

**Domestic and External Factors in Public Procurement
Reform Programmes in Developing Countries: A Case
Study of Kenya**

By

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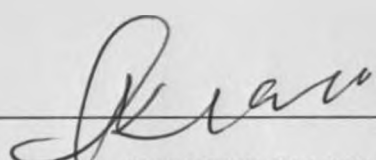
October 2010

DECLARATION

I, **GEOFFREY KIMANI GATHIGI** do hereby declare that this is my original work and has not previously been submitted for the award of a degree in any other University.

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DEDICATION

This Dissertation is dedicated to my beloved children: Kare, Ciru and Christian. "May this inspire you."

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As to whether I have succeeded in my objectives or not, you, the readers, are the final arbiters but such were my noble targets and I harbour no excuses in this regard.

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ACRONYMS

ACP	African and Caribbean Partnership
ADB	African Development Bank
AFRODAD	African Forum and Network on Debt and Development
CDF	Comprehensive Development Framework
CPAR	Country Procurement Assessment Reports
CPPR	Country Portfolio Performance Review
DPs	District Prefectures
ERS	Economic Recovery Strategy
EU	European Union
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
GOG	Government of Ghana
GPA	General Procurement Agreement
IDR	Indonesian dollar
IFIs	International Financial Institutions
IMF	International Monetary Fund
IPR	Intellectual Property Rights
KPK	Corruption Eradication Commission
MOF	Ministry of Finance
NARC	National Rainbow Coalition
NEPAD	New Partnership for Africa's Development
NGOs	Non-Governmental Organization

OECD	Organization for economic Cooperation and development
PD 80	Presidential Decree Eighty
PFM Reforms	Public Finance Management
PPOA	Public Procurement Oversight Authority
PPOG	Public Procurement Oversight Group
PPR	Public Procurement Reform
PUFMARP	Public Financial Management Reform Programme
RBM	Results Based Management
SAPs	Structural Adjustment Programmes
TRIPS	Agreements such as Trade Related Aspects of Intellectual Property
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
US	United States
USAID	United States Agency for Development
WTO	World Trade Organization

THE ABSTRACT

Two audits conducted on public procurement in Kenya by SGS (in 1987) and the World Bank in collaboration with the Kenya Government(in 1997) revealed that despite the fact that over 60% of government revenue is spent on public procurement, there existed a wide scale corruption and inefficiency. From this was generated the need to reform this sector whose effects had incrementally stifled domestic investment, with many adverse effects on the economy.

The study examines the progress of procurement reform process from its commencement to date and, seeks to assess the various interventions employed by the government to fix various problems in the sector. The study seeks to establish whether Kenya's public procurement reforms are donor-driven, and whether they are protectionist in nature.

Adopting the historical and analytical approaches, the study chronicles the various efforts at reforming public procurement system. Spanning from a discussion of the historical perspective, to the challenge of donor-driven reforms, and a review of the Public Procurement and Disposal Act, 2005, the study takes stock of comparative procurement reforms in selected Third World countries namely, Ghana, Indonesia and the Philippines.

The study arrives at the findings that public procurement reform in Kenya is not wholly donor-driven, but is also a response to the gaps that existed prior to the enactment of Public Procurement and Disposal Act, 2005. While contributions by the business

community, civil society and the Government towards procurement reforms process are appreciable, it is the pressure that the donors brought to bear that kick-started the reform process, and sustained the tempo, which culminated in the enactment of the Act. The reforms are not protectionist.

Finally, the study recommends mandatory and continuous training on procurement law and policy at the professional level, and entrenchment of procurement discipline in the syllabi of the universities and other institutions of higher learning. It also proposes development of a cadre of reformers and incorporation of the media to spearhead the creation of a sound procurement system. It posits that the reform agenda can only be sustained on a foundation of steady political goodwill.

INTRODUCTION

1.1 Introductory Remarks

Public procurement is broadly defined as the purchasing, hiring or obtaining by any other contractual means of goods, construction works and services by the public sector. Public procurement is alternatively defined as the purchase of commodities and contracting of construction works and services if such acquisition is effected with resources from state budgets, local authority budgets, state foundation funds, domestic loans or foreign loans guaranteed by the state, foreign aid as well as revenue received from the economic activity of state. Public procurement thus means procurement by a procuring entity using public funds.¹

Public procurement is different from private procurement, because in public procurement the economic results must be measured against more complex and long-term criteria. Furthermore, public procurement must be transacted with other considerations in mind, besides the economy. These considerations include accountability, non-discrimination among potential suppliers and respect for international obligations. For these reasons, public procurement is subjected in all countries to enacted regulations, in order to protect the public interests. It is worth noting that unlike private procurement, public

¹ WORLD BANK (1995a), "Guidelines: Procurement under IBRD Loans and IDA Credits", World Bank, Washington, D.C.

procurement is a business process within a political system and has therefore significant consideration of integrity, accountability, national interest and effectiveness.²

Public procurement regulation and processes are constantly changing, not only to adapt to economic and social circumstances but ultimately to increase transparency, fairness and efficiency in contract awarding processes. Since public resources are scarce, the efficiency of the procurement process is a primary consideration of every procurement regime, and will usually be subject to specific rules and policies covering how the relevant decisions are made.

