in order for IEBC to meet its timelines. It was a requirement by the IEBC that this equipment would have to meet IEBC BVR technical specifications as set out in the tender specifications set out in Part 1 of the tender process that was eventually cancelled. However, it is important to note that this assertion was contradicted by SAFRAN Morpho of France (the eventual supplier of the BVR kits) who advised that the specifications for the G to G procurement were prepared by them.⁸⁸

⁸⁵ *ibid.*

⁸⁶ *ibid* 108.

⁸⁷ *ibid* 108–109.

⁸⁸ *ibid* 109.

3.3. How was G to G process managed?

The OAG's report indicates that according to a letter dated 9th August 2012 written by the Permanent Secretary in the Office of the Prime Minister, the process of how the G to G procurement process was to be undertaken were stated as follows:⁸⁹

- a) The Ministry of Finance would commence the G to G procurement process of procuring the help of the Canadian government to enable the procurement by IEBC of the BVR kits and system.⁹⁰
- b) A technical committee would be configured comprising of representatives from the IEBC, the Prime Minister's office, the Justice National Cohesion and Constitutional Affairs Ministry, Ministry of Finance and the Attorney General's office with a view of supervising the G to G procurement process.⁹¹
- c) It was IEBC's responsibility to arrange for the procurement of the BVR Kits under the supervision of the technical committee.⁹²

⁸⁹ *ibid* 111.

⁹⁰ *ibid*.

⁹¹ *ibid*.

⁹² *ibid*.

- d) The technical committee would prepare and submit reports for the Permanent Secretaries, whose ministries are members of the committee of the Cabinet overseeing the implementation of the Constitution of Kenya.⁹³
- e) The Permanent Secretaries were to prepare reports to the committee of the Cabinet overseeing the implementation of the Constitution of Kenya.⁹⁴

The Minister for Finance thereafter wrote a letter to the High Commissioner of Canada to officially seek the Canadian government's assistance by way of the provision to the Government of Kenya a loan facility for purposes of financing the procurement of BVR kits to be utilised by the IEBC. The letter stated that the estimated cost for the procurement of 15,000 BVR kits and training programme to be utilised by officers of the IEBC was about KES 6.2 billion.⁹⁵

According to the OAG report, it appeared that the Government of Canada was single sourced as the Canadian High Commissioner had been present at the initial meeting to deliberate on how to undertake the G to G procurement hence his presence at the initial meeting indicated that it was highly likely that the Government of Canada had already been approached.⁹⁶

⁹³ *ibid.*

⁹⁴ *ibid.*

⁹⁵ *ibid.*

⁹⁶ *ibid* 112.

A Memorandum of Understanding (MOU) made between the Kenyan government represented by the Ministry of Finance and Canadian government, represented by the Canadian Commercial Corporation was signed on 29th August 2012. The MOU set out certain goals and the timeliness within which these goals were to be achieved by the relevant parties. According to the MOU, only qualified Canadian suppliers were to be involved who would make the supplies through the Canadian Commercial Corporation.⁹⁷

The OAG report also notes that SAFRAN Morpho, a French company, is a subsidiary of Morpho (SAFRAN Group). Morpho Canada (which is a fully owned subsidiary of SAFRAN Morpho of France) was registered on 1st February 2013 when the G to G procurement process was ongoing and the Government of Kenya had already identified Canada as the source of BVR.⁹⁸

3.4. Whether the G to G procurement process was undertaken in accordance with Kenyan Procurement Law

At the time the G to G procurement process was undertaken, the main applicable procurement law was the PPDA 2005. It is however not certain what law was applied when undertaking the G to G procurement of the election kits for the following reasons.

⁹⁷ *ibid* 119.

⁹⁸ *ibid* 112 According to the OAG's report, it was also apparent that Morpho Canada was registered with the aim of conveniently creating a connection between the Canadian Commercial Corporation and SAFRAN Morpho in order to be in compliance with the provisions of the MOU made between the Government of Canada and the Government of Kenya.

