

**ATTAINING SUBSTANTIVE EQUALITY THROUGH GENDER-RESPONSIVE PUBLIC  
PROCUREMENT PRACTICES IN KENYA**

**RESEARCH PAPER SUBMITTED TO THE UNIVERSITY OF NAIROBI IN PARTIAL  
FULFILMENT OF THE REQUIREMENTS FOR THE AWARD OF THE DEGREE OF MASTER  
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## TABLE OF CONTENTS

DECLARATION OF ORIGINALITY .....	VI
ACRONYMS AND ABBREVIATIONS .....	VIII
LIST OF STATUTES .....	IX
Kenyan Statutes .....	ix
South African Statues .....	ix
LIST OF CASES .....	X
DEDICATION .....	XI
ACKNOWLEDGMENT .....	XII
CHAPTER 1:0: INTRODUCTION.....	1
1.1. Background .....	1
1.2 Problem Statement .....	4
1.3 Objectives .....	4
1.4 Research Questions .....	4
1.5 Hypothesis.....	5
1.6 Justification .....	5
1.7 Methodology .....	5
1.8.0 Theoretical Framework.....	6
1.8.1 Liberal Feminism Theory .....	6
1.8.2 Transaction Cost Theory.....	8
1.8.3 Empowerment Theory .....	9

1.9.0 Literature Review.....	11
1.9.1 Evolution of gender-responsive procurement practices.....	11
1.9.2 Gender and Public Procurement .....	12
1.9.3 Linkages Between Gender, Substantive Equality, and Public Procurement .....	15
1.9.4 Challenges Facing Gender-Responsive Procurement.....	19
1.10 Scope and Limitation .....	21
1.11 Chapter Outline.....	22
CHAPTER 2.0: EVOLUTION OF GENDER-RESPONSIVE PROCUREMENT PRACTICES IN KENYA.....	24
2.1 Introduction.....	24
2.2 Public Procurement and Substantive Gender Equality .....	24
2.3.0 Gender-Responsive Procurement Practices in Kenya.....	27
2.3.1 The Public Procurement and Disposal Act No. 3 of 2005 .....	27
2.3.2 Constitution of Kenya, 2010 .....	31
2.3.3 Public Procurement and Asset Disposal Act, 2015 .....	33
2.3.4 Public Finance Management Act, 2014 .....	35
2.4 Institutional Framework.....	36
2.4.1 The Ministry of Finance) .....	36
2.4.2 AGPO Program.....	38
2.4.3 The PPRA .....	38

2.4.4 Review Board.....	39
2.4.5 Government Ministries .....	42
2.4.6 County Government-County Treasury .....	43
2.4.7 Parliamentary Committees.....	43
2.4.8 Ministry of Public Service, Youth and Gender Affairs .....	44
2.4.9 National Gender and Equality Commission (“NGEC”) .....	44
2.5 Conclusion .....	45
CHAPTER THREE 3.0: DATA ANALYSIS AND RESULTS .....	47
3.1 Introduction.....	47
3.2 Research Design and Rationale .....	47
3.3 Results.....	48
Table 1: Equal Access and Opportunities to Procurement .....	49
Table 2: Costs Related to Opportunistic Procurement Tendencies .....	50
Table 3: Implementation of Gender Responsive Public Procurement Practices. .....	52
3.4 Summary of Findings.....	53
CHAPTER FOUR 4.0: CONCLUSIONS AND RECOMMENDATIONS .....	55
4.1 Conclusions.....	55
BIBLIOGRAPHY .....	61
Books .....	61
Journals .....	62

Dissertations.....	65
Discussions .....	66
Reports .....	66
Electronic Sources .....	66
APPENDICES .....	68
Appendix 1: General Questionnaire.....	68
Appendix 2: Research Permit .....	74

## **DECLARATION OF ORIGINALITY**

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Dr. Seth Wekesa

A handwritten signature in blue ink, appearing to be 'Seth Wekesa', written over a faint circular stamp.

Signed:

Date: 01 November 2023.

## **ACRONYMS AND ABBREVIATIONS**

AGPO	Access to Government Procurement Opportunities.
B-BBEEA	Broad-Based Black Economic Empowerment Act.
BRS	Business Registration Service.
ICT	Information Communication Technology.
KNBS	Kenya National Bureau of Statistics.
LPO	Local Purchase Orders.
NGEC	National Gender and Equality Commission.
PPDA	Public Procurement and Disposal Act.
PPDR	Public Procurement and Disposal Regulations.
PPRA	Public Procurement Regulatory Authority.
SDG	Sustainable Development Goal.
SMEs	Micro and Small Enterprises.
Review Board	Public Procurement Administrative Review Board.



## **LIST OF STATUTES**

### **Kenyan Statutes**

The Constitution of Kenya, 2010.

The National Gender and Equality Commission Act, 2011.

The Public Finance Management Act, 2014.

The Public Procurement and Asset Disposal Act, 2015.

The Public Procurement and Asset Disposal Regulations, 2020.

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

The Public Procurement and Disposal (Preference and Reservations) Regulations, 2020.

The Public Procurement and Disposal Act, 2005.

The Public Procurement and Disposal (County Government) Regulations 2013.

The Public Procurement and Disposal (Preference and Reservations (Amendment No. 2) Regulations, 2013.

### **South African Statues**

The Constitution South African, 1996.

## **LIST OF CASES**

*Asal Frontiers Limited v the Accounting Officer Kenya National Highways Authority & Another*, Review Board Application No. 9 of 2023.

*Asal Frontiers Limited v the Accounting Officer Kenya National Highways Authority & Another*, Review Board Application No. 18 of 2023.

*Blue Sea Services Limited v the Accounting Officer Kenya Ports Authority & Another*, Review Board Application No. 57 of 2023.

*Kenya Pipeline Company Limited v Hyosung Ebara Company Limited & Others*, Court of Appeal (Nairobi) Civil Appeal Number 145 of 2011.

*Peesam Limited v the Accounting Officer Kenya Airports Authority & Another*, Review Board Application No. 97 of 2022.

*Peesam Limited v the Accounting Officer Kenya Airports Authority & Another*, Review Board Application No. 55 of 2023.

*Space Contractors & Suppliers Investment Limited v the Accounting Officer Kenya Ports Authority & Another*, Review Board Application No. 52 of 2023.

*Swiftmax Services Limited v the Accounting Officer (Department of Health Services) County Government of Kericho*, Review Board Application No. 95 of 2022.

## **DEDICATION**

To my parents, the late Mr. Samuel Wamwangi Nyuguto and Mrs. Beatrice Mutheu Nyuguto, for teaching me courage, and learning is a life-long commitment. The financial, emotional, and social support, love, and encouragement have gone a long way to enable this research paper's completion.

To my siblings Joy Nyuguto, Millicent Nyuguto, Mwangi Nyuguto, and Wasike Faith, close friends, and extended family, much appreciation for the immense support, morale, and encouragement to complete this research paper.

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## CHAPTER 1:0: INTRODUCTION

### 1.1. Background

Women are systemically excluded from mainstream social, political, economic, and cultural activities, including public procurement.<sup>1</sup> Their marginalisation necessitates embedding gender-responsive procurement practices.<sup>2</sup> The Kenya National Bureau of Statistics (“KNBS”) also notes that progress toward women’s empowerment and efforts towards gender equality is slow.<sup>3</sup>

To remedy the situation, the National Treasury has adopted strategies such as building capacity for women to participate in public procurement and developing a preference and reservation monitoring and evaluation framework.<sup>4</sup> The National Treasury, in its mid-term plan for the year 2018-2022, recommended the enhancement of women’s participation in gender-responsive procurement programs and policies through women's integration within policy formulation, planning, and budgeting processes.<sup>5</sup> The gender-responsive interventions by the National Treasury include increasing awareness among women, increasing funding opportunities, and increasing the Access to Government Procurement

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<sup>1</sup> Wanjala B M and Were M, ‘Gender Disparities and Economic Growth in Kenya: A Social Accounting Matrix Approach’ (2009) 15(3) *Feminist Economics* 227.

<sup>2</sup> National Gender and Equality Commission, ‘Flares of Marginalisation among Selected Minority Communities of Kenya’ National Commission on Gender and Equality Commission (Nairobi, 12 May 2013). <<https://www.ngeckeny.org/Downloads/flares-of-marginalisation-in-Kenya.pdf>> accessed 26 May 2020.

<sup>3</sup> GOK, ‘Women Empowerment Index Report 2020’ (Government Printer, 2020).

<sup>4</sup> GOK, ‘Strategic Plan 2018/19 – 2022/23 Sustained Socio-Economic Transformation for Job Creation and Shared Prosperity’ (Government Printer, 2020).

<sup>5</sup> *ibid.*

Opportunities (“AGPO”) program registered enterprises to 210,000 to ensure full access to the reserved government 30% procurement opportunities.<sup>6</sup>

The State Department for Gender and Affirmative Action in its “Women Economic Empowerment Strategy 2020-2025”, notes the challenges women face within public procurement that led to low uptake of procurement opportunities.<sup>7</sup> Women, especially in the agricultural, livestock, and construction sectors, perform relatively poorer in procurement due to market access, ICT challenges, and lack of value-addition facilities.<sup>8</sup> As a result, women groups cannot take up the available gender-responsive procurement opportunities, limiting their intended impact.

A study of the AGPO program reported that between 2013 and 2016, more men were registered than women out of the 40,860 firms registered under the program.<sup>9</sup> Men-owned businesses account for 54.0%, women-owned businesses account for 41.1% and persons with disabilities account for 4.9%, however, the study did not reveal data relating to incidences of double registration across the three categories of special groups categories.

The study showed that despite women-owned businesses accounting for 41.1% of the registered firms, they received 26% of the total amount of money reserved in the budget for the women category while the remaining funds were neither allocated nor utilised.

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<sup>6</sup> GOK, ‘Third Medium Term Plan 2018 – 2022 Transforming Lives: Advancing socio-economic development through the “Big Four”’ (Government Printer, 2018).

<sup>7</sup> GOK, ‘Ministry of Public Service and Gender State Department for Gender: Women Economic Empowerment Strategy 2020-2025’ (Government Printer, 2020).

<sup>8</sup> *ibid.*

<sup>9</sup> HIVOS, ‘Kenya’s Efforts to Empower Women, Youth and Persons with Disability through Public Procurement’ HIVOS (Nairobi, 4 August 2018) <<https://www.openupcontracting.org/assets/2018/04/Agpo-Report-Web-version-Full-Report.pdf>> accessed 01 July 2022.

<sup>10</sup>Further, the study revealed that 34.9% of the AGPO-published tender categories seek construction-related services yet only 6% of AGPO firms are engaged in construction work.<sup>11</sup>

Consequently, women miss out on these reserved opportunities since women-owned businesses dominate in the agribusiness, food supplies, and cleaning services categories at 3.5%, 3.17%, and 3.17%, respectively.<sup>12</sup> While the government has reserved tenders for women in certain categories, women's businesses are underrepresented and unqualified to take up the reserved tender opportunities, akin to taking to giving with one hand and taking with the other hand.

Regarding the national reach of the AGPO program, Nairobi County dominates with 67% of registered firms under the program, while Mombasa County accounts for 6% and Kiambu County accounts for 5%. Nakuru and Uasin Gishu account for 2% and the rest of the counties account for 1% of registered firms under the program.<sup>13</sup> Nationally concerning tenders above 5 million, the study by Hivos revealed that out of a sample of 2,232 tenders, 172 were awarded to AGPO-listed firms valued at around 7 million in value, which in absolute values falls far below the legal requirement that 30% value of tenders is awarded under the program.<sup>14</sup>

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<sup>10</sup> GOK, 'KNBS Kenya Economic Survey Report 2021' (Government Printer, 2021).

<sup>11</sup> *ibid.*

<sup>12</sup> HIVOS, (n 9).

<sup>13</sup> *ibid.*

<sup>14</sup> *ibid.*

## **1.2 Problem Statement**

The problem this research paper addresses is whether the disconnect between the gender-responsive procurement laws and the existing policies and practices has an impact on the attainment of substantive equality for women. The current frameworks do not effectively eliminate women's marginalisation, discrimination, and exclusion within public procurement due to the disconnect between the existing law and the existing gender-responsive procurement practices and policies. Women-owned businesses continue to compete relatively poorer within public procurement despite government interventions as women-owned businesses are unable or unqualified to take up the reserved procurement opportunities. While Kenya has made commendable strides in achieving formal equality within public procurement, the issues of the disconnect between the existing framework and policies have limited women's involvement in procurement and the attainment of substantive equality.

## **1.3 Objectives**

This research paper has two distinct objectives. The first objective is to assess the regulatory framework governing gender-responsive procurement practices in Kenya. The second objective is to assess whether the disconnect between the framework governing gender-responsive procurement practices and the existing policy has an impact on the attainment of substantive equality.