In Kenya, public procurement has undoubtedly become an increasingly important issue in economic and business circles globally because the procurement of products and services by government agencies represents an important share of total government expenditure and thus plays a significant role in domestic economies, and has become a key issue in the country's economic governance and related areas. While ensuring best value for money will be secured through an open and non-discriminatory procurement regime, governments sometimes seek to achieve certain other domestic policy goals through their purchasing decisions, such as promotion of local industrial sectors or business groups.

This is evidenced by the growing interest of donors, governments, civil society, professional organisations, the private sector and the general public on matters of public

² Wittig, W.A. (1998). *Report of the Conference on Public Procurement Reform Conference in Africa, Côte d'Ivoire*. 30 November-4 December 1998, International Trade Centre, Geneva.

procurement³. Just as the anti-corruption policy turned out to be brittle and ultimately not effective, there are few who believe that the procurement systems in place have the necessary strength of style or will power to sustain the anti-graft struggle that has wide support from the development partners.⁴

Procurement policies and practices are an integral part of good governance and accountability. In addition and perhaps even more importantly, an effective and efficient procurement regime is critical for the efficient allocation and use of our limited resources. That procurement practices have an impact on governance, economic growth and development is not in doubt. This is because adequate capacity and integrity in procurement are prerequisites for international trade, investor confidence and a stable and predictable commercial and investment environment⁵.

The bulk of corrupt practices in Kenya have occurred in public procurement, where about 60% of government revenue is spent on procurement of goods and services. This therefore explains why public procurement has been at the centre of corruption⁶. This

³ Walter Odhiambo and Paul Kamau (2003), *Public Procurement: Lessons from Kenya, Tanzania and Uganda*, OECD Development Centre, Working Paper No. 208, Research Programme on The Integration of Developing Countries into the World Trading System, p. 19.

⁴ Corruption has over the years become a reality of monumental proportions. Since independence, Kenya has been mired in corruption, always ranking low in the Transparency International's Global Transparency Index. For details on this, see Report on the Transparency International Global Corruption Barometer 2006, Transparency International. Anglo Leasing and Goldenberg are some of the most recent examples of grand scale corruption.

⁵ Peninah Kihika (2005), *Towards a Sustainable Fight Against Corruption in Public Procurement*, Adili, Transparency International-Kenya, Issue No. 69, p 10. See also Healey, J. and Kilick, T. (2000) 'Using Aid to Reduce Poverty' in Tarp, F. and Hjertholm, P. (eds) *Foreign Aid and Development: Lessons Learnt and Directions for the Future*, New York: Routledge, p 243.

⁶ Corruption in public procurement not only leads to unfair competition among interested parties but also is a waste of public resources, especially in developing countries. Transparency International Global; Corruption report 2005 reports that US \$ 4 trillion is spent on government procurement annually worldwide; that is in the construction of dams and schools, provision of medical equipment and

state of affairs has been buttressed by opaque and unaccountable regulations⁷. The direct effect therefore, is increasing the cost or decreasing the quality of the goods and services tendered for due to corruption in public procurement and contracting constitutes extra tax on the poorest and most vulnerable citizens in developing countries and Kenya in particular.

Part of the problem may lie in the fact that anti-corruption institutions are often established to appease international actors, while governments endeavour not to alienate political allies at home through anti-corruption crackdowns. Indeed developing countries are highly aid-dependent and anti-corruption requirements continue to be central aid conditionalities⁸.

The World Bank and the IMF remain the dominant drivers and gatekeepers of donor policy in Africa. They continue to put pressure on African development through their conditionalities, using development aid as a lever to impose neo-liberal paradigm of privatisation, liberalization and the markets. The power relations in the WTO suggest it plays an important role in global governance. Pressure from the United States on some countries, using development aid as a lever to secure agreement in the WTO, is a clear link between the trade agenda and development aid.⁹

pharmaceuticals for the health sector, provision of text books and stationery to schools, construction of water disposal services, public buildings and other infrastructure important to economic growth.

⁷ J. M. Migai Akech (2007), *Development Partners and Governance of Public Procurement in Kenya: Enhancing Democracy in the Administration of Aid*, NYU Institute for International Law and Justice (IILJ) Working Paper 2006/3, p. 2. See also *The Public Procurement Policy (2007)*, **Political Café, Friedrich Ebert Stiftung**, (2007), p.1.

⁸ *Id.*

⁹ See *The Reality of Aid*, www.kubatana.net. (Accessed on 92/97/2007). In most countries the government, and the agencies it controls, are together the biggest purchasers of goods of all kinds, ranging from basic

1.2 Background

1.2.1 Enactment of Public Procurement and Disposal Act, 2005¹⁰

The Public Procurement Reform in Kenya was jointly initiated in 1997 by the Kenya Government and the World Bank. The procurement audits carried out on Kenya's public procurement system disclosed serious shortcomings ranging from inefficiency to lack of sound and transparent legal framework. The government decided to review and reform the existing procurement system with a view to enhancing efficiency, economy, accountability and transparency in public procurement.

The Public Procurement Reform undertaken by Kenya is home grown and has also borrowed good practices from the rest of the World. The Government developed and put in place appropriate Public Procurement Regulations, which were published as Legal Notice No. 51; The Exchequer and Audit (Public Procurement Regulations, 2001) dated 30th March, 2001 and the amendment of the same in 2002.