According to the OAG's report, the Director of Procurement wrote to the Permanent Secretary in the Ministry of Finance through a letter dated 24th August 2012 advising the Permanent Secretary that section 6 of the PPDA 2005 was applicable.⁹⁹ Section 6 of the PPDA stated:

*“Where any provision of this Act conflicts with any obligations of the Republic of Kenya arising from a treaty or other agreement to which Kenya is a party, this Act shall prevail except in instances of negotiated grants or loans”*¹⁰⁰

The OAG noted that the Attorney General however had a different view. In his letter dated 18th September 2012 to the Permanent Secretary in the Ministry of Finance, he stated that provisions of section 6 of the PPDA would apply in the event external financing (for example, through a negotiated loan) finances a project. He further stated that the procurement of the BVR kits could not fall under Section 6 of the PPDA 2005 because neither the Canadian Government nor SAFRAN Morpho advanced any loan and that the supplier had been requested to propose a quotation based on IEBC's technical specifications.¹⁰¹ The loan was eventually negotiated between the Government of Kenya GOK and Standard Chartered Bank based in London and not Canadian Commercial Corporation.

⁹⁹ *ibid* 116.

¹⁰⁰ Public Procurement and Disposal Act (Act No. 3 of 2005, Laws of Kenya) s 6(1).

¹⁰¹ (n 12) 116–117.

All procuring entities were required to use open tender process and only utilise any alternative method (such as direct procurement, request for proposal and restricted tendering) to the extent the use of such alternative procedures is permitted under PPDA 2005.¹⁰²

A procuring entity may only use direct procurement provided that its use is not aimed at the avoidance of competition. Further, direct procurement may be utilised if the supply of the goods may only be undertaken by one person and the goods are required urgently.¹⁰³ It is also important to note that the PPDA 2005 states that the circumstances giving rise to an urgency should such that they could be foreseen and were not occasioned by the dilatory conduct of the entity that is procuring the goods.¹⁰⁴ In our case, the CEO of the IEBC cancelled the Part 1 tender process which led to the urgency in the direct procurement of the BVR kits by way of G to G procurement. It would therefore not have been possible to justify the direct procurement in accordance with the provisions of the PPAD 2005 since IEBC was responsible in the creation of the situation that necessitated the urgent procurement of the BVR kits.

¹⁰² Public Procurement and Disposal Act (Act No. 3 of 2005, Laws of Kenya) s 29.

¹⁰³ *ibid* 74.

¹⁰⁴ *ibid* 74(3)(c).

3.5. Findings on the Cost-Effectiveness of the G to G Process - A comparison of the cost between BVR Part 1 and BVR Part 2

Following the cancellation of Part 1 of the tender, the BVR kits were subsequently procured by the IEBC at a cost of € 65,152,629.00.¹⁰⁵ The OAG analysed the costs of the BVR by comparing the costs of the equipment through the cancelled open-tendered process (Part 1) and the eventual cost of the equipment procured through the G to G procurement process (Part 2). It is important to note that the company that eventually supplied BVR under Part 2, SAFRAN Morpho from France, had initially participated in the first part of the open tender process with a bid of € 27,665,786 in respect of 9,750 BVR kits but the company did not succeed during this open tender process.¹⁰⁶ As SAFRAN Morpho participated in both phases, it was possible to conduct a comparison between the two phases as illustrated in the table below:

¹⁰⁵ (n 12) 124.

¹⁰⁶ *ibid* 126.

Comparison Between BVR Part 1 and Part 2							
Details/Description	SAFRAN Morpho Tender Document in BVR Part 1				SAFRAN Morpho Financial Proposal Document in BVR Part 2		
	Quantity	Price Per Unit in €	Total Cost in € (Before Prorating)	Total Cost in € (After Prorating)	Quantity	Price Per Unit in €	Total Cost in €
Complete BVR Kits(equipped with power source)	9,750	2,127.44246	20,742,563.99	20,742,563.99			
Complete BVR kits equipped with generator					4000	3,005.199	12,020,796.00
Complete BVR kits equipped with Solar panel					8000	2,852.00	22,816,000.00
Complete BVR kits Not equipped with power source					3000	2,614.199	7,842,597.00
BVR Kits software (for supplied 9750 and existing 1500)	9,750	100.00	975,000.00	975,000.00	15000	182	2,730,000.00
	9,750	2,227.44246	21,717,563.99	21,717,563.99	15000		45,409,393.00
SUB-TOTAL(Prorated Total Cost if 15,000 BVR kits(including software) were purchased @ unit price of 2,227.442) Vs actual cost at Sept 2012	15,000	2,227.44246	N/A	33,411,636.90	15,000	3,027.293	45,409,393.00
Additional 4-4-2 fingerprint readers	1,500	801.00	1,201,177.00	1,201,177.00	1800	976	1,756,800.00
Additional equips for IEBC poll book							29,800.00
Additional BVR software	1500	100	149,775.00	149,775.00	1800	182	327,600.00
Central Voter data base management System			1,379,695.00	1,379,695.00			2,131,400.00
Services (Installation & configuration, Maintenance, Training.	1	2,345,890.00	2,345,890.00	2,345,890.00			
Central Biometric Matching Solution	1	871,685.00	871,685.00	871,685.00			
Additional airfreight charges							1,223,902.00
CCC Contract award and Management fee							2,788,155.00
Total cost as per Bid Doc/Financial Proposal)				39,359,858.9			58,551,200.00
Less 4% Discount				0			2,342,048.00
Total cost as per Bid Doc/Financial Proposal)			27,665,785.99	39,359,858.9			56,209,152.00