## **1.4 Research Questions**

The paper answers two research questions. The first question is what is the regulatory framework governing gender-responsive procurement practices. The second question is



whether the disconnect between the framework governing gender-responsive procurement practices and the existing policy has an impact on the attainment of substantive equality.

### **1.5 Hypothesis**

The paper tests two hypotheses. The first is that substantive equality has been attained through gender-responsive public procurement practices in Kenya. The second hypothesis is that substantive equality has yet to be reached through gender-responsive public procurement practices in Kenya.

### **1.6 Justification**

This paper builds on the limited literature addressing women's engagement in public procurement in Kenya and specifically, its impact on the attainment of substantive equality. Public procurement is viewed as an effective tool in the Kenyan government's hands to achieve equality objectives by implementing gender-sensitive procurement practices. However, this is sometimes not the case. The paper highlights the disconnect of the existing laws and policies that impede women's equality in implementing gender-responsive practices. This paper shall be instrumental in paving the way for public discussions and policy reform.

### **1.7 Methodology**

This paper uses a mixed research design: doctrinal, quantitative, and qualitative research. Doctrinally, the paper analyses the law relating to gender-responsive procurement laws and underlying legal policies within a legal context. The paper reviews relevant statutes and subsidiary regulations, government reports from the Government printer and online legal resources, books, and scholarly articles accessed from various libraries. A survey in a semi-

structured questionnaire to key informants sampled from selected institutions, including the AGPO program under the National Treasury, the Public Procurement Regulatory Authority (“**PPRA**”), the Public Procurement Review Board (“**the Review Board**”), and NGEIC, assesses whether gender-responsive practices contribute to substantive equality in Kenya.

## **1.8.0 Theoretical Framework**

### ***1.8.1 Liberal Feminism Theory***

The liberal feminist theory explains pertinent issues surrounding inequality, gender, and women's empowerment.<sup>15</sup> The liberal feminist theory is associated with scholars such as Martha Nussbaum, Drucilla Cornell, Diana Furchtgott-Roth, and Christine Stolba.<sup>16</sup> The core tenets of the liberal feminist theory focus on the ideas of personal autonomy and political autonomy.<sup>17</sup> It posits that women should live their chosen lives and exercise personal autonomy through unfettered access to autonomy-enabling conditions. However, the enabling conditions need to be more available within the social arrangements, which curtails the ability of women to exercise this kind of autonomy and thrive.<sup>18</sup> The theory explains that the women's movement has a cardinal duty to identify and promote these enabling conditions. Some of these enabling conditions include having access to options whereby women's options are limited, leading to economic deprivation and the

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<sup>15</sup> Schwartzman L, *Challenging Liberalism: Feminism as Political Critique* (Pennsylvania State University Press 2010).

<sup>16</sup> Pearce D, ‘The Feminisation of Poverty’ (1987) 21 (1) *Journal of Economic Issues* 329.

<sup>17</sup> *ibid.*

<sup>18</sup> Madsen D, *Feminist Theory and Literary Practice* (Pluto Press 2000).

feminisation of poverty.<sup>19</sup> Women's options concerning access to education, opportunities, training, and economic power are also limited.<sup>20</sup> The theory further posits that the needs and interests of women are inadequately reflected within the conditions they live under and that this is permeated by limited women's engagement in democratic self-determination.<sup>21</sup>

Diana Furchtgott-Roth and Christine Stolba criticise this theory, stating that systematic economic discrimination against women does not square with the evidence and that there is no evident marginalisation of women.<sup>22</sup> They also criticise this theory that it would do better to support women in their traditional roles rather than challenging the remaining inequalities.<sup>23</sup>

The theory's implication to the problem statement is that it enunciates and acknowledges the limited access to autonomy-enabling conditions in public procurement, necessitating the identification of inherited traditions and institutions within public procurement that limit women's inclusion and address them. These enabling conditions for women are the gender-responsive procurement practices, which the paper shall assess whether the disconnect between existing laws and policies and practices affects the attaining substantive equality.

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<sup>19</sup> Pearce D, 'The Feminisation of Poverty' (1987) 21 (1) *Journal of Economic Issues* 329.

<sup>20</sup> *ibid.*

<sup>21</sup> *ibid.*

<sup>22</sup> Pettersson K, Helene A, Karin B and Malin T, 'In the Name of Women? Feminist Readings of Policies for Women's Entrepreneurship in Scandinavia' (2017) 33(1) *Scandinavian Journal of Management* 50.

<sup>23</sup> Morgan B L, 'Putting the Feminism into Feminism Scales: Introduction of a Liberal Feminist Attitude and Ideology Scale (LFAIS)' (1996) 34(5) *Sex Roles* 359.

### *1.8.2 Transaction Cost Theory*

The paper applies the transactional theory to link gender-responsive procurement practices, gender, and procurement decisions by public bodies, which is the focus of the research questions. The theory explains the effects of bounded rationality in decision-making processes, opportunistic tendencies of agents, and market tendencies that affect women in public procurement. It is associated with scholars such as Oliver Williamson, Ronald Course, Yochai Benkler, and Stephen Cheung.<sup>24</sup>

The Transactional Cost Theory is concerned with debunking the problem of social cost within procurement transactions. It opines that the transaction costs are the costs of running the systems, including *ex-ante* and *ex-post* costs.<sup>25</sup> Williamson states that the transaction costs include the direct costs of contracting and opportunity costs from inferior government decisions.<sup>26</sup>

The core tenet of this theory is that sources of transactional costs are bounded rationality in decision-making processes, opportunistic tendencies of agents, and market tendencies.<sup>27</sup>

The bounded rationality behind decision-making is attributed to the limitation of the human ability to gather, analyse information, and understand business transactions. Opportunism emanates from the self-interests of players within a transaction, while uncertainty results

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<sup>24</sup> Foss Nicholai J (Ed), *The theory of the firm: Critical Perspectives on Business and Management* (Taylor & Francis 2000).

<sup>25</sup> Rindfleisch A, 'Transaction Cost Theory: Past, Present and Future' (2019) 10(5) *AMS Review* 3.

<sup>26</sup> *ibid.*

<sup>27</sup> *ibid.*

from the unpredictable challenges of all transactions.<sup>28</sup> The theory proposes that these challenges, especially contractual uncertainties, can be met through safeguards or trusts that enable cost-effective governance structures within competition environments.<sup>29</sup>

Ghoshal and Moran criticise the theory for being narrow-minded and not considering any positive human behaviours within procurement.<sup>30</sup> In the context of this paper's statement of the problem, this theory explains why substantive justice for women has not been reached despite existing gender-sensitive procurement practices and laws. The theory's impact on the research question is explaining whether the safeguards that enable cost-effective governance structures within gender-responsive gender practices have been effective.

### ***1.8.3 Empowerment Theory***

This research paper applies the empowerment theory or affirmative action theory to debunk the ideas surrounding public procurement to achieve social goals of substantive equality as a form of positive discrimination to attain substantive equality of women within procurement through gender-responsive policies and laws.<sup>31</sup> Its' theoretical model helps to understand the process and consequence of control and influence over decisions that affect one's life, organisational functioning, and the quality of community life.<sup>32</sup> The theory is

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<sup>28</sup> Foss Nicholai J (Ed), *The theory of the firm: Critical Perspectives on Business and Management* (Taylor & Francis 2000).

<sup>29</sup> *ibid.*

<sup>30</sup> Ghoshal S and Moran P, 'Bad for Practice: A critique of the Transaction Cost Theory' (1996) 21(1) *Academy of Management Review* 13.

<sup>31</sup> Zimmerman M A, 'Empowerment Theory: Psychological, Organisational and Community Levels of Analysis' (2000) 1 (1) *In Handbook of Community Psychology* Springer 43.

<sup>32</sup> *ibid.*

associated with scholars such as Perkins, Zimmerman, Rappaport, Fredman, and Warschausky. It defines empowerment as the process in which people can gain control and resources to enable them to have power over their lives to achieve their highest aspirations.<sup>33</sup>

Empowerment theory's core tenets are that empowerment is necessary to eliminate the impediments to access resources to individuals or groups, including marginalisation, discrimination, and socio-stratification.<sup>34</sup> To achieve social and policy change, the theory links the individual's strengths and capabilities with natural helping systems to foster proactive behaviour.<sup>35</sup>

The theory advocates empowerment-oriented interventions to address or eliminate challenges, create capacity, provide opportunities, and develop knowledge and skills.

<sup>36</sup>Fredman opines that empowerment creates a fusion of status and socioeconomic disadvantage by attaching socioeconomic benefits to those disadvantaged by status. The redress of disadvantage by affirmative action is effective and beneficial to the disadvantaged group and society if it brings about structured change, making it genuinely transformative.<sup>37</sup>

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<sup>33</sup> Robbins SP, Chatterjee P, Canda ER and Leibowitz G, *Contemporary Human Behavior Theory: A Critical Perspective for Social Work* (Pearson 1998); Migwi SM, 'Public Procurement Management and Access to Government Procurement Opportunities (AGPO) Policy' (PhD Thesis, University of Nairobi, 2018).

<sup>34</sup> Douglas D P and Zimmerman M A, 'Empowerment Theory, Research and Application' (1995) 23 (5) *American Journal of Community Psychology* 569.

<sup>35</sup> *ibid.*

<sup>36</sup> Zimmerman MA and Warschausky S, 'Empowerment Theory for Rehabilitation Research: Conceptual and Methodological Issues' (1998) 43(1) *Rehabilitation Psychology* 3.

<sup>37</sup> Fredman S, 'Combating Poverty through Equality Law – Possibilities and Pitfalls' (2009) *The Equal Rights Review* 1.

Scholars such as Nancy Fraser state that affirmative action has a backlash effect, where those groups that benefit from special measures to end their discrimination and inequality face are further stigmatised for getting special treatment.<sup>38</sup> However, the paper justifies the empowerment theory on the premise that the paper assumes that empowerment remains a critical enabler and facilitator of substantive equality. This theory is also essential to the research as it explains and justifies the positive discrimination intended social goals and preferential treatment of women as a special group within the procurement process aimed at achieving substantive equality.

## **1.9.0 Literature Review**

### ***1.9.1 Evolution of gender-responsive procurement practices***

The earliest uses of procurement for social objectives like achieving equality, are traceable in the United States and England in the 19<sup>th</sup> Century.<sup>39</sup> The United States formulated affirmative action policies in the 1950s and 1960s by adopting procurement mechanisms that went beyond the fair price for public goods to prohibiting discrimination against the racial black minority, tackling unemployment, and providing opportunities to disadvantaged groups.<sup>40</sup>

Other responsive practices included preferential treatment to contracting for blind-made products at specific prices and for a specified time and the use of a “set aside” program” to

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<sup>38</sup> Fraser N, *Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation* (Routledge 1998); Fraser N, *Justice Interruptus: Critical Reflections on the “Post-Socialist” Condition* (Routledge 1997).

<sup>39</sup> McCrudden C, ‘Using Public Procurement to Achieve Social Outcomes’ (2004) 28 (4) *Natural Resources Forum* 257.

<sup>40</sup> *ibid.*

ensure that proportions of government contracts were reserved for the black-owned businesses to promote the growth of the black entrepreneurial middle class. Britain adopted an offer-back system, where an offer by a registered supplier registered as a member of a disadvantaged group that is rejected solely on the issue of price is allowed to resubmit a revised tender to match the best market price to bolster increased engagement in procurement.<sup>41</sup>

The affirmative action movement introduced Gender-responsive procurement practices in the late 1960s. As members of disadvantaged groups, these policies granted women equal access and opportunities to government procurement.<sup>42</sup> Katiyatiya defines affirmative action as “any remedial policy that seeks to secure and provide advantages for the (previously) disadvantaged.”<sup>43</sup> Affirmative action acknowledges that treating all equally in society will achieve very little if some people face barriers and disadvantages experienced by others within the same community.<sup>44</sup> Affirmative action justifies the redistribution of benefits to disadvantaged groups because it reduces the effects of distributive inequalities brought about by discrimination.<sup>45</sup>

### ***1.9.2 Gender and Public Procurement***

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<sup>41</sup> *ibid.*

<sup>42</sup> Sen G, ‘Gender Equality and Women's Empowerment: Feminist Mobilisation for the Sustainable Development Goals (“SDGs”) Global Policy’ (2019) 10 (1) *Global Policy* 28.

<sup>43</sup> Katiyatiya L M, ‘Substantive Equality, Affirmative Action and the Alleviation of Poverty in South Africa: A Socio-Legal Enquiry’ (LLD Thesis, Stellenbosch University 2014).

<sup>44</sup> *ibid.*

<sup>45</sup> *ibid.*; see also Sen (n38) 29.