To further streamline the legal framework and deepen the public procurement reforms, the Government drew and published Public Procurement and Disposal Bill, 2002, 2003, 2004 and 2005. The slow pace with which the Government proceeded to enact this bill

commodities to high-technology equipment. At the same time, the political pressure to favour domestic suppliers over their foreign competitors can be very strong. An Agreement on Government Procurement was first negotiated during the Tokyo Round and entered into force on 1 January 1981. Its purpose is to open up as much of this business as possible to international competition. It is designed to make laws, regulations, procedures and practices regarding government procurement more transparent and to ensure they do not protect domestic products or suppliers, or discriminate against foreign products or suppliers.

¹⁰ Act no. 3 of 2005, Laws of Kenya.

had at times been interpreted by development partners and other stakeholders as lack of commitment to good governance. It was in response to this that the enactment of the Bill was conditionality under the Economic Recovery Strategy Assistance.

The Public Procurement and Disposal Act borrowed heavily from the Exchequer and Audit (Public Procurement) Regulations, 2001. At the same time, it introduced some major changes in the Public Procurement System. In summary fashion, outlined its purpose as maximizing economy and efficiency; promoting competition and ensuring that competitors are treated fairly; promoting the integrity and fairness of the procurement procedures; increasing transparency in those procedures, and increasing public confidence in the procurement procedures.

Additionally, the Act establishes an Authority known as the Public Procurement Oversight Authority, whose principal function is to oversee the public procurement regulations and to deal with actual procurement.

The Act also establishes an Advisory Board that advises the Authority on exercise of its powers and performance of its functions, approve the Budget and recommend the appointment of the Chief Executive Officer.

It also bars public servants from participating in the tendering while still in service in order to avoid conflict of interest and provides for the establishment of “Public Procurement Administrative Review Board”. The legislation also provides for sanctions

to serve as a deterrent to those who breach the law, on collusion, misrepresentation, corruption, interference with tendering, conflict of interest and disobeying decisions of the Review Board and Judicial Review.

The Act also provides for the regulation of security procurement and shows how such procurements and disposals are to be managed, audited and laid before parliament in the annual report. The security organs are required to maintain a dual list i.e. an open and restricted list. Items under the restricted list are procured in accordance with the method approved by the Authority.

The Act also introduces new methods of procurement procedures for low value items and specially permitted procurement procedures and repeals the requirement for the Permanent Secretary, Treasury to countersign contracts in the Central Government as stipulated by the Government Contracts Act, Cap 25.

1.2.2 Public Procurement and Donor Aid

There is divergence of opinion as to the place of public procurement in Kenya. One view is that Public Procurement Reform undertaken by Kenya is homegrown and has borrowed only good practices from the rest of the world.¹¹ The other school of thought holds the

¹¹ The legislation is based on the United Nations Commission on International Trade Law (UNCITRAL) model on procurement of goods, construction and services. According to the model law, the purpose of procurement legislation is to maximize competition, accord fair treatment to suppliers and contractors, and enhance transparency and objectivity. In doing so, it is envisaged to curb corruption in public procurement,

view that it has been pushed by the World Bank under the Economic Recovery Strategy Assistance.¹² To this latter school, in the guise of transparency and efficiency, the Public Procurement and Disposal Act sought to open public sector procurement to international competition, a competition which is neither equal nor fair.¹³

Developed countries attribute bad governance partly to corruption and abuse of office¹⁴. As a result, these countries, through IMF, World Bank and other development partners introduced structural adjustment programmes to address these concerns. The programmes have in turn come wrapped together with “aid conditionalities” as condition precedent to accessing the donor funds. Conspicuous among these conditionalities is that the recipient governments must undertake steps to eliminate corruption and corrupt practices, instil good governance and ensure the observance of the rule of law, transparency and accountability in the management of public affairs and funds.

Contrary to the contention by the development partners, their resources are not available with lower conditionalities. In fact, studies have shown that in recent years, the donors have lent only to the countries which have met a very high threshold in the implementation of measures demanded by them. In addition, the period during which the

an underlying theme in the recently passed legislation. Additionally, it is an initiative aimed at strengthening the legal framework and restoring public confidence in public procurement.

¹² *Id.* note 5. It is in the public domain that Bretton Woods institutions have been bullying Kenya and other developing countries to adopt strategic western countries-compliant Bills.

¹³ Sylvia W. Kangara (1998), *When the Pendulum Swings Too Far: Structural Adjustment Programmes in Kenya*, *Third World Legal Studies* 109 (1998), p. 116.

¹⁴ De Ases Anne Janet (2004), *Developing Countries: Increasing Transparency and Other Methods of Eliminating Corruption in the Public Procurement Process* 34 *Public Contract Law Journal* 553 (2004-2005).

conditionalities heightened also depended on who was the borrower, thus contradicting IMF's purported political neutrality.¹⁵

In an effort to streamline the legal framework and tighten the public procurement reforms, the Government drafted and published the Public Procurement and Disposal Bill in 2002. There were subsequent publications of the Bill in 2003, 2004 and 2005, a sluggish process that had been interpreted by Kenya's development partners as lack of commitment to reforms of the country's procurement system. The Bill was passed by Parliament in August 2005 and was assented to by the President in November 2005¹⁶.