From: "Special Audit on Procurement of Electronic Voting Devices For the 2013 General Election by the Independent Electoral and Boundaries Commission" page 125

From the above analysis by the OAG, it was noted that there was a variation of the cost and a change in specifications between the procurement process undertaken in Part 1 and the BVR kits

in the procurement process undertaken in Part 2. In the initial attempt at procurement, the IEBC had stated that they required a total of 9,750 BVR kits. However in Part 2 of the procurement process, the number was increased to 15,000 units.¹⁰⁷

The OAG notes that in part 1, the entire 9,750 BVR kits would have been equipped with an unspecified power source and each kit would have cost € 2,227.442 whereas in Part 2, the BVR kits were either eventually provided with different power source or without having any source of power.¹⁰⁸ It was therefore found that BVR kits procured in Part 2 through the G to G procurement process were more expensive due to the fact that a BVR kit without a power source was supplied at unit cost of € 2,614.199 while on the other hand, in the open tender process in Part 1, a similar BVR kit with a power source would have been acquired at a price of € 2,227.442.¹⁰⁹ Further, the unit cost for additional equipment in Part 1 was € 801 while the same equipment was priced at € 976 in Part 2. In the same breath, the unit cost for software was € 100 in BVR part 1 while the same cost € 182 in Part 2.¹¹⁰

The OAG's report further points out that SAFRAN Morpho of France, the eventual supplier of the BVR kits had lodged its tender during Part 1 but was thereafter disqualified at the preliminary

¹⁰⁷ *ibid* 23.

¹⁰⁸ *ibid* 126. – The Auditor General's report clarifies that a total of 4,000 units were equipped with generators at a unit cost of € 3,005.199, while 8,000 units were equipped with a solar panel at a unit cost of € 2,852 and 3,000 units were not supplied with a power source and the unit cost of each was € 2,614.199.

¹⁰⁹ *ibid*.

¹¹⁰ *ibid*.

stages. The company initially offered to supply 9,750 BVR Kits at a total cost of € 27,665,786 during Part 1 but eventually supplied 15,000 BVR kits at a total cost of € 56,209,189.68 in Part 2. If one was to proportionally prorate the costs, SAFRAN Morpho could have charged € 42,577,433.90 for 15,000 kits which was a difference of € 13,631,755.78 that is equivalent to an increase in the cost by 32.02 % from the tender price under Part 1. This therefore meant that the Government of Kenya made a payment of € 13,631,755.78 over and above the price that SAFRAN Morpho initially tendered during the Part 1 process.¹¹¹

The OAG's report noted that the G to G procurement process also entailed the use of a loan facility from Standard Chartered Bank United Kingdom in the amount of € 65,152,629 (plus interest). The effect of this is that the Government of Kenya ended up spending € 22,575,195.10 over and above what SAFRAN Morpho had quoted during the Part 1 open tender process which amount would have been a saving had the Government of Kenya procured the BVR kits from SAFRAN Morpho during Part 1.¹¹² Further, the Government of Kenya will be expected to pay interest on the loan from Standard Chartered Bank United Kingdom in the amount of € 14,414,742.42 which will bring the total amount that could have been saved had SAFRAN Morpho supplied the BVR kits at the Part 1 tendered price to € 36,989,937.52.¹¹³

¹¹¹ *ibid.*

¹¹² *ibid* 127.

¹¹³ *ibid* 128.

As indicated in Chapter One, value for money requires any contract should be concluded on the best available terms. In addition to a procuring entity accepting the lowest price, the procuring entity should also consider other features of the contractor's product.¹¹⁴

In addition to the fact that it was more expensive to procure the BVR kits under Part 2, the BVR kits which were eventually provided either had a different power source from IEBC's specifications or did not have any source of power.¹¹⁵

Based on the above cost effective analysis, it can be concluded that the Kenyan Government did not receive value for its money when procuring the BVR kits under a G to G procurement arrangement as it was evident that the BVR kits could have been procured at a reduced price by either:

- (a) Completing the Part 1 procurement process;¹¹⁶ or
- (b) Engaging directly with SAFRAN Morpho.¹¹⁷

¹¹⁴ Arrowsmith, Linarelli and Wallace (n 15) 29.