As a disadvantaged group, women have faced historical exclusion in economic spheres and procurement.<sup>46</sup> This marginalisation of women also leads to the feminisation of poverty through the discrimination of women within the economic sphere.<sup>47</sup> However, the affirmative action movement and gender procurement practices developed as class affirmative policies to solve equality objectives through public procurement.

Reece proposes three guiding principles for women's class-based affirmative action.<sup>48</sup> The first is that affirmative action should have genuine equality of opportunity where real natural talents flourish and are nurtured to their full potential. This principle ensures that the policy and programs give a leg up to individuals who face disadvantage relative to the competition or those who employ disadvantaged or marginalised groups. The second principle is that the program should be administrable through verifiable information, using objective criteria of contract awards and punitive penalties to deter potential abuse of the system.

The third principle is that the system should be politically palatable and align with the form of government and existing laws.<sup>49</sup> Trepte explains that this political public procurement model uses procurement processes to meet social and political goals such as gender equality. When gender-responsive procurements are palatable, they simultaneously enable

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<sup>46</sup> Yusran S, Mokodompit E A and Ulfa M, 'Women's Circle Approach is An Alternative Path for Gender Responsive Public Procurement System in Indonesia' (2018) 1(1) SALASIKA: Indonesian Journal of Gender, Women, Child and Social Inclusion's Studies 69.

<sup>47</sup> Melo C L, 'The Feminisation of Poverty: A Critical Analysis' (2019) 1 (1) Witness: The Canadian Journal of Critical Nursing Discourse 73.

<sup>48</sup> Reece J D, 'Revisiting Class Based Affirmative Action in Government Contracting' (2011) 88(1) Washington University Law Review 1309.

<sup>49</sup>ibid, 1310.

the coexistence of laws and regulations that provide non-discrimination in awarding government contracts and preferential treatment of disadvantaged groups.<sup>50</sup>

The gender dimension within public procurement predominantly takes three main approaches: selection criteria, contract award criteria, and contract performance conditions.<sup>51</sup> The first dimension of selection criteria is the most common and involves positive discrimination of the disadvantaged group members being awarded preference in procurement.<sup>52</sup> For instance, the affirmative action schemes adopted in Malaysia, where the government also used public procurement for wealth redistribution to the native Malays and Chinese Malaysians, the *bumiputeras*, through interventions such as price margin preference, reserving service contracts between RM 10,000 and RM 100,000 and works contracts up to RM 100,000 were reserved for the target groups.<sup>53</sup>

The second dimension of gender-responsive procurement practices is illustrated in procurement selection criteria. For instance, South Africa adopted public procurement to alleviate poverty and promote equality among the black community that faced discrimination during the apartheid period.<sup>54</sup> The Broad-Based Black Economic Empowerment Act (“B-BBEEA”) provides for B-BBEE social goals, which include contracting with persons disadvantaged in the past based on gender and discrimination and

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<sup>50</sup> Trepte P, *Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation* (UOP 2004).

<sup>51</sup> Vyas-Doorgapersad S and Kinoti A, ‘Gender-based Public Procurement Practices in Kenya and South Africa’ (2015) 8 (3) *African Journal of Public Affairs* 96.

<sup>52</sup> McCrudden (n 39), 257.

<sup>53</sup> McCrudden (n 34) 10.

<sup>54</sup> Helmrich C, ‘Equality-Oriented Horizontal Policies in South African Public Procurement’ (2014) 61(1) *African Public Procurement Law Journal* 59.

which form the criterion for preferential treatment in procurement dependent on the status level of the tenderer.<sup>55</sup> The B-BBEEA uses a point system of public procurement through a desired list of social goals, whose addition within contract documents leads to attracting preferential treatment.<sup>56</sup> Depending on the price value of the contract, a tenderer is awarded 10 to 20 points depending on their B-BBEE status. This requires the programs to be measurable, reliable, and verifiable and regular monitoring for compliance.<sup>57</sup>

The third approach to gender-responsive procurement practices of performance conditions is where preferential tender conditions are awarded to bidders. For instance, Germany used this model to award certain public sector workers to workshops that sheltered disabled workers. The government awarded contracts to bidders that employed a circle of people within specific guidelines, even when the price was more significant than the cheapest bid from a competitor within allowed margins.

### ***1.9.3 Linkages Between Gender, Substantive Equality, and Public Procurement***

The nexus between substantive equality, gender, and public procurement is premised on using public procurement as a means to attain social outcomes like the promotion of substantive equality based on gender.<sup>58</sup> The need to achieve gender equality is no longer

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<sup>55</sup> *ibid.*

<sup>56</sup> McCrudden C, *Buying Social Justice: Equality, Government Procurement & Legal Change* (OUP 2007).

<sup>57</sup> *ibid.*

<sup>58</sup> Kirton M R, 'Gender, Trade and Public Procurement Policy: Kenya, Australia, Jamaica.' Commonwealth Organisation 2012' World Bank (United Kingdom, 1 June 2013)

an achievement of human rights exclusively; it must transcend to the efficiency within public procurement processes, also referred to as the economic approach. Equality guarantees that governments improve the productivity of their labour force, stimulate economic growth for men and women and promote countrywide development.<sup>59</sup>

McCrudden has defined procurement linkages as the application of procurement by governments to attain social-economic, and political goals.<sup>60</sup> He states that these linkages have changed the public procurement space, from increased public scrutiny to ensure increased efficiency and cost reduction in procuring public goods to meeting social goals. The most critical linkage of public procurement in this research paper is the use of public procurement to help stimulate increased procurement activity by disadvantaged groups of ethnicity or gender.<sup>61</sup>

To this end, Muthomi opines that the main drivers of social procurement include addressing socioeconomic inequalities such as the social exclusion of women from opportunities, resources, and their rights, presenting "wicked problems" that do not respond to conventional solutions.<sup>62</sup> The social exclusion of women from public procurement makes

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*<[https://ppp.worldbank.org/publicprivatepartnership/sites/ppp.worldbank.org/files/documents/The%20Commonwealth\\_Gender,%20Trade%20and%20Public%20Procurement%20Policy.Pdf](https://ppp.worldbank.org/publicprivatepartnership/sites/ppp.worldbank.org/files/documents/The%20Commonwealth_Gender,%20Trade%20and%20Public%20Procurement%20Policy.Pdf)> accessed 8 August 2023.*

<sup>59</sup> *ibid.*

<sup>60</sup> McCrudden (n 34).

<sup>61</sup> *ibid.*

<sup>62</sup>Thiankolu M, 'Balancing Economic and Social Objectives in Public Procurement in Kenya - A Review of the Law, the Policy and the Practice' (PhD Thesis, University of Nairobi 2020).

the economic approach regulation unsuitable to deal with the wicked problem of inequality.<sup>63</sup>

Affirmative action became prevalent as an unconventional solution to a wicked problem as a mechanism for dealing with various approaches to end discrimination and proactive measures to promote equality for disadvantaged groups, including women.<sup>64</sup> The linkages between substantive equality and public procurement are geared towards using public procurement to end discrimination and attain status equality.<sup>65</sup> The appropriateness of the mechanisms employed in the procurement process to achieve equality is therefore dependent on the initial goal of the policymakers in developing gender-responsive policies. Several criticisms and objections to public procurement for social goals and equality have been termed ill-advised.<sup>66</sup> It is limited to rewarding only those group members that can meet the competitive performance standards and is faulted for only helping those at the "top of the bottom" who are best qualified among the target group and not necessarily the poorer and most disadvantaged of the group.<sup>67</sup>

According to McCrudden, government contracting is not the appropriate place for social policies and is not in the public interest.<sup>68</sup> He also states that promoting social outcomes through public procurement comes with additional financial costs.<sup>69</sup> Implementing policies

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<sup>63</sup> *ibid.*

<sup>64</sup> McCrudden (n 34) 10.

<sup>65</sup> *ibid.*

<sup>66</sup> *ibid.*

<sup>67</sup> Reece (n 48), 115.

<sup>68</sup> *ibid.*

<sup>69</sup> McCrudden (n 56).

for preference for certain groups of persons is unfair and discriminatory and facilitates protectionist behaviour that does not consider global and domestic equity.<sup>70</sup> They are prone to bureaucracy and regulatory capture by the politically organised rather than the unorganised groups, hence prone to abuse.<sup>71</sup>

Nonetheless, procurement linkages are effective in attaining substantive equality, as other methods have been ineffective in guaranteeing compliance with equality legislation. Gender-specific procurement practices effectively promote women's groups through incentive-based antidiscrimination enforcement.<sup>72</sup> The procurement linkages aid in overcoming the limits of commercial public procurement models that impact citizens' welfare and are critical in addressing status inequality caused by the government or society directly or indirectly.<sup>73</sup>

Procurement linkages are necessary to guarantee the inclusion of women within the mainstream market activities for an effective market. The linkages ensure that society is not deprived of the advantages of having women participate in public procurement by their sustained involvement and increased competition. This places an obligation on the governments to eliminate procurement practices that exclude women or minimise the impact of the policies on women entrepreneurs, especially within the procurement decision-making level.<sup>74</sup>

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<sup>70</sup> *ibid.*

<sup>71</sup> *Ibid.*

<sup>72</sup> *ibid.*

<sup>73</sup> *ibid.*

<sup>74</sup> Kirton MR, 'Gender, Trade and Public Procurement Policy: Kenya, Australia, Jamaica'. Commonwealth Organisation 2012' World Bank (United Kingdom, 1 June 2013) <<https://ppp.worldbank.org/public-private->

#### ***1.9.4 Challenges Facing Gender-Responsive Procurement***

Nyeck observes that while it is common knowledge that practices that limit women's engagement in procurement hurt economic growth, it is still unclear if African states, including Kenya, bid for or against gender equality in public procurement.<sup>75</sup> The role of states in achieving social changes through procurement practices raises the question of gender equality as a normative variable within the diffusion of procurement policy internationally. However, it is only through pressure and influence from international financial institutions and critical trade partner states that gender-responsive public procurement practices have been diffused in Africa.<sup>76</sup>

African states have taken a minimalist and instrumentalist approach to gender equality within public procurement policies.<sup>77</sup> This approach is evidenced by the minimal inclusion of women as a normative category in prime national procurement laws and regulations and for attaining gender equality in public procurement.<sup>78</sup> In Kenya, for instance, women appear as a special group within a preferential category within the existing framework. Yet, there is no comprehensive justification spelling out the demand and supply aspect of gender equality in procurement frameworks which polarises advocacy for gender-related empowerment in procurement.<sup>79</sup>

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partnership/sites/ppp.worldbank.org/files/documents /The%20Commonwealth\_ Gender,  
%20Trade%20and% 20Public%20Procurement% 20 Policy. pdf> 8 August 2023.

<sup>75</sup> *ibid.*

<sup>76</sup> *ibid.*

<sup>77</sup> Nyeck N S, '(Out)Bidding Women: Public Procurement Reform Diffusion and Gender Equality in Africa' (2015) 14(1) *Wagadu: A Journal of Transnational Women's & Gender Studies* 13.

<sup>78</sup> *ibid.*

<sup>79</sup> *ibid.*

Gatere and Shale, in their article, reported that the challenges in attaining substantive equality arise from challenges with the existing complex and strict legal framework, limited funding, insufficient training, and limited access to information.<sup>80</sup> This position is echoed by Mwangi, who added that there is also the unethical conduct of bidders, corruption, poor managerial capacity, and the problem of translating the procurement laws and language into everyday language that enables the particular groups to understand the impact of their compliance.<sup>81</sup>

Gichuhi also identifies the challenge of lack of capacity due to a lack of skills and knowledge to enable them to participate in public procurement, defeating substantive equality.<sup>82</sup> Onyinkwa observes that public procurement in Kenya is shrouded in secrecy, inefficiency, and corruption and excludes participation.<sup>83</sup> Kimani and Ngugi also opine that public contracting by SMEs is especially tricky due to funding challenges and there is a need to reach out to rural poor populations.<sup>84</sup>

Mohammed reports that the main trouble with women in public is that contract required quantities can be substantial and the cost of funding contracts is very high. However,

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<sup>80</sup> Gatere B and Shale N, 'Challenges Affecting the Implementation of Access to Government Procurement Opportunities for Special Interest Groups in Kenya: A case of Nairobi County' (2014) 1(12) *International Journal of Social Sciences and Entrepreneurship* 831.

<sup>81</sup> Mwangi P N, 'Determinants of Compliance with Access to Government Procurement Opportunities Regulations for Special Groups by Public Universities in Kenya' (PhD. Thesis, COHRED-JKUAT 2017).