Granted, in any given economy, the government is the largest single purchaser and consumer of goods and services, putting it in direct or indirect control of the economy. Moreover, even the private sector more often than not depends on the government as the single largest purchaser of their products. Therefore, an argument has been advanced by the developed countries¹⁷ that a proper procurement legal regime ought to be put in place to ensure transparency and accountability in the way government purchases or procures goods and services. In their view, the procedures through which the government procures or purchases goods and services ought to be subjected to transparent, competitive and accountable procurement systems for public goods and services. It has been argued that in cases where there is no transparency and competitiveness in government procurement, the entire national economy could be heavily compromised and distorted.

¹⁵ Rajagopal Balakrishnan, *Crossing the Rubicon: Synthesising the Soft International Law of the IMF and Human Rights*, 11 *Boston University International Law Journal* 81 (1993), p. 91.

¹⁶ One of the cardinal themes of the Act was to ensure that procurement laws were streamlined to conform to international procurement laws and standards.

¹⁷ Mainly the USA and the European Union.

1.3 STATEMENT OF THE PROBLEM

Public procurement is undoubtedly one of the public sector's most vulnerable to corruption, due to its size, complexity and the sums of money involved in situations which provide both incentives and opportunities for corrupt behaviour. This partly explains why it has been the subject of criticism in the past few years. A strong public procurement system enhances economy and efficiency, competition, integrity, transparency, public confidence and, a conducive investment climate. While some efforts have been directed towards procurement reform, there is still some disconnect between policy and law on the one side and practice. It is this disconnect that the study hopes to address.

In spite of the growing interest of donors to look into the political economy of anti-corruption reforms, very little analysis has been undertaken in a scholarly way to examine more specifically at the political economy of procurement reforms. Political economy issues have been rarely included in procurement assessment reports such as the ones conducted by the World Bank which tend to have a more legal or technical focus.

In common discourse, this state of affairs has been attributed to the failure by Kenya to fully own the structural changes as they are perceived inappropriate and, invariably a perpetuation of intrusiveness of the donors' policy conditionality.¹⁸ This has largely been

¹⁸ A conditionality is a concept in international development, political economy and international relations and describes the use of conditions attached to a loan, debt relief, bilateral aid or membership of international organizations, typically by the international financial institutions, regional organizations or donor countries.

noted in the discussions on the role of structural policies in donor-supported adjustment programmes. . The programmes, loosely interpreted as policies, are aimed towards improving the efficiency of resource use and increasing the economy's productive capacity.¹⁹

Within this context, procurement reform is essentially about addressing corruption risks, with the view of reducing opportunities for public officials to solicit or accept bribes at the various stages of procurement processes as well as strengthening internal and external controls to ensure enforcement. Yet, as procurement reform usually affects the interests of well connected and organized groups in society, reform processes often meet major opposition and resistance to change among the ruling elites. Against this background, increasing efforts to analyse at the political economy aspects of procurement constitute a promising trend to help understand the politics of change and address challenges and political barriers as they come up along reform process.

The formulation of policies and regulations to guide public procurement are not necessarily consistent with the unique requirements and conditions of Kenya and by extension, not necessarily reflects the practice. It is this disconnect that the study hope to plug.

¹⁹ Structural policies are usually aimed at reducing/dismantling government- imposed distortions or putting in place various institutional features of a modern market economy. Such structural policies include, inter alia: financial-sector policies; liberalization of trade, capital markets, and of the exchange rate system; privatization and public enterprise policies; tax and expenditure policies (apart from the overall fiscal stance); labor market policies; pricing and marketing policies; transparency and disclosure policies; poverty-reduction and social safety-net policies; pension policies; corporate governance policies (including anti-corruption measures); and environmental policies. For a detailed reading on this, see Morris Goldstein, "IMF Structural Conditionality: How Much is Too Much?", Institute for International Economics, a paper presented at NBER Conference on, "Economic and Financial Crises in Emerging Market Economies", Woodstock, Vermont, 12-21 October, 2000.

Yet, in spite of the growing interest of donors to look into the political economy of anti-corruption reforms, very little analysis has been undertaken in practice to look more specifically at the political economy of procurement reforms. Political economy issues have been rarely included in procurement assessment reports such as the ones conducted by the World Bank, which tend to have a more legal or technical focus. A more common approach has been to marginally or implicitly address the political economy dimension of procurement as part of studies looking at public sector.

A possible reason for this knowledge gap is that procurement reforms have traditionally been seen as a technical and administrative process mainly undertaken by legal experts and technical advisors. Its inherent political nature has often been ignored and the underlying incentive structure affecting support for reforms has been largely overlooked by policy makers.

While reformers are usually broadly aware of political economy factors, this knowledge has remained largely absent from the analyses with little explicit effort to determine how it might affect the outcome of procurement reforms. In addition, in many countries, procurement reforms have often been triggered by external pressures or corruption scandals, leading to hasty and piecemeal reforms that focus more on adding controls and legislation rather than developing a thorough understanding of the underlying causes of the problems and feasible options to address them.

RESEARCH OBJECTIVES

This study focuses on assessing the impact and/or efficacy of the donor conditionalities on the public procurement regime, and particularly attempts to:

- a) identify the key drivers of the public procurement reform agenda; who are the intended beneficiaries and establish the reasons for the heightened interest in the area of public procurement?
- b) establish the impact of donor imposed conditionalities in public procurement system and the extent to which it has served to ameliorate corruption levels in public procurement?
- c) establish the donor-supported procurement systems as they relate to government's own good governance initiatives?