¹¹⁵ (n 12) 126. – The Auditor General's report clarifies that a total of 4,000 units were equipped with generators at a unit cost of € 3,005.199, while 8,000 units were equipped with a solar panel at a unit cost of € 2,852 and 3,000 units were not supplied with a power source and the unit cost of each was € 2,614.199.

¹¹⁶ *ibid* 26.

¹¹⁷ *ibid*.

CHAPTER FOUR: FINDINGS, SUMMARY AND CONCLUSION

In conclusion, this study points out the following:

4.1. The Cost-effectiveness in G to G Procurement

From a review of the procurement of the BVR devices by the IEBC, the study has indeed illustrated that the G to G procurement process does not lead to the procurement of goods, works and services on the best available terms and therefore such procurement is not in accordance with a system that is cost-effective as is required under the Constitution of Kenya. This is due to the lack of transparency, accountability and competitiveness throughout the process.

The legitimacy theory advances that firms (including public bodies) should undertake measures with a view of ensuring that their performance and activities are acceptable to the society or community.¹¹⁸ The public expects that any procurement ought to be cost-effective. Institutions have the obligation to justify their actions such as procurement to their respective key actors and should state its benefits to the society.¹¹⁹

¹¹⁸ Wilmshurst and Frost (n 19) 11.

¹¹⁹ *ibid.*

4.2. Lack of Oversight and Legislation

There has been an increase in the utilisation of G to G procurement as a method of procurement. The study illustrates the effects of not having in place sufficient regulation with regards to the G to G procurement process as this process has been excluded from the provisions of the PPAD 2015.

It is important to note that the agency theory advances the argument that in order to prevent the divergence of the goals of the between the agent and the principal (and in effect, any conflict of interest by the agent), the principal tends to rely on the supervisory strategies of monitoring and bonding.¹²⁰ An agent would always prefer to have reduced supervision when undertaking any action on behalf of the principal and especially in the event his interests deviate from the goal of the principal. In the case study, it could be inferred that the cancellation of the Part 1 open tender by IEBC was an attempt to create a crisis so that the only remaining option was to go through a G to G procurement process which is a process that is not adequately regulated.

Despite having one of the most comprehensive provisions on procurement processes, it is absurd that the PPAD 2015 would then again create a loophole by excluding G to G procurement process keeping in mind the perceived corruption and other controversies surrounding Kenyan public procurement processes. A reason for this could be due to the absence of political goodwill in providing a robust legislative framework on public procurement. It is important to note that there are various studies which have confirmed that interference in the process of procurement hinders

¹²⁰ Yukins (n 16) 65.

the implementation of Kenyan procurement law as it was intended under the Constitution of Kenya. Further political patronage always plays a key role in determining procurement processes and it is highly likely that this influences the use of G to G procurement process.¹²¹

¹²¹ See Kimani, Odek and Waris (n 6) 114.

CHAPTER FIVE: RECOMMENDATIONS

5.1. Legal Framework

The PPAD 2015 should be reformed by extending its application to the G to G procurement processes so that the general principles and rules of procurement under the PPAD 2015 would apply to G to G procurement.¹²² This ought to be the ultimate goal.

However in the meantime and as a short term measure, the Kenyan Government should formulate a comprehensive policy on the G to G procurement process since there is a lacuna in the law. Such policy should put in place measures that ensure any G to G procurement is undertaken in a fair, equitable, transparent, competitive and cost-effective manner. In order to ensure that value for money is achieved, the policy should include measures such as requiring the conduct of a value for money assessment of any G to G procurement before the entry of the resultant contract.

5.2. The use of G to G procurement process

As a general rule, the use of G to G procurement should be used sparingly. This is due to the fact that it is not adequately regulated and is therefore prone to manipulation with the public entity being at risk of not attaining its value for money.

¹²² These general principles and basic procurement rules are set out in Parts 6 and 7 of the PPAD 2015.

5.3. Further Research

Finally, further research should be conducted in the area of G to G procurement to ascertain whether it is a desirable process of procurement. This study has focused on the cost-effectiveness of G to G procurement. Other studies could focus on other key areas of procurement such as determining whether G to G procurement is fair, equitable, transparent and competitive.

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