<sup>82</sup> Gichuhi M, 'An Examination of the Effect of Access to Government Procurement Opportunities (AGPO) Program on the Performance of Youth Owned Enterprises in Nairobi County in Kenya' (PhD Thesis, University of Nairobi 2016).

<sup>83</sup> Onyinkwa B, 'A Critical Analyse of the Enforcement of the Public Procurement and Assets Disposal Act No. 33 of 2015 and its Regulations' (2017) 1 SSRN 3.

<sup>84</sup> Kimani N H, Ngugi P K and Orwa G, 'Challenges of Micro and Small Enterprises'(MSEs') Finance Accessibility on Participation Public Procurement Market Kenya" (2015) 3(4) *International Journal of Innovative Finance and Economics Research* 15.



payment of invoices by the government can take months due to delays in the release of funds.<sup>85</sup> SMEs led by women have recorded poor performance due to the women's lower levels of education, limited access to credit, and the lack of necessary entrepreneurship training and management skills required to participate in public procurement.<sup>86</sup>

Muthoka and Iravo propound that more than access to information on procurement opportunities is needed to contribute to increased participation.<sup>87</sup> It is the source of the data, and the type, purpose, and frequency of information are core factors that improve engagement within the program.<sup>88</sup> SMEs should also be integrated through framework contracts characterised by low contract value or volumes, local delivery, tailored or innovative products, and limited economies.<sup>89</sup>

The available literature on substantive equality reveals a knowledge gap regarding whether women's involvement in public procurement has led to substantive justice. There is consensus that gender-responsive practices need to consider the true nature of most women-owned businesses, especially those in rural Kenya that are informal, small-scale, and within informal group settings commonly known as *chamas*.

## 1.10 Scope and Limitation

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<sup>85</sup>Mohammed R, 'Progress on the Economic Empowerment of Female Entrepreneurs in Kenya's 30% Preferential Public Procurement Policy' (PhD Thesis, Walden University 2019).

<sup>86</sup> *ibid.*

<sup>87</sup> Kipkoech S G, 'Influence of the Implementation of Access to Government Procurement Opportunities Programme on Business Growth in Youth Owned Enterprises in Murang'a South Sub County, Kenya' (PhD Thesis, University of Nairobi 2015).

<sup>88</sup> Muthoka J and Iravo M, 'Influence of Information Seeking Behavior on Access to Preferential Government Procurement by Special Groups (Youth and Women) In Nairobi County Kenya' (2017) 18 1(3) International Journal of Supply Chain and Logistics 46.

<sup>89</sup> *ibid.*

The scope of this research paper is limited to gender-sensitive public procurement practices in Kenya. The field survey is conducted among 15 key informants, and given the small number of participants, the sample is not a representation of the target group. The results reported cannot be generalised

### **1.11 Chapter Outline**

This paper is arranged in the following chapters:

**Chapter One** of the paper defines and scopes the study and provides a detailed overview. The chapter addresses the background of the study, the statement of the research problem, the research objectives and research questions, the study's hypothesis, and its scope and limitations. It grounds the paper within the theoretical and philosophical frameworks and synthesises relevant literature discussed in detail in subsequent chapters.

**Chapter Two** of the paper provides the evolution of procurement and contextualises gender-responsive procurement practices in Kenya. It looks into the advancement in procurement law practices and the progress toward gender-responsive procurement practices. It discusses the procurement linkages or uses of gender-responsive procurement practices to achieve substantive equality. It also covers the Constitutional, statutory, and institutional frameworks governing gender-responsive procurement laws and deepens the understanding of the environment in which gender-responsive procurement practices operate.

**Chapter Three** assesses whether substantive equality has been achieved through gender-responsive public procurement practices in Kenya through assessment and analysis of the available evidence from fieldwork research. The research interviews and administers semi-

structured questionnaires to crucial informants from relevant institutions such as the AGPO, the Review Board, the National Treasury, and the National Gender and Equality Commission.

**Chapter Four** provides a summary of the findings, conclusion, and recommendations.

## **CHAPTER 2.0: EVOLUTION OF GENDER-RESPONSIVE PROCUREMENT PRACTICES IN KENYA**

### **2.1 Introduction**

This chapter examines the evolution of gender-responsive procurement practices in Kenya and its governing framework. Specifically, the chapter addresses the first research question of the paper in three main sub-topics. The first is the issue of gender and substantive equality and its relation to public procurement. The second is the Kenyan law and regulations governing gender-responsive procurement practices. The third subtopic discusses the institutional framework governing gender-responsive procurement practices in Kenya.

### **2.2 Public Procurement and Substantive Gender Equality**

Gender remains an essential aspect of public procurement, as it facilitates the achievement of socioeconomic goals of equitable access to shared resources and diversifies the supply chain.<sup>90</sup> Governments in developing states spend up to 30% on public procurement, yet only 1% of women entrepreneurs participate in the tender processes.<sup>91</sup> The involvement of women in procurement improves poverty alleviation and promotes gender equality, especially within the small and medium enterprises, a subsector where the women-owned businesses are disproportionately located.<sup>92</sup>

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<sup>90</sup> Kirton (n 58); See also, Vyas-Doorgapersad et al (n 51).

<sup>91</sup> González A, 'Public Procurement, a Tool to Boost Women's Economic Empowerment' International Trade Centre (Milan, 10 November 2017) <[http://www.intracen.org/news/Public-Procurement-a-Tool-to-Boost-Womens-Economic -Empowerment](http://www.intracen.org/news/Public-Procurement-a-Tool-to-Boost-Womens-Economic-Empowerment)> accessed 01 June 2020.

<sup>92</sup> *ibid.*

It has been posited that there is no correlation between procurement and gender equality. Alternatively, there are suggestions that public procurement is an irrelevant consideration to actualise equality between men and women.<sup>93</sup> However, these suggestions are inaccurate since the social impact of public procurement is often overlooked as opposed to the overall economic development.<sup>94</sup>

Djan states that for public procurement to achieve these gender equality objectives, it must not be solely based on the headcount of men and women engaging in public procurement practices but should influence decision-making and implementation that impact the quality of life for both genders.<sup>95</sup> This situation necessitates the procurement laws to positively discriminate against groups disenfranchised economically to impact these social goals. Unlike gender-responsive laws, gender-neutral laws deepen existing social norms which further discriminate against women.<sup>96</sup>

However, buying from women-owned businesses does not necessarily lead to substantive equality. The public discourse concerning substantive equality has evoked compelling opinions by scholars that allude to it as an underlying value in attaining human rights rather than a discrete principle.<sup>97</sup> Substantive equality is closely linked to equality as they both aspire to achieve non-discrimination. However, they have different meanings; equality denotes that some groups are treated unequally and there is a need to make this situation

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<sup>93</sup> Trepte (n 50).

<sup>94</sup> *ibid.*

<sup>95</sup> *ibid.*

<sup>96</sup> *ibid.*

<sup>97</sup> Richard A and Cameron D (Eds), *Canada in the World: Comparative Perspectives on the Canadian Constitution* (Cambridge University Press 2017).

right by treating them equally. Non-discrimination notates the comparison between two groups with different characteristics, with one group lacking the benefits or opportunities available to the other.

Therefore, this means that both groups, in comparison, may be poorly treated without any of the groups being discriminated against. Equality demands that like should be treated alike.<sup>98</sup> Arguments for equality and equal treatment of both genders have little significance, as it is possible to treat them equally well or poorly. This argument forms part of the formal equality that provides that men and women are treated the same way, without considering gender, social, and economic differences.<sup>99</sup>

Further, it discloses the problem of equality in understanding women's issues, whereby women are treated the same way as their male counterparts, perpetuated through gender-neutral laws and policies. The implication is that the women are treated according to the male standard, disregarding and obscuring how men and women differ.<sup>100</sup> The danger in using male standards within procedural rules, expected behaviour, and output for both gender place women at a disadvantage as they are distinct and different from men.<sup>101</sup>

From the foregoing, substantive equality is not concerned with the mere presence of differences, or lack thereof, between certain groups in society as a measure of differential treatment.<sup>102</sup> Substantive equality looks behind the façade of the resemblances and

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<sup>98</sup> Fredman S, 'Substantive Equality Revisited' (2016) 14(3) International Journal of Constitutional Law 712.

<sup>99</sup> *ibid.*

<sup>100</sup> IWRAW Asia Pacific 'Building Capacity for Change: Training Manual on the Convention on the Elimination of all Forms of discrimination against Women' (2001) IWRAW 1.

<sup>101</sup> *ibid.*

<sup>102</sup> Westen P, 'The Empty Idea of Equality' (1982) 95 (3) Harvard Law Review 537.

differences between groups in procurement. It seeks to establish what characteristics the treatment is predicated on and whether those characteristics are relevant considerations within the given context.<sup>103</sup> It is concerned with pointing out and addressing differential treatment that is discriminatory due to prejudice and negative stereotyping within society.

### **2.3.0 Gender-Responsive Procurement Practices in Kenya**

Kenya has adopted various approaches to gender-responsive practices in the selection and reservation of contracts, criteria in awarding contracts, and the performance of contracts to attain substantive equality. These gender-responsive practices have enhanced the inclusion of women within the following legal and policy framework:

#### ***2.3.1 The Public Procurement and Disposal Act No. 3 of 2005***

The gender-responsive procurement practices were first introduced through the Public Procurement and Disposal Act of 2005 (PPRDA) and its subsidiary legislations. Its purpose included the attainment of economic and social goals of public procurement, especially the improved competition between local firms and economic development.<sup>104</sup> The gender-responsive procurement practices were provided for in the Public Procurement and Disposal (Preference and Reservations) Regulations of 2011 (the “2011 Preference and Reservations Regulations”).<sup>105</sup>

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<sup>103</sup> SNV, ‘Enhancing Opportunities for Women’s Enterprises Programme’ SNV (Nairobi, 12 May 2016) <<https://snv.org/project/enhancing-opportunities-womens-enterprises-eowe>> accessed 26 May 2020.

<sup>104</sup> The 2005 Public Procurement and Disposal Act, s 2

<sup>105</sup> Legal Notice No 58 of 2011.

The 2011 Preference and Reservations Regulations introduced class affirmative action programs of preferential and reservation schemes. This program is intended to increase procurement activity by disadvantaged groups that are deemed to have limited access to opportunities means and tools for their sustenance. It includes people facing prejudice and cultural bias based on their status and identity, including women.<sup>106</sup> The program approached the issue of gender equality on a two-pronged approach of contract selection criteria and contract award criteria.

On contract selection, the Regulations defined the marginalised and disadvantaged and the qualification criteria for their selection for the preferential and reservation schemes.<sup>107</sup> The Regulations required businesses to qualify for the preference and reservation scheme and registered under the National Treasury. The requirement for gender was that a business must have at least 70% membership comprising of women and its leadership must entirely be women-led.<sup>108</sup> The Regulations also set the margins for preference, the type of contracts to be reserved, the geographical regions where the schemes would apply, and the means of monitoring and measuring the effectiveness of the policy.<sup>109</sup>

To increase women's participation, the 2011 Preference and Reservations Regulations included measures such as unbundling of goods works in smaller feasible quantities, the removal of requirements to provide tender security during reserved procurement proceedings, and setting requirements for the tendering body to advertise the open tenders

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<sup>106</sup> *ibid.*

<sup>107</sup> *ibid.*, Reg 4.

<sup>108</sup> The 2005 Public Procurement and Disposal Act, s 32.

<sup>109</sup> *ibid.*



to the target groups.<sup>110</sup> Monitoring and evaluation of the scheme was effected through the Ministry of Finance and Public Procurement Oversight Authority as provided by the Act.<sup>111</sup> The county governments were also to apply the 2011 Preference and Reservations Regulations in their procurement processes through the Public Procurement and Disposal (County Government) Regulations 2013.<sup>112</sup>

However, these regulations did not take steps to address specific procurement linkages to resolve problems faced by women as a disadvantaged group. Instead, the regulations recommended that the tendering bodies use the existing framework contracts where applicable in dealing with women in procurement.<sup>113</sup> The 2011 Preference and Reservations Regulations were amended in 2013 to introduce “set aside” procurement practices that originated from the United States of America.<sup>114</sup> The set-aside procurement practices in the United States mirror Kenya's program, which involves preferential contracting for women-owned small businesses and other disadvantaged groups to increase economic stability and growth.<sup>115</sup>

The United States in 1991 adopted a government approach of awarding at least 5% of the sum value of contracts to small business owners controlled by women and disadvantaged groups.<sup>116</sup> It further guaranteed increased inclusion in the set-aside scheme by

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<sup>110</sup> Legal Notice No 58 of 2011, Reg 25.

<sup>111</sup> The 2005 Public Procurement and Disposal Act, s 8

<sup>112</sup> Legal Notice No. 60 of 2013.