1.4 LITERATURE REVIEW

In a 2007 article, Phillip Kichana,²⁰ examines whether The Public Procurement and Disposal Act, No 3 of 2005 is the panacea to procurement scandals in the public sector. He makes the argument that the whole corpus of anti-corruption law generally and the Procurement Act specifically should make a big contribution to minimizing or eradicating corruption in the public sector if implemented zealously, but are by no means

²⁰ Phillip Kichana,(2007) , the Public Procurement Act is not Tamper-proof, Adili Magazine, Transparency International Kenya.

a panacea on its own. The law has to be based on a clear documented government policy to streamline procurement across the public sector. Also, there has to be goodwill by the government organs concerned with procurement, and a lot of investment in training procurement officials. But above all, the policy and laws must exist in the minds and hearts of the officials who apply them and become some sort of culture or creed before public savings begin to be made; otherwise in some cases new challenges will emerge that will make the procurement law and rules punitive to the same public they are set to protect. Lastly, there must be equal emphasis on disposal of public assets, which seems to be submerged under the zeal to streamline procurement.

A more common approach has been to marginally or implicitly address the political economy dimension of procurement as part of studies looking at public sector or governance reforms more broadly. For example, the OECD 2009 Report on the “Use of Country Systems in Public Finance Management”²¹ touches on the politics of reform in relation to Public and Financial Management (PFM) that covers, to some extent, public procurement related issues. This report emphasizes the importance of grounding public sector reforms in a country’s political reality and identifies key drivers of successful PFM reforms that can be directly applied to procurement reforms, including factors such as country-led strategies, country-owned management reform process, co-ordinated donor support, stakeholder engagement and capacity development.

A possible reason for this knowledge gap is that procurement reforms have traditionally been seen as a technical and administrative process mainly undertaken by legal experts and technical advisors. Its inherent political nature has often been ignored and the

²¹ Available at <<http://www.oecd.org/dataoecd/7/41/42448739.pdf>> (accessed 10th February, 2009).

underlying incentive structure affecting support for reforms has been largely overlooked by policy makers. While reformers are usually broadly aware of political economy factors, this knowledge has remained largely absent from the analysis with little explicit effort to determine how it might affect the outcome of procurement reforms.²²

In addition, in many countries, procurement reforms have often been triggered by external pressures or corruption scandals, leading to hasty and piecemeal reforms that focus on adding controls and legislation rather than developing a thorough understanding of the underlying causes of the problems and feasible options to address them.²³

Public procurement can, and does, have a large impact on the development goals of poor countries. This is largely due to its sheer size, relative to the economies of most developing countries.²⁴ As Mosoti argues, there is a direct positive correlation between government procurement and development.²⁵ According to him, this direct relationship is demonstrable in a number of ways. First, public procurement is the interface at which public demands, such as infrastructure and medical supplies, meet the private sector suppliers, such as construction companies and pharmaceutical drugs suppliers. Most of the large-scale public requirements that must be met through public procurement are classic development needs, such as roads, railways, bridges, hospitals, medical supplies,

²² Marie Chene, *The Political Economy of Public Procurement Reform*, U4 Helpdesk, Transparency International, p.2.

²³ *Ibid.*

²⁴ Federico Trionfetti, *Discriminatory Public Procurement and International Trade*, 23 *World Econ.* 57, 73(2000).

²⁵ Mosoti, Victor, *The WTO Agreement on Government Procurement: A Necessary Evil in the Legal Strategy for Development in the Poor World?* 25 *University of Pennsylvania Journal of International Economic Law* 593(2004) at 599.

and others. In this sense, public procurement provides direct avenue, with high levels of expertise, for governments to meet their development challenges.²⁶

Another direct interface between public procurement and national development is to be seen in the “value for money”. This, arguably, is one of the fundamental goals of procurement.²⁷ Getting “value for money” is at the core of sound public management. In order to achieve this, there must be in place performance efficiency, cost-cutting and general fiscal discipline. According to Mosoti, these enable government and public sector management entities to avoid unnecessary wasteful spending, thereby lowering operational costs and increasing rates of savings. In the end, they translate into general lower government spending and lower budget deficits, a fundamental problem throughout the developing world. It also translates into a less acute need for financial injections from multilateral lending institutions such as the World Bank and the IMF. It thereby reduces debt-servicing commitments, which have been shown to have disastrous economic effects because of escalating and unsustainably high interest rates.²⁸

Additionally, governments can use public procurement as a direct social and economic development tool. This can be enhanced by formulating strategies that give preference to suppliers from certain sectors and nurture their development and long-term

²⁶ *Id.* Mosoti quotes Vinod Rege (Transparency in Government Procurement: Issues of Concern and Interest to developing Countries, 35 *Journal of World Trade* 489, at 496 (2001) as saying that “[I]t is a widely held view in most...[developing countries] that central and local authorities can make significant contributions to the development of national industries and employment by awarding contracts to domestic suppliers and contractors by giving preferences to the procurement of domestically produced goods, services or works.”