<sup>113</sup> Legal Notice No 58 of 2011, Reg 23

<sup>114</sup> Public Procurement and Disposal (Preference and Reservations (Amendment No. 2) Regulations, 2013.

<sup>115</sup> *ibid.*

<sup>116</sup> McCrudden C, *Buying Social Justice: Equality, Government Procurement & Legal Change* (OUP 2007) 168.

implementing best efforts to give women the maximum practicable opportunity to participate “to the fullest extent consistent to the performance of the contracts.”<sup>117</sup>

Similarly, the set-aside program in Kenya benefits women, the youth, and persons with disabilities. It reserved at least 30% of the state’s procurement of works, services, and goods for these special interest groups.<sup>118</sup> This led to the development of the Access to Government Procurement Opportunities Policy and the establishment of the AGPO Program in the year 2013.<sup>119</sup> However, the government is not mandated to make the best efforts to ensure enhanced performance of the contracts awarded to women.

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<sup>117</sup> *ibid.*

<sup>118</sup> Public Procurement and Disposal (Preference and Reservations (Amendment No. 2) Regulations, 2013.

<sup>119</sup> *ibid.*

### ***2.3.2 Constitution of Kenya, 2010***

The Constitution has provided for the inclusion of women in economic activities including in public procurement by providing for equality and non-discrimination rights. The Constitutional approach identifies women's systematic oppression and domination that marginalise women from procurement and limit their ability to take up procurement opportunities.<sup>120</sup> It requires the state to take action to achieve gender equality through affirmative action legislation and other measures to address past disadvantages and disenfranchisement.<sup>121</sup>

This provision of the Constitution has triggered gender-responsive public procurement reforms, restructuring, rules, and regulations.<sup>122</sup> Specifically, Article 227 has expressly provided for gender-responsive procurement practices by state organs. The provision obligates the state to procure following a just, equitable, transparent, competitive, and cost-effective procurement system.<sup>123</sup> The provision further imposes a duty on parliament to provide a framework for governing procurement and asset disposal policies.

The Constitution's most critical role in framing gender-responsive procurement practices is that it acknowledges and creates avenues for the supply of public goods of equality for women that would otherwise not be supplied without government intervention, thereby

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<sup>120</sup> Iris M Y, *Justice and the Politics of Difference* (Princeton University Press 2009).

<sup>121</sup> The 2010 Constitution of Kenya, Article 27(6).

<sup>122</sup> Nduati M P, 'Internal Controls Determinants of Compliance with AGPO Regulations for Special Groups by Public Universities in Kenya' (2017) 11(8) *International Journal of Innovations, Business and Management (IJIBM)* 1.

<sup>123</sup> The 2010 Constitution of Kenya, Article 227(1).

justifying procurement linkages for substantive equality.<sup>124</sup> The value-imbued constitution affirms the national social goal of attaining gender equality through provisions to address gender imbalance through affirmative measures within institutional setups and government operations.<sup>125</sup>

Notably, the Constitution constitutionalised gender-responsive public procurement practices through extensive application of constitutional norms.<sup>126</sup> Muthomi notes that the Constitution permeates most aspects of public procurement in Kenya, whereby there are numerous provisions relating to public procurement in the Constitution that only become clearer with litigation and judicial interpretation. While this is the case, the constitutionalisation of gender equality and responsive procurement has elevated the issues of gender in public light as a critical social objective of procurement and as a political priority of the Kenyan government for substantive equality.

In contra-comparison, unlike the repealed constitution, Article 27 of the Constitution is extensive and was intended by the Constitution's drafters to address the background of unequal treatment in the Kenyan past, especially concerning the exclusion of women. The Repealed Constitution prohibited discrimination but did not extend the rights between private persons and entities where gender inequality thrives.

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<sup>124</sup> McCrudden C, *Buying Social Justice: Equality, Government Procurement & Legal Change* (OUP 2007), 127.

<sup>125</sup> Ochieng W K, 'The Jurisdictional Remit of the Supreme Court of Kenya over Questions Involving the 'Interpretation and Application ' of the Constitution' (2020) 5(1) Kabarak Journal of Law and Ethics 19.

<sup>126</sup>Thiankolu M, 'Balancing Economic and Social Objectives in Public Procurement in Kenya - A Review of the Law, the Policy and the Practice' (PhD Thesis, University of Nairobi 2020).

The Constitution also introduced the duty to the state to take special measures through affirmative action to achieve substantive equality that was not previously provided for under the repealed constitution.<sup>127</sup> Compared to the South African constitution, the 2010 Constitution is more progressive as the latter has not made provisions for protection from discrimination based on gender.<sup>128</sup>

### ***2.3.3 Public Procurement and Asset Disposal Act, 2015***

The Public Procurement and Asset Disposal Act 2015 was later enacted to give effect to Article 227 of the Constitution of Kenya and repealed the 2005 Act. The Act consolidates the laws that govern public procurement and extensively widens the scope of application of the state bodies and organs in which gender-responsive procurement practices apply.<sup>129</sup> It also provides a mechanism for monitoring and evaluating gender-responsive procurement practices through establishing the Public Procurement Regulatory Authority, whose key mandate is to monitor, assess, and review the public procurement and asset disposal system and ensure that they respect the Constitution.<sup>130</sup>

In furthering the gender-responsive procurement practices agenda, the Act heavily borrowed on the 2011 Preference and Reservations Regulations as amended. It obliged public entities to ensure that money paid to an enterprise owned by youth, women, or persons with disabilities is paid into an account where the mandatory signatory is a youth,

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<sup>127</sup> Glinz C, ‘Kenya's New Constitution: A Transforming Document or Less Than Meets the Eye?’ (2011) 1(1) *Verfassung und Recht in Übersee/Law and Politics in Africa, Asia and Latin America* 60.

<sup>128</sup> Constitution of South Africa, Article 9(3).

<sup>129</sup> See especially, Public Procurement and Asset Disposal Act 2015, s 2.

<sup>130</sup> The 2015 Public Procurement and Asset Disposal Act, s 9 (1).

woman, or a person with a disability.<sup>131</sup>The Act included additional reporting duties to the authority to report to parliament bi-annually on equalizing opportunities for youth, women, and persons with disabilities to improve monitoring and oversight of the AGPO program.<sup>132</sup>

The Public Procurement and Asset Disposal Regulations, 2020 were enacted under the Act to administer the powers vested in the Cabinet Secretary for the National Treasury and Planning regarding public procurement.<sup>133</sup> They also harmonise and standardise the application of the government service in control and managing the procurement function. The regulations are meant to promote accountability, efficiency, transparency, and effective utilisation of public resources.<sup>134</sup> The regulations address social goals and have addressed the issue of tender preference and reservations to apply to supplies wholly mined and produced in Kenya and partly mined and made in the country and firms with at least 51% Kenyan shareholding.

However, scholars like Muthomi have viewed the Public Procurement and Asset Disposal Act 2015 as a missed opportunity for its failure to transform public procurement in Kenya as envisioned by the transformative nature of the Kenyan Constitution.<sup>135</sup> Case in point, the Act adopts the provisions of the Repealed Act and its regulations without introducing provisions that enhance gender-responsive procurement practices or provide mechanisms for improving the implementation of the existing laws.

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<sup>131</sup> *ibid.*

<sup>132</sup> *ibid.*

<sup>133</sup> Public Procurement and Asset Disposal Regulations, 2020, Reg 4.

<sup>134</sup> See especially, Public Procurement and Asset Disposal Regulations, 2020, Reg 4(2).

<sup>135</sup>Thiankolu M, 'Balancing Economic and Social Objectives in Public Procurement in Kenya - A Review of the Law, the Policy and the Practice' (PhD Thesis, University of Nairobi 2020).

The Act ought to have provided means to reach the target groups through increased selection criteria, such as a proposal to make the ownership requirements of the entity wholly owned by the target group provide statutory timelines to pay contract awardees in line with government budgetary allocations and cycles.

The act was an opportunity to radically provide for an offer-back system, where an offer by a woman-owned business rejected on the issue of price exclusively in unreserved tenders could be given another opportunity to resubmit a revised tender to match the best market price.<sup>136</sup> The Act missed the opportunity to progressively provide for economic, social, and environmental goals of sustainable procurement.

#### ***2.3.4 Public Finance Management Act, 2014***

Public Finance Management Act, 2014, through Legal Notice No. 21, established the Uwezo Fund to promote Millennium Development Goals number 1 on eradicating extreme poverty and hunger and Goal number 3 on promoting gender equality and women empowerment.

The fund's objectives are to facilitate access to affordable credit to support women, youth, and persons living with disabilities to start and expand businesses for wealth and employment creation, capacity-building market support, and linkages and mentorship opportunities.<sup>137</sup> It is modelled around creating an alternative in community-driven development through access to funding.<sup>138</sup> The Uwezo fund has improved women's

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<sup>136</sup> *ibid.*

<sup>137</sup> Uwezo Oversight Board, 'About Uwezo Fund' Uwezo Fund (Nairobi, 1 December 2019) <<http://www.uwezo.go.ke>> accessed 03 September 2020.

<sup>138</sup> *ibid.*

partaking in public procurement by capacity building and financial assistance to women who would otherwise not participate due to monetary constraints. It resolves the issue of access to opportunities for women based on poor or lack of funding. This is because it has concerted efforts at the constituency level to ensure that even those within rural settings can access and participate in mainstream economic activities, including public procurement.

## **2.4 Institutional Framework**

The gender-responsive procurement laws are implemented in several institutions mandated to procure public goods for the national and county governments. These institutions monitor and evaluate the implementation of gender-responsive procurement laws and policies.

### ***2.4.1 The Ministry of Finance)***

The Public Procurement and Asset Disposal, 2015 mandates that the National Treasury enforce compliance with procurement laws by all state organs, including county governments.<sup>139</sup> It has an overarching supervisory mandate to oversee the implementation of the procurement laws and is the reporting body on the implementation efforts. The National Treasury also receives procurement plans and reports from accounting officers to guarantee their conformity with the National Treasury's medium-term fiscal framework

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<sup>139</sup> The 2015 Public Procurement and Asset Disposal Act, s 34.



and fiscal policy objectives.<sup>140</sup> It also assists when the accounting officers have compliance challenges.<sup>141</sup>

The National Treasury formulates policy on administrating the preference and reservations scheme and registering women businesses under AGPO. It also facilitates affirmative action for women, enhancing their inclusion in public procurement.<sup>142</sup> It has the responsibility to operationalise a preference and reservations secretariat.<sup>143</sup> Importantly, it is responsible for the certification of women-owned businesses, their training and capacity building, and providing them with procurement technical and advisory assistance.<sup>144</sup>

However, there is more that the National Treasury can do for women in procurement. For instance, the National Treasury has failed to regulate the coordination of business registration under the program, leading to double registration where an entity registered as youth can also be registered under the women or persons living with disability category. The National Treasury tasked with budgetary allocations and oversight of the exchequer release schedules should provide timelines in which tendering bodies should pay contract awardees to avoid.<sup>145</sup> The National Treasury should also roll out national policies and training on the capacity building and sensitisation of gender-responsive procurement practices.

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<sup>140</sup> *ibid.*

<sup>141</sup> *ibid.*

<sup>142</sup> See, The 2015 Public Procurement and Asset Disposal Act, s 7.

<sup>143</sup> *ibid.*

<sup>144</sup> *ibid.*

<sup>145</sup> Kimani et al (n 34).

### **2.4.2 AGPO Program**

Developed by the National Treasury, the Access to Government Procurement Opportunities Policy established the AGPO Program in 2013.<sup>146</sup> The AGPO program policy acknowledges entrepreneurship as a core social and economic development component. Its purpose is to enhance the inclusion of marginalised target groups, including women, in public procurement.

The program identifies at least thirteen classifications of services and goods for women and other marginalised groups and six other procurement classes in which they are given preference. The businesses must complete a two-tier registration system, including registration at the BRS or County office and under the AGPO program at the National Treasury. Under the program, women also benefit from Local Purchase Orders (“LPOs”), payment-on-delivery facilities, and the waiver of tender security.<sup>147</sup> The efficacy of the AGPO shall be discussed in detail in the subsequent chapter.

### **2.4.3 The PPRA**

The PPRA monitors and enforces the implementation of the preference and reservation schemes by the state.<sup>148</sup> This extends to developing and managing the State portal on procurement and asset disposal and ensuring that it is available and easily accessible for

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<sup>146</sup> Migwi S M, ‘Public Procurement Management and Access to Government Procurement Opportunities (AGPO) Policy’ (PhD Thesis, University of Nairobi 2018).

<sup>147</sup> Mwangi (n 81)

<sup>148</sup> The 2015 Public Procurement and Asset Disposal Act, s 9.

women. The Authority is a reporting body to ensure compliance by the procuring bodies and data of firms that benefit from the scheme.<sup>149</sup> Its Review Board and investigative and capacity-building departments are central to the enforcement of gender-responsive procurement practices.

The role of the PPRA in the implementation of gender-responsive procurement practices guarantees that the programs for women in public procurement are administrable through verifiable information relating to the target groups, the consistent use of set out objective criteria of contract awards, and imposing punitive penalties to deter potential abuse of the gender-responsive procurement practices to guarantee genuinely disadvantaged groups benefit from the schemes and programs.<sup>150</sup>

#### **2.4.4 Review Board**

The Review Board, under PPRA, is established under the Act.<sup>151</sup> Its jurisdiction is discussed by the Court of Appeal in *Kenya Pipeline Company Limited v Hyosung Ebara Company Limited & Others*<sup>152</sup>, that it has dealt with all kinds of complaints against any procuring bodies. This power extends to annulling the actions of a procurement body, replacing its decision with that of the procurement entity and the administrative review envisaged is, in actuality, an appeal. Its jurisdiction extends to disputes on all aspects of the procurement process, including allegations of impropriety and corruption by

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<sup>149</sup> The 2015 Public Procurement and Asset Disposal Act, s 1(1).

<sup>150</sup> Reece (n 48).

<sup>151</sup> The 2015 Public Procurement Act, s 27 (1).

<sup>152</sup> *Kenya Pipeline Company Limited v Hyosung Ebara Company Limited & Others*, Court of Appeal (Nairobi) Civil Appeal Number 145 of 2011.

accounting officers.<sup>153</sup> It also entertains substantive issues of unfair disqualification at technical evaluation of tenders and tender awards.<sup>154</sup>

Regarding enforcing the reservation of tenders for women in public procurement processes, the Review Board enforces national values, including gender. In *the Gardens and Weddings Centres Limited v the Accounting Officer Independent Electoral and Boundaries Commission*,<sup>155</sup> the Review Board emphasised that tenderers must comply with the statutory laws and tender requirements and cannot rely on the constitutional provisions enshrined in any constitutional provisions to receive preferential treatment if they fail to meet the tender requirements that other tenderers have met.<sup>156</sup> Therefore, women must comply with the statutory provisions and cannot enjoy special preferential treatment in procurement outside the ambit of the law.

However, the Review Board has decided on significant cases relating to the 30% tender reservation for women and, in some cases, overturned the decisions of the accounting officers in the award of tenders in favour of applicants upon request for review. The Review Board in *Asal Frontiers Limited v the Accounting Officer Kenya National Highways*

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153 *Space Contractors & Suppliers Investment Limited v the Accounting Officer Kenya Ports Authority & Another*, Review Board Application No. 52 of 2023.

154 *Blue Sea Services Limited v the Accounting Officer Kenya Ports Authority & Another*, Review Board Application No. 57 of 2023, where the request for review was based on the allegation of unfair disqualification at the technical evaluation stage on the certification of academic documents as per the Oaths and Statutory Declarations Act.

155 *The Gardens and Weddings Centres Limited v the Accounting Officer Independent Electoral and Boundaries Commission*, Review Board Application No. 78 of 2022.

156 See *Peesam Limited v the Accounting Officer Kenya Airports Authority & Another*, Review Board Application No. 55 of 2023, where the tenderer submitted multiple bids to a tender without filing a Withdrawal or Substitution Notice, thereby rendered unresponsive.

*Authority & Another*<sup>157</sup> enforced the requirement of due diligence by the law in the tender award. The dispute related to the allegation of failure to observe fair, transparent, competitive tendering and evaluation process as the applicant was disqualified because the Kenya Revenue Authority withdrew her Tax Compliance certificate during the due diligence process despite having quoted the lowest price. The accounting officer did not comply with the Review Board's orders for a second due diligence process. As a result, the tender award to the Applicant in a subsequent request for review in *Asal Frontiers Limited v the Accounting Officer Kenya National Highways Authority & Another*.<sup>158</sup> The review board observed that the accounting officer had introduced further conditions and qualifications whose effect is barring tenderers who enter into a payment plan or who, upon renewal or reinstatement of their compliance documents from issuing Authorities.<sup>159</sup>

*Peesam Limited v the Accounting Officer Kenya Airports Authority & Another*<sup>160</sup> case relates to a disputed decision of the accounting officer in evaluating the Applicant's tender at the technical evaluation stage. The Applicant contested the "poor performance" evaluation at 75% score, while the agreement between the Applicant and the procuring entity set poor performance between 50% and 60%.<sup>161</sup> Similarly, in *Royal Taste Kitchen*

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157 *Asal Frontiers Limited v the Accounting Officer Kenya National Highways Authority & Another*, Review Board Application No. 9 of 2023.

158 *Asal Frontiers Limited v the Accounting Officer Kenya National Highways Authority & Another*, Review Board Application No. 18 of 2023.

159 See also, *Swiftmax Services Limited v the Accounting Officer (Department of Health Services) County Government of Kericho*, Review Board Application No. 95 of 2022.

160 *Peesam Limited v the Accounting Officer Kenya Airports Authority & Another*, Review Board Application No. 97 of 2022.

161 See also, *Swiftmax Services Limited v the Accounting Officer (Department of Health Services) County Government of Kericho*, Review Board Application No. 82 of 2022.

*Limited v the Accounting Officer National Social Security Fund & Another*,<sup>162</sup> the procuring entity failed to give reasons why the successful tenderer has been successful by the tendering officer as required under the Act and in line with the constitutional public procurement principles of transparency and accountability.

The Review Board, in its decisions above enforcing the gender-responsive procurement practices, leans towards formal compliance with the Act and the regulations, even when dealing with women as tenderers. They must comply with the statutory and tender requirements met by other tenderers. The law does not justify special treatment in enforcing gender-responsive procurement practices.

#### **2.4.5 Government Ministries**

The Constitution has provided for twenty-two cabinet secretaries to head the state ministries.<sup>163</sup> The procurement within these ministries is conducted through the ad hoc committees to oversee public procurement.<sup>164</sup> The government ministries have a critical role in formulating economic and financial policies to promote and maintain stable financial, economic, and procuring policies for socioeconomic advancement within the government subsectors.<sup>165</sup> The ministries in entrenching gender-responsive procurement

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<sup>162</sup> *Royal Taste Kitchen Limited v the Accounting Officer National Social Security Fund & Another*, Review Board Application No. 25 of 2023.

<sup>163</sup> The 2010 Constitution of Kenya, Article 152(1) d.

<sup>164</sup> Migwi S M, 'Public Procurement Management and Access to Government Procurement Opportunities (AGPO) Policy' (PhD Thesis, University of Nairobi 2018).

<sup>165</sup> Muthoka, C N, "E-procurement and Performance of Government Ministries in Kenya" (PhD Thesis, University of Nairobi 2016).

practices have a role in ensuring that 30% reservation of their contracts for women, among other special groups.

#### ***2.4.6 County Government-County Treasury***

The PPDA has obliged the 47 county governments to comply with the legal framework governing gender-responsive procurement practices.<sup>166</sup> Through the County Treasury, county governments are obligated to promote preference and reservation schemes for SMEs and disadvantaged groups. The disadvantaged groups include women-owned businesses engaged in county government public procurement. Through the tendering committees, each county treasury ensures that the principles of procurement required under the Act are complied with, including reserving 30% of the tenders to advance substantive equality.<sup>167</sup>

#### ***2.4.7 Parliamentary Committees***

Parliament oversees government spending by way of budget approvals. Parliament and its parliamentary committees have a general oversight role over compliance with laws relating to procurement practices at the national level.<sup>168</sup>

At the same time, the Senate plays a similar role regarding county governments' procurement. These committees play a critical role in enhancing participation in procurement by ensuring that programs are implemented within the law and that

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<sup>166</sup> The 2015 Public Procurement and Asset Disposal Act, s 33(2) (F).

<sup>167</sup> *ibid.*

<sup>168</sup> Mihyo B, Mukuna E and Musahara H, 'Needed: A Legal Framework for Strengthening Oversight Role of the Kenyan Parliament' (2016) 1 Africa Portal 4.

investigations are conducted where there is evidence of corruption and misappropriation of public funds.<sup>169</sup> The committees also receive tendered evidence and audit the reports from the Office of the Controller of Budget and the Office of the Auditor General concerning the government's expenditure concerning gender-responsive procurement.<sup>170</sup>

#### ***2.4.8 Ministry of Public Service, Youth and Gender Affairs***

The Ministry in 2007 established the Women Enterprise Fund, a semi-autonomous government agency in place to assist women to start or expand businesses and create capacity for them to engage in business.<sup>171</sup> Through providing credit and training, the fund seeks to address the perennial challenges of women's exclusion from economic resources and procurement opportunities. The fund is critical in advancing and promoting women's engagement within public procurement by solving the challenges of limited financial accessibility, information dissemination, training, and capacity building for women and women groups.<sup>172</sup>

#### ***2.4.9 National Gender and Equality Commission (“NGEC”)***

NGEC was established to operationalise the Constitutional provisions for the promotion of equality, equity, and gender mainstreaming in the country.<sup>173</sup> The Commission was

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<sup>169</sup> *ibid.*

<sup>170</sup> TISA, ‘Oversight Role of Parliament’ The Institute for Social Accountability (Nairobi, 1 February 2012) <[https://www.tisa.or.ke/images/uploads/Oversight\\_Role\\_of\\_Parliament\\_Abridged\\_Version\\_-2012.pdf](https://www.tisa.or.ke/images/uploads/Oversight_Role_of_Parliament_Abridged_Version_-2012.pdf)> accessed 28 August 2023.

<sup>171</sup> Women Enterprise Fund, ‘Women Enterprise Fund Service Charter’ WEF (Nairobi May 24 2023) <[https://www.wef.co.ke/images/Charter/Service\\_Charter\\_English\\_and\\_Swahili\\_2019.pdf](https://www.wef.co.ke/images/Charter/Service_Charter_English_and_Swahili_2019.pdf)> accessed 28 August 2023.

<sup>172</sup> *ibid.*

<sup>173</sup> The 2010 Constitution of Kenya, Article 59.



established by the National Gender and Equality Commission Act, which sets out its functions to include promoting gender equality and the integration of equality and human rights.<sup>174</sup>

The issues of gender, gender equality, and mainstreaming form the core mandate of the commission, especially policy advisory and formulation and practices.<sup>175</sup> The commission also formulates action plans and strategic plans to enhance and develop affirmative action for women for gender equality.<sup>176</sup>

## **2.5 Conclusion**

This chapter answers the first research question of this research paper on the evolution, legal, and policy framework governing gender-responsive procurement practices in Kenya. To answer this question, the chapter discusses gender and how public procurement can achieve substantive equality. Through the various laws providing for gender-responsive procurement practices, the chapter discusses the approaches taken to entrench gender in public procurement, including using class affirmative action, reservations, and set-aside programs borrowed from the United States and Canada.

Through best efforts to reserve 30% of all government contracts for women and disadvantaged groups, the government has taken measures such as unbundling goods work in smaller feasible quantities, removing requirements to provide tender security during reserved procurement proceedings, and requiring tendering bodies to advertise the open

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<sup>174</sup> The National Gender and Equality Commission Act 2011, s 9

<sup>175</sup> *ibid.*

<sup>176</sup> See especially, The National Gender and Equality Commission Act 2011, s 8.

tenders to the target groups.<sup>177</sup> The chapter has answered the question by providing the various acts, regulations, and institutions that govern public procurement in Kenya. The chapter also highlights the constitutionalising of gender-responsive public procurement, which has elevated and highlighted gender considerations in attaining the social objective of procurement.

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<sup>177</sup> Legal Notice No 58 of 2011, Regulation 25.

## **CHAPTER THREE 3.0: DATA ANALYSIS AND RESULTS**

### **3.1 Introduction**

This chapter of the research delves into the data analysis and the presentation of the results in line with the research questions of the paper. The main research question of the study is whether the disconnect between the gender-responsive procurement laws and the existing policies and practices have an impact on the attainment of substantive equality for women.

Three theoretical frameworks guide the study, which include the liberal feminist theory, transactional cost theory, and empowerment theory. The liberal feminist theory served as the field study to identify the enabling conditions within the procurement environment that promote or impede women's engagement in public procurement.

The empowerment theory aids the study in identifying if gender-responsive procurement practices have contributed to women's empowerment and substantive equality. The transactional cost theory serves the study in the assessment of opportunistic tendencies that impede the inclusion of women in procurement.

### **3.2 Research Design and Rationale**

The study administered semi-structured questionnaires to 15 purposively selected key informants. The Likert scale was used where the key informants were asked to record their answers from 1 to 5, where a score of 1 represents "I strongly disagree" and a score of 5 represents "I strongly agree". These key informants were selected from the AGPO secretariat under the National Treasury, the PPRA, the National Gender and Equality Commission, the Ministry of Public Service, Gender and Affirmative Action.