²⁷ Mosoti (2004) p, 600. See also Robert Hunja, Obstacles to Public Procurement Reform in Developing Countries, in *NO LONGER BUSINESS AS USUAL: FIGHTING BRIBERY AND CORRUPTION* 159, (OECD ed. 2000), p. 13.

²⁸ Mosoti (2004), p. 600.

competitiveness. Governments can use public procurement as a tool for lending support to small and medium scale enterprises, for overcoming regional or sectoral unemployment problems, providing support to minority or disadvantaged communities or workers, ensuring fair treatment of employees and so on.²⁹

It therefore behoves a state to preferentially treat its nationals, but in a competitive and open manner. This then becomes a potent arsenal for stimulating national development.³⁰ And as Wittig observes, “the more focused the management of public procurement, the better a country can take advantage of its purchasing power to help development efforts.”³¹

Chene, having noted that procurement is one of the most challenging sectors to reform because it meets major resistance from vested interests within the society, advocates for understanding the political economic aspects of procurement for the society to be able to address the underlying factors that may impede the effective implementation of reforms.

³²She argues that the combined effect of high value transactions, excessive discretionary powers afforded to public officials and dependency of private firms on government contracts to survive economically provide fertile grounds for procurement, intense rivalry, conflict and corruption in many countries. He holds the opinion that procurement reform is a highly technical and complex process that requires major changes involving a

²⁹ *Ibid.*, p. 601

³⁰ *Ibid.*

³¹ Wayne Wittig, International Trade Centre, Public Procurement and the Development Agenda 3 (2003), available at http://www.wto.org/english/tratop_e/groc_e/wkshop_tanz_jan03/itcdemo1_e.pdf (date accessed 02/07/2007).

³² Marie Chene, “The Political Economy of Public Procurement,” U4 Helpdesk, Transparency International.

wide variety of actors with multiple, often conflicting and changing political incentives that can complement, compete or reinforce each other. He states that due to the inherent political nature of procurement reforms, anti-corruption approaches cannot be limited to implementing a set of technocratic solutions. The incentive structure that may undermine political will for reform has to be adequately assessed and addressed to ensure effective implementation of reforms.

A 2004 “Study of Procurement Reform in Sierra Leone”³³ supports this view. Based on the Sierra Leone case study, it recommends the need to examine the motivational factors when analyzing the drivers of economic and political behaviours in the context of procurement reform. The Sierra Leone procurement reform, launched in 2003, used a legal and regulatory framework as well as capacity building strategy. This paper argues that the introduction of a comprehensive legislation cannot be seen as the panacea to effectively reform procurement systems, as successful implementation of reform greatly depends on the support of political change agents. The various stakeholders’ incentives that are likely to support or inhibit the reform process must be taken into account, since it is unlikely to bring meaningful change without securing the support and cooperation of the influential political circles.

In yet another paper, “International Cooperation and the Reform of Public Procurement Policies,”³⁴ it is argued that while there is a wide consensus that the ultimate goal of

³³ Elliot “Study of Procurement Reform in Sierra Leone,” available at <<http://www.ippa.ws/IPPC/PROCEEDING%20PAPERS/Elliot.pdf>

³⁴ International Cooperation and the Reform of Public Procurement Policies, available at <http://papers.ssrn.com/so13/papers.cfm?abstract_id=821424>(accessed 10th November, 2009).

procurement reforms is to promote efficient, transparent and non-corrupt procurement systems that achieve value for money, there is little information available on the means of effective reform, the process and dynamics of change and what strategies can be successfully replicated to improve developing countries' procurement systems. The paper concludes that since there is no sufficient evidence as to the means by which successful procurement reform can be implemented in developing countries, there is a need for a concerted effort to substantially add to the knowledge base on public procurement reforms through the development of a policy relevant research agenda. The development of such knowledge base is critical to pro-actively design advocacy campaigns, create the peace for change and build traction for reform. The paper then urges the need for the development of an in-depth understanding of the factors, structures, formal and informal institutions that shape incentives and behaviours with the view to identifying procurement reform opportunities and threats. As political economy analysis is mainly concerned with the incentive structures, power relationships, institutional factors that lead political actors to support or resist change, it can significantly contribute to analyzing the underlying causes of procurement corruption and develop a solid understanding of the drivers and dynamics of change. This approach is crucial to manage the politics of procurement reform and adequately address political challenges and problems as they arise during the implementation process.

In the paper, *Corruption in Public Procurement: A Perennial Challenge*,³⁵ Glenn T. Ware, Shaun Moss, J. Edgardo Campos, and Gregory P. Noone explore potential

³⁵ Glenn T. Ware, Shaun Moss, J. Edgardo Campos, and Gregory P. Noone. (2006), "Corruption in Public Procurement: A Perennial Challenge." in J. Edgardo Campos Sanjay Pradhan(eds).THE MANY FACES OF CORRUPTION

weaknesses along the procurement chain and identifying red flags as well as potential policy options to address and manage corruption risks. A World Bank 2007 study tracking corruption vulnerabilities at sector level illustrates emerging efforts by donors to include political economy issues in the dialogue with partner countries.

The study starts by identifying the most common corruption schemes used to manipulate procurement processes such as kickback brokered by local agents, various forms of bid rigging or use of shell companies and provides an overview of the potential vulnerabilities associated with each phase of the government contracting process. At the project selection stage, demand for goods and services can be inflated, artificially induced or manipulated to identify projects with higher return value. Many opportunities for corruption also occur during the tendering process, where specifications can be tailored or publicity restricted to limit competition, confidentiality can be abused, and preparation, submission and evaluation of bids manipulated. There are also many opportunities for abuse of authority in the post-tendering process, when it comes to monitoring contract performance, administration and supervision. The chapter identifies three overarching factors that heighten corruption risks throughout the procurement chain, including budget management, personnel management and staff capacity.

The article concludes that conducting comprehensive vulnerability assessment as a tool that establishes the likelihood of corruption to occur in a given project can be considered a new and promising approach to anticipate and reduce corruption risks in specific

TRACKING VULNERABILITIES AT THE SECTOR LEVEL., The International Bank for Reconstruction and Development, p. 250. available at , (http://www.igac.net/pdf/publications_adb_manyfacesofcorruption.pdf) (accessed 6/06/2010).

procurement processes. By obtaining comprehensive information before the distribution of funds on the likelihood of corruption, the methods likely to be employed and the actors likely to use them, due diligence can be enhanced throughout the project cycle and corruption risks adequately managed.

Yet still, other challenges abound. Section 7(1) of Public Procurement and Disposal Act³⁶ hardly proceeds to buttress the line of argument outlined shifts the debate a scale higher.

It states thus:

“7. (1) if there is a conflict between this Act, the regulations or any directions of the Authority and a condition imposed by the donor of funds, the condition shall prevail with respect to a procurement that uses those funds and no others.

The impact of this is to accord conditionalities that accompany donor aid superiority over Kenya’s municipal law. This immediately triggers questions of considerable undue donor influence, considering the fact that Kenya is a dualist state, meaning that the international agreements have to be domesticated in order to become applicable law.³⁷

The provision traces its roots to the WTO GPA, which aims at opening public procurement contracts to international competition under equal commercial conditions

³⁶ Public Procurement and Disposal Act, Act No. 3 of 2005, Laws of Kenya.

³⁷ Ratification of a bilateral, plurilateral or a multilateral agreement does not automatically become Kenyan law unless so passed as an Act of Parliament. The most direct effect of this is that under the Judicature Act, international, bilateral or plurilateral agreements cannot be a basis for creating obligations or rights nor can they be used for resolution off disputes in our judicial system.

free of any national preference. The GPA requires its signatories to accord national treatment to all suppliers, meaning discrimination against products or suppliers from other signatory countries is prohibited. As a result, the non-discriminatory element in the WTO GPA, rooted in the maximization of competition, generally ensures that procuring agencies do not treat suppliers differently due to their nationality, ownership, affiliation, or origin. In a nutshell, preferential prices and offsets are prohibited, as is any form of favoritism for domestic suppliers, and instead thereof, an open and competitive tendering process of public procurement is encouraged with limited tendering allowed for exigencies.³⁸

As Wahi argues, there is plenty of literature to support the idea of coercion even in the exercise of private power.³⁹ She advances the view that the World Bank and IMF's coercive use of the conditionality arrangement in determining the fiscal and monetary policies and shaping the development decisions of debtor countries as constituting not an expansion but, in fact, a transfer of 'public decision making' from states to these non-state actors. Given the acknowledgement of the role of coercion even in democratic states, it is evident that the actions of intergovernmental organizations like the World Bank and the IMF, which are independent of states, have a significant coercive impact on

³⁸ *Id.* Note 8. Article opens an avenue for derogation from non-discrimination feature of the WTO GPA. Under this article, developing countries may obtain special treatment in terms of coverage and national treatment rules by specifying exclusions in the list of offer.

³⁹ Jon Hanson & David Yosifon, *The Situation: An Introductory to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. Pa. L. Rev. 129 (2003), as quoted in Wahi, Naomi, Human Rights Accountability of the IMF and the World Bank: A Critique of Existing Mechanisms and Articulation of a Theory of Horizontal Accountability, 12 *University of California at Davis Journal of International Law & Policy* 333 (2005-2006), p. 333. She argues that public power as comprised in the state and state agencies is by definition coercive and hence the need for regulation. That said, then it . arguendo, explains the need for regulation of public procurement in a manner that will not stifle investment in the domestic front.

the lives of the people within these developing countries.⁴⁰ When such coercion results in skewing the platform for trade, as seen in public procurement, the need for leveling the playing field becomes imperative.

The most cardinal assumption behind the prescriptions (most of which have found their way into the procurement statute) is the legitimacy and power derived from the “universal notions” of free market and liberal democracy. These neo-liberal prescriptions are based on images of failure and lack of economic rationality. As further justification, they remind African economic leadership of its dark past, intimating that if reforms are not adopted in toto and entrenched into the legal regulatory framework, the African state is destined to relive its life in the economic doldrums.⁴¹ While literature in this area has been quick to recognize the ethnocentricity, cultural particularity and coercive imposition of these twin projects of global governance, it has to this date failed to acknowledge or even consider that they are based, at least in part, on underlying assumptions and unstated, disparaging and therefore implicitly racist stereotypes of the African state, its leadership, and its people⁴².