The key informants' sample consists of experts or employees of the institutions including procurement officers, the head of the department, and the PPRA secretariat. The study sought to interview more heads of departments and experts by design to have a working knowledge of the operation, implementation, and challenges of gender-responsive procurement practices. The key informants are distributed in the following categories; seven from the AGPO program under the National Treasury, three from the Public Procurement PPRA secretariat, two from the Review Board, and three were civil servants working at the NGEN. The data was entered into an Excel sheet and analysed.

### **3.3 Results**

The study sought to establish whether substantive justice has been attained in three main thematic areas. The first set of questions assessed whether there are equal opportunity and access to procurement within the context of gender-responsive procurement practices. The Key informants were asked whether the AGPO program and other gender-responsive procurement practices accord women equal opportunity and access from several demographics including, women from elite and empowered, the rural poor, the impoverished and those that have faced adversity, hardship and adversity equal access and opportunity.

The rationale of this assessment lies in the centrality of the right to equality, and non-discrimination to the paper because gender-responsive procurement practices ideally ought to benefit all women. The question asked the key informants to make choices from strongly disagree to strongly agree whether the target groups by category have access to procurement opportunities.

**Table 1: Equal Access and Opportunities to Procurement**

<b>Target Group by Category</b>	<b>Strongly Disagree</b>	<b>Disagree</b>	<b>Neither Agree nor Disagree</b>	<b>Agree</b>	<b>Strongly Agree</b>	<b>Total</b>
Elite and Empowered Women	0%	0%	0%	27%	73%	100%
Women from Rural Kenya	47%	53%	0%	0%	0%	100%
Women who have overcome difficulty/disadvantage/adversity	60%	40%	0%	0%	0%	100%
Women in SMEs and Micro-Enterprises	0%	7%	0%	67%	27%	100%
Impoverished Women	80%	13%	7%	0%	0%	100%

Source: Field Data

As Table 1 shows, more elite and empowered women are perceived to be the beneficiaries of gender-responsive procurement practices. The vulnerable groups who ideally should benefit from gender-responsive practices have very limited access to the opportunities. Impoverished women, as compared with rural women, women who have faced adversity and hardship, scored significantly lower in their perceived access to procurement opportunities.

Women working in small and micro enterprises scored higher on the scale signifying improved access to procurement opportunities. This could be attributed to funding options and improved access to financing for SMEs and micro enterprises. This intervention within AGPO is achieved through the obligation to procure entities to facilitate funding through the authentication of tender awards, and issuance of purchase and service orders to women entrepreneurs.

However, the responses reveal inequality in the access to procurement opportunities that disproportionately favour elite and empowered women, while those that are in the most vulnerable situations are left out. Women businesses that are not registered under the Business Registration Service (**BRS**) have also been left out of the AGPO program entirely such as those that are registered as community-based organisations, societies, and self-help groups.

The second theme of the questionnaire relates to the transactional costs related to gender-responsive procurement practices including the cost of running and operation of the AGPO program. The key informants were asked whether the communication and information provided by participants in the program is openly provided, verifiable, and compliant with the legal and procedural requirements of the National Treasury. The majority of informants, 90%, stated that the information was open, verifiable, and compliant, while the remaining 10% strongly agreed with this finding. This can be explained by the rigorous process of obtaining the AGPO certificate under the National Treasury and the two-tiered registration system under AGPO.

Regarding costs related to opportunistic tendencies of players within gender-responsive procurement processes, the study asked the key informants whether they were aware of the opportunistic tendencies relating to procurement. The key informants were asked to record their answers to each of the listed procurement malfeasances using the same scale.

***Table 2: Costs Related to Opportunistic Procurement Tendencies***

<b>Type of Opportunistic Tendencies</b>	<b>Strongly Disagree</b>	<b>Disagree</b>	<b>Neither Agree nor Disagree</b>	<b>Agree</b>	<b>Strongly Agree</b>	<b>Total</b>
Corruption	0%	20%	20%	20%	40%	100%

Collusion	0%	0%	27%	67%	7%	100%
Kickbacks	0%	0%	0%	67%	33%	100%
Price Fixing	0%	0%	7%	20%	73%	100%
Nepotism	0%	7%	7%	0%	87%	100%

Source: Field Work

Table 2 indicates that 67% of the informants reported perceived collusion and kickbacks in the implementation of gender-responsive practices 73% of the informants reported price fixing and 87% reported nepotism related to awarding tenders to family members and close family relations. The responses also recorded malfeasance relating to selling AGPO registration certificates to third parties, the misuse of women as a false front for men-owned businesses, and the exploitation of women-registered businesses by male entrepreneurs to procure tenders.

The third theme relates to the assessment of whether the disconnect between the frameworks has an impact on substantive equality. The study examined figures published by the KNBS for the year 2021/2022 relating to AGPO tenders. In the financial year 2021/2022, there was an expectation that the tender reservation for women, youth, and persons with disabilities would increase to Ksh 81.6 billion.<sup>178</sup> Women's reserved tenders were expected to increase to Ksh. 24.4 billion.<sup>179</sup>

In the financial year, 2021/2022 the total number of tenders reserved under the AGPO program was 34,384 tenders valued at Ksh.41,051.300/=.<sup>180</sup> Out of these figures, women were awarded 20,877 tenders valued at Ksh.22,614,500/=:, a figure falling below the expected reservation for women in absolute sums.

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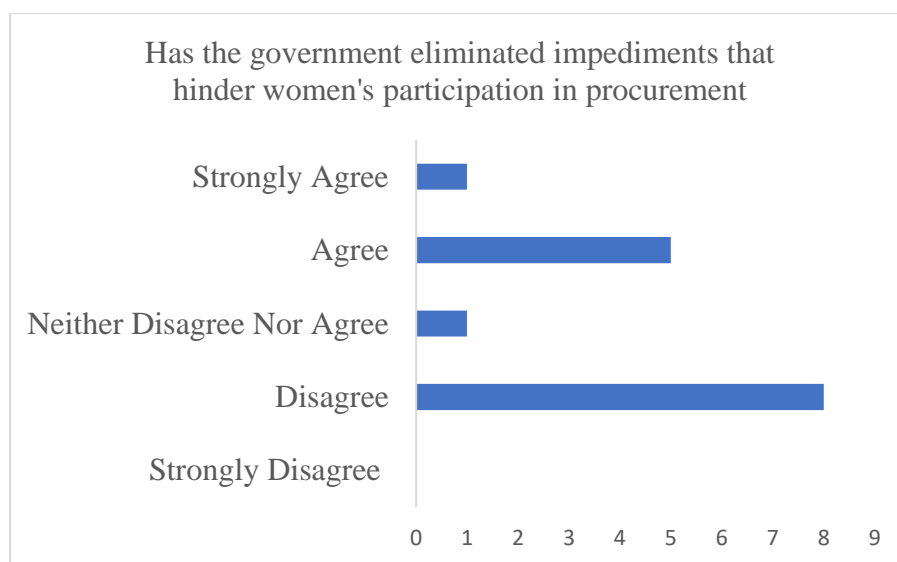
<sup>178</sup> GOK, 'KNBS Kenya Economic Survey Report 2023' (Government Printer, 2023).

<sup>179</sup> *ibid.*

<sup>180</sup> *ibid.*

The key informants were asked questions to assess whether the government has eliminated conditions that hinder women's engagement in public procurement. They used the same scale to record their answers.

**Table 3: Implementation of Gender Responsive Public Procurement Practices.**



Source: Field Work.

Table 3 indicates that more than half of the key informants indicated that substantive equality is yet to be attained through gender-responsive procurement practices due to the disconnect in laws, policies, and practices. The response indicates that the government has yet to eliminate some practices that limit women's access to public procurement. The informants stated that limited funding and funding options for women-owned businesses, reservation of tenders where women do not qualify, limited funding of the PPRA, gaps in the legal framework, and challenges in the implementation of the 2015 Public Procurement and Asset Disposal Act.



Importantly, the informants indicated the existence of tailor-made discriminative tender requirements that limit women's access to procurement opportunities. These requirements include late payments by procuring entities that place micro and small enterprises in financial distress over late payments. They also highlight the problem of institutional corruption and giving bribes to be awarded tenders hindering small women-led enterprises from accessing opportunities.

In addition, the tender documents require unnecessary conditions such include the requirements for recommendation letters from previous clients for simple supply tenders that involve sourcing and delivery of goods. The tender documents also require the awardee to provide financial proposals that include the awardee specifying the period or duration of the credit.

This requirement is limiting women's access to procurement opportunities as women predominantly fund their businesses from informal *chamas*, and social groups and do not necessarily have a pre-existing credit history with financial institutions. The tenders are also advertised in mediums inaccessible to women such as print and electronic sources where women are unable to access tender information.

### **3.4 Summary of Findings**

This chapter raises critical aspects of the disconnect between gender-responsive laws, policies, and procurement practices hindering the attainment of substantive equality. Elite and empowered women continue to benefit from the existing gender procurement practices, defeating the social objective of the interventions. Women from the rural, poor, impoverished, and women who have faced adversity have limited or no access to procurement opportunities.

The results reveal the existence of tailor-made discriminative barriers to procurement and the failure of the existing gender-responsive procurements to lead to the attainment of substantive equality. These barriers are provided for in tender documents such as unnecessary requirements, late payments by procuring entities, and limited access to information regarding tender advertisements.

There is also existing procurement malfeasance that increases the transactional costs relating to the implementation of gender-responsive procurement practices such as corruption, price fixing, commission, nepotism, and kickbacks. Malfeasance relating to the AGPO program includes unlawful selling of AGPO certificates to third parties and male-led enterprises. There is also deceptive fronting of women as leaders in male-owned firms to attain formal compliance, while true ownership and leadership are male-dominated. These factors as shown by the results have hindered the attainment of gender-responsive procurement practices.

## **CHAPTER FOUR 4.0: CONCLUSIONS AND RECOMMENDATIONS**

### **4.1 Conclusions**

The paper sought to achieve two key objectives. The first objective was the legal and policy framework governing gender-responsive procurement in Kenya. The second objective was whether the disconnect between gender-responsive laws and practices has impacted the attainment of substantive equality. The study employs desktop research to review the laws and policies that govern gender-responsive public procurement practices. The paper uses semi-structured questionnaires to key informants from selected institutions.

The research is grounded on three theoretical underpinnings of liberal feminism, transactional cost theory and the empowerment theory. The justification of the paper is the disconnect between formal equality evidenced by gender-responsive procurement practices and the current framework that has perpetuated the marginalisation of women within public procurement, requiring legal and policy reforms.

Chapter two of the paper is a review of the framework governing gender-responsive procurement practices. The governing framework has provided for gender-responsive procurement practices like the use of reservation and preference schemes, set-aside programs, and class affirmative action to increase women's engagement in public procurement.

The conclusion from the chapter is that the constitutionalisation of gender-responsive procurement practices has justified the implementation of constitutional norms to streamline gender within procurement, which facilitates the infusion of social objectives within the governing frameworks. The framework also reveals that the framework places

emphasis, on and prioritises compliance with laws and tender requirements and cannot rely on the constitutional provisions enshrined in any constitutional provisions to receive preferential treatment outside the ambit of the law. This fact necessitates legal reform and the transformation of gender-responsive procurement practices to resolve the disconnect with current practices to increase women's participation.

Chapter three of the paper is the field study through a semi-structured questionnaire to assess whether the disconnect between the gender-responsive procurement laws and the existing policies and practices has an impact on the attainment of substantive equality for women in Kenya. In three main themes, the study indicates the disconnect has hindered substantive equality for women through public procurement. The women from rural, urban poor, impoverished, and women who have faced hardship and adversity have been unable to access procurement opportunities. Elite women and empowered women benefit from the access and opportunities reserved for women.

The issue of the capacity to participate in public procurement for women is central to the assessment of whether substantive justice has been attained through gender-responsive procurement practices. Women have limited technical, specialised, and financial capacity to take up the reserved tenders.

Tailor-made discriminative procurement practices hinder women's participation in public procurement. These discriminative practices exist in the tender requirements that are a bottleneck to participation and do not serve any other legitimate purpose. These include financial and experience requirements that have no bearing on the tender performance. The advertisements of the tenders also limit their engagement as they are in mediums to which women do not have access such as print and electronic media.

## **Recommendations**

The paper recommends several interventions to ensure that gender-responsive procurement practices lead to the attainment of substantive equality. The first recommendation is the elimination of tailor-made discriminative impediments to women's partaking in public procurement. The tailor-made discriminative barriers are entrenched in unnecessary tender requirements and qualifications.

Women entrepreneurs face unnecessary requirements such as recommendation letters for simple tenders, especially in supplies, that have no impact on the performance of the tender since the contracts involve sourcing for goods and delivery. To resolve this challenge, PPRA should engage procuring entities and procurement officers, and issue guidelines, to eliminate these institutional barriers to participation in procurement for women.

The paper further recommends an inclusive approach to entrench gender-responsive procurement practices that account for the true nature of women's businesses which are largely semi-informal and in group settings. The digitisation of the procurement processes by the government has excluded all businesses that are not registered under the BRS, under the Registrar of Companies.

However, women's businesses also exist as societies, self-help groups, and community-based organisations that have been systemically excluded from the AGPO program. There is a need to revise the registration under the AGPO program to include entities registered as societies, self-help groups, and community-based organisations, where women's businesses dominate.

The enhancement of women's technical and financial capacity to engage in public procurement is critical to the attainment of substantive equality. Women can overcome capacity challenges through targeted interventions to ensure that the available opportunities in technical and specialised tender categories such as construction, energy, and professional services are taken up. The AGPO and PPRA engage market sector leaders to register more women-owned firms under the technical and specialised tender categories where women's involvement is minimal.

The main challenge of reservation of tender categories where women firms are not registered or qualified ought to be addressed to ensure women benefit from the available reserved tenders. To this end, the AGPO should carry out a baseline survey on the registered firms about the reserved tenders under the AGPO program, and the categories under which they are registered and promote the reservation of tenders under these categories. Procurement entities should first reserve tenders in categories where women qualify and participate, and where that cannot be achieved, ensure that the subcontractors comply with the 30% reservation to women under the AGPO program.

Parliament should also increase the budget allocation to the PPRA capacity building department to facilitate its discharge of the mandate to create capacity for women entrepreneurs to compete for procurement opportunities. The challenge of capacity can only be resolved through long-term interventions to create capacity sustainably for women-owned enterprises.

Substantive equality is attainable through gender-responsive procurement practices when the poorest, impoverished, disadvantaged, and rural women participate in public procurement at the national and county governments. These are the demographics of

women who ought to benefit from the affirmative action programs as opposed to elite and empowered women who are the majority of the beneficiaries of the AGPO program. To increase their participation, the paper proposes two main approaches.

The first approach is to reform the preferential and reservation rules to make provisions for these marginalised categories of women. The regulations can enforce rules on procuring entities to source local suppliers who fit within a set selection criterion that identifies, verifies, and awards women from these marginalised demographics.

The second approach is the use of community procurement initiatives spearheaded by the Ministry of Labour and Social Protection. Under these initiatives, social workers assist in identifying, and organising local marginalised women and women groups and facilitate their participation in public procurement through contracting for services through locally elected community organisations. This approach is ideal in contract categories involving fresh produce, livestock, general supplies, textile and clothing, catering, and cleaning tender categories.

To curb procurement malfeasance and opportunistic procurement behaviours by the procurement actors such as reported corruption, price fixing, and nepotism, the PPRA should invest in the investigative department to effectively monitor, identify, and correct procurement malfeasance. Malfeasance relating to the AGPO program such as the illegal sale of AGPO certificates, and fronting women leadership in male-owned companies should also be investigated and corrective measures applied. To this end, Parliament should increase funding to the PPRA investigative department to allocate for investigations and increased monitoring of firms registered under AGPO.

Importantly, legal reform is necessary to enforce gender-responsive laws and regulations and promote substantive equality. While the Act provides for gender-responsive procurement practices, it does not codify in definitive terms social goals relating to gender and equality through procurement. The Act should be amended to include social goals that align with the promotion of women's businesses, reduction of poverty among women, and increased participation.

The legal reform should also provide for stiff penalties for public procuring entities that do not meet the 30% tender reservations in their procurement plans to deter noncompliance. The Act should also provide incentives and rewards for those procuring entities that meet the threshold to encourage compliance. The Act should also be amended to include offenses relating to misuse of gender-responsive procurement practices and their penalties to allow the prosecution of individuals who abuse the programs and interventions designed to empower women's participation in procurement.

The review of the Act is necessary to address the practical challenges of implementation of the 2015 PPRA. The PPRA dispute resolution tribunal has powers to annul anything done by a procuring entity and substitute its decision of a procurement entity. Yet the tribunal's powers to order the revaluation of a tendering process do not include orders to reconstitute the composition of the procurement committee of the procurement body, which leads to practical challenges of the committees reaching similar decisions under review.<sup>181</sup>

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<sup>181</sup> See especially, (n 159 and n160).



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## APPENDICES

### Appendix 1: General Questionnaire

Monica Muthoni Nyuguto  
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Nairobi  
[nyugutomonica@gmail.com](mailto:nyugutomonica@gmail.com)  
Star House, Room 408, Ruiru  
Along Njiiri Karago Road

Dear Sir/Madam,

**RE: RESEARCH QUESTIONNAIRE: ATTAINING SUBSTANTIVE EQUALITY THROUGH GENDER RESPONSIVE PUBLIC PROCUREMENT PRACTICES IN KENYA.**

#### **Part A: Introduction**

I am Monica Muthoni Nyuguto, a research candidate at the Nairobi University School of Law Masters Programme. The research assesses whether gender-responsive procurement practices have led to substantive equality in Kenya.

This is a kind request to complete the questionnaire below and, at your convenience, grant me an interview.

The information provided will be analysed, and your name shall not be disclosed in the data analysis, and shall be used for the purpose of this research exclusively. You may withdraw your participation at any time, and your confidentiality remains my ethical responsibility.

**Important Notes:** Within the context of this questionnaire

- a. “*Gender Responsive Procurement Practices*” is the sustainable procurement of goods and services that accounts for the impact of gender inequality and women's economic empowerment. These practices are designed to end women's discrimination, their economic marginalization, and the achievement of procurement practices that meet the needs of both men and women.



- b. “*Substantive Equality*” is the implementation of affirmative action laws, policies, and plans that improve women’s capacity to participate in public procurement. Within the context of this study, substantive equality.
- c. “*Enabling Conditions*” include women’s access to options such as procurement and tendering education, funding, business support, opportunities, training, and greater economic power.
- d. “*Opportunistic tendencies*” are behaviours that emanate from the self-interests of players within a transaction to influence the outcome of a tendering process
- e. “*Compliant*” means legal and procedural compliance within the tendering process.

### Part B: Questionnaire

Name (optional):
Occupation:
Organization/where you work:
On a Scale of 1-5, where 1 represents “I strongly disagree,” and 5 represents “I strongly agree,” please communicate how strongly you agree or disagree with a particular question.
<b>A. Equal opportunities and Access to procurement opportunities assessment</b>
<p>1. Do you think the AGPO program and other gender-responsive procurement practices accord Kenyan women equal procurement access and opportunities?</p> <ul style="list-style-type: none"> <li><input type="radio"/> I strongly disagree</li> <li><input type="radio"/> I disagree</li> <li><input type="radio"/> I neither disagree nor agree</li> <li><input type="radio"/> I agree</li> <li><input type="radio"/> I strongly agree</li> </ul>
<p>2. Has the AGPO program and other gender-responsive procurement practices benefitted women-owned businesses in the following demographics: -</p> <p>2A. Elite and empowered women?</p>

- I strongly disagree
- I disagree
- I neither disagree nor agree
- I agree
- I strongly agree

2B. Women from rural Kenya?

- I strongly disagree
- I disagree
- I neither disagree nor agree
- I agree
- I strongly agree

2C. Women who have overcome difficulty/ /disadvantage/adversity?

- I strongly disagree
- I disagree
- I neither disagree nor agree
- I agree
- I strongly agree

2D. Women in SMEs and Micro enterprises?

- I strongly disagree
- I disagree
- I neither disagree nor agree
- I agree
- I strongly agree

2E. Impoverished women?

- I strongly disagree
- I disagree
- I neither disagree nor agree
- I agree
- I strongly agree

3. How many women-owned businesses have reported the following indicators following participation in the AGPO program and other gender-responsive procurement practices
- Increased contract awards
  - Increased registration of women businesses.
  - Other indicators

4. What do you recommend to increase women's access to and procurement opportunities in Kenya?

5. What can be done to increase the effective participation of women in public procurement in Kenya?

**B: Transaction costs to gender-responsive procurement practices**

6. Is the information and communication submitted by the tenderers under the AGPO program and other gender-responsive procurement practices open, compliant, and verifiable?
- I strongly disagree
  - I disagree
  - I neither disagree nor agree
  - I agree
  - I strongly agree

7. Are there opportunistic tendencies and malpractices between the various players under the AGPO program and other gender-responsive procurement practices?
- I strongly disagree
  - I disagree
  - I neither disagree nor agree
  - I agree

- I strongly agree

8. Do you know of any misconduct or opportunistic tendencies under the AGPO program and other gender-responsive procurement practices?

- Corruption
- Collusion
- Kickbacks
- Price fixing
- Nepotism
- Any other -specify

9. What can overcome these challenges in implementing the AGPO program and other gender-responsive procurement practices?

### **C. Recommendations and Proposed Reforms**

10. Has the law effectively promoted substantive equality through gender-responsive procurement?

- I strongly disagree
- I disagree
- I neither disagree nor agree
- I agree
- I strongly agree

11. What legal and policy interventions can be adopted to promote substantive equality through procurement?

Having participated in the study, do you have any questions for the candidate?

Appendix 2: Research Permit

NATIONAL COMMISSION FOR SCIENCE, TECHNOLOGY AND INNOVATION

REPUBLIC OF KENYA

Ref No: 275378

**RESEARCH LICENSE**

Date of Issue: 07/October/2023


This is to Certify that Miss.. MONICA NYUGUTO of University of Nairobi, has been licensed to conduct research as per the provision of the Science, Technology and Innovation Act, 2013 (Rev.2014) in Kiambu, Nairobi on the topic: **ATTAINING SUBSTANTIVE EQUALITY THROUGH GENDER-RESPONSIVE PUBLIC PROCUREMENT PRACTICES IN KENYA** for the period ending : 07/October/2024.

License No: NACOSTI/P/23/30202

Applicant Identification Number: 275378

Director General  
NATIONAL COMMISSION FOR SCIENCE, TECHNOLOGY & INNOVATION

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See overleaf for conditions

**THE SCIENCE, TECHNOLOGY AND INNOVATION ACT, 2013 (Rev. 2014)**  
 Legal Notice No. 108: The Science, Technology and Innovation (Research Licensing) Regulations, 2014

The National Commission for Science, Technology and Innovation, hereafter referred to as the Commission, was established under the Science, Technology and Innovation Act 2013 (Revised 2014) herein after referred to as the Act. The objective of the Commission shall be to regulate and assure quality in the science, technology and innovation sector and advise the Government in matters related thereto.

**CONDITIONS OF THE RESEARCH LICENSE**

1. The License is granted subject to provisions of the Constitution of Kenya, the Science, Technology and Innovation Act, and other relevant laws, policies and regulations. Accordingly, the licensee shall adhere to such procedures, standards, code of ethics and guidelines as may be prescribed by regulations made under the Act, or prescribed by provisions of International treaties of which Kenya is a signatory to
2. The research and its related activities as well as outcomes shall be beneficial to the country and shall not in any way;
  - i. Endanger national security
  - ii. Adversely affect the lives of Kenyans
  - iii. Be in contravention of Kenya's international obligations including Biological Weapons Convention (BWC), Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO), Chemical, Biological, Radiological and Nuclear (CBRN).
  - iv. Result in exploitation of intellectual property rights of communities in Kenya
  - v. Adversely affect the environment
  - vi. Adversely affect the rights of communities
  - vii. Endanger public safety and national cohesion
  - viii. Plagiarize someone else's work
3. The License is valid for the proposed research, location and specified period.
4. The license any rights thereunder are non-transferable
5. The Commission reserves the right to cancel the research at any time during the research period if in the opinion of the Commission the research is not implemented in conformity with the provisions of the Act or any other written law.
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9. The Commission may monitor and evaluate the licensed research project for the purpose of assessing and evaluating compliance with the conditions of the License.
10. The Licensee shall submit one hard copy, and upload a soft copy of their final report (thesis) onto a platform designated by the Commission within one year of completion of the research.
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12. Research, findings and information regarding research systems shall be stored or disseminated, utilized or applied in such a manner as may be prescribed by the Commission from time to time.
13. The Licensee shall disclose to the Commission, the relevant Institutional Scientific and Ethical Review Committee, and the relevant national agencies any inventions and discoveries that are of National strategic importance.
14. The Commission shall have powers to acquire from any person the right in, or to, any scientific innovation, invention or patent of strategic importance to the country.
15. Relevant Institutional Scientific and Ethical Review Committee shall monitor and evaluate the research periodically, and make a report of its findings to the Commission for necessary action.

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