The assumption was that the reforms would introduce market-based solutions that are superior to personal bonds or relationships that command individual loyalty, such as those of family, clan, kinship, or ethnicity at the expense of common good. To maintain this distance or arms-length principle, the developing partners proposed that one way of

⁴⁰ *Id.*

⁴¹ Gathii, James Thuo, Representation of Africa in Good Governance Discourse: Policing and Containing Dissidence to neo-Liberalism, Post-colonialism, Globalization and the Law, *Law Journal Library, Third world Legal Studies* 1998-1999, p. 71.

⁴² *Ibid.*

reducing corruption would be to prefer foreign firms with no close ties in the country over local companies when awarding contracts, although merit is another key consideration.⁴³

If Gathii is comprehensive, Ngugi is even more forthright. The matter has been the subject of intense intellectual contestations, with the latter arguing that the current development agenda, operationalised by the development partners is ideological and, invariably, weakens the ability of the Third World countries to articulate their economic and foreign policies in ways that would benefit their citizenry the most. Secondly, that since the World Bank and other International Financial Institutions are key players in the development reform agenda, as well as international organizations meant to reflect the collective will of their members, the charge of ideological bias should be taken seriously than in the past.⁴⁴

Aguirre presents yet another important evaluation of the impact on Third World countries albeit on a tangent: a human rights perspective. That this trend in development has continued unabated despite widespread international outcry from various sectors of the society. That the “free market” global trade system based on deregulation, liberalization and competitiveness has been presented as the only option for development.

⁴³ See World Bank, *Reducing Corruption*, POL'Y & RES. BULL., Sept 1997, at p.3 also quoted in Gathii 1999), *infra* note 5.

⁴⁴ Ngugi, Joel M., *The World Bank and the Ideology of Reform and Development in International Economic Development Discourse*, 14 *Cardozo Journal of International & Comparative Law* 313 (2006). See also JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS*, W. W. Norton & Company 16 (2002) where he authoritatively indicates that a one-size-fits-all economic policies can damage rather than help countries with unique financial, governmental and social institutions advocates more democracy and openness in the operations of these organizations, but says there will be no reform until they critically examine the tacit assumptions on which their policies are built.

Supporters of the current trade regime insist that positive economic arguments show the success of the global trade system and that it enhances human rights through economic growth, provided by the Structural Adjustment programmes. That while it is avowed that free trade and economic freedom are essential for the enjoyment of human rights, the system allows for pursuit of self-interest, which raises the standard of living for all. That it is erroneous to say that the sustained global economic growth promoted by these ideals and transferred to the developing world through the implementation of the Structural Adjustment Programmes will provide funds for the realization of human rights. He dismisses the assumption that this growth leads directly to improvement in social justice and poverty alleviation.⁴⁵

While there abound different contestations as to the role of the development partners in development in Third World countries, there are others who are of the opinion that today's global economy dictates the very measures instituted, implemented, and utilized by the IMF.⁴⁶

Developing countries are reforming and establishing public procurement systems in order to save their governments money and increase public confidence in new or reformed

⁴⁵ Auguirre, Daniel, *Restricted Development: The Entrenchment of Structural Adjustment Development and Human Rights Law*, 18 *Sri Lanka Journal of International Law* 9 (2006). This view finds favour with Wahi, who argues that because these organizations do more than merely monitoring state behaviour and facilitating international regulation-they are exercising power directly over individuals within their member states-the use of such governing power justifies direct human rights accountability of these institutions. See Wahi (2005-2006) p. 334-335. To Wahi's mind, the importance of international human rights accountability must be understood in the context of increasing power of non-state actors (in general, and that of World Bank and the IMF in particular) as presenting a normative challenge to the existing vision of international law as today being primarily a vertical order that governs the rights and obligations of sovereign states.

⁴⁶ Makich-Macias, Milena D., *The Effect of the International Monetary Fund Bailout on Emerging Growth Countries*, 26 *Brooklyn Journal of International Law* 1755 (2000-2001 p. 1756.).

governments⁴⁷. During the process of establishing the public procurement systems, developing countries encounter a broad range of issues and difficulties that are not usually the concerns for industrialized countries. Although the principle of strong and efficient procurement systems are sought in each country, the system and details for each will inevitably differ because of a whole series of economic, social and political considerations which prevail in the geographic area where the procurement is located⁴⁸.

While the United Nations Commission on International Trade Law (UNCITRAL)⁴⁹ procurement model provides extensive guidance on procurement, developing countries may need additional help in addressing particular issues. Several problems arise when developing countries sign and adopt anti-corruption treaties at the international level. Issues of sovereignty, international accountability for local officials and jurisdiction almost always crop up. It is extremely important for developing countries to guard their sovereignty and protect themselves from being overrun by the development partners⁵⁰.

While the legislation on procurement in Kenya is anchored on the philosophy of promoting transparency and accountability, it must be noted that transparency and market access are two different notions and must be treated as such, unlike as it is at the moment

⁴⁷ Robert R. Hunja, *Obstacles to Public Procurement Reform in Developing Countries*, in *NO LONGER BUSINESS AS USUAL: FIGHTING BRIBERY AND CORRUPTION* 159, 159(OECD ed. 2000).

⁴⁸ De Ases Anne Janet (2004), *Developing Countries :Increasing Transparency and other Methods of Eliminating Corruption in the Public Procurement Process* 34 *Public Contract Law Journal* 553 (2004-2005).

⁴⁹ UNCITRAL is a subsidiary body of the United Nation's General Assembly that formulates and regulates international trade in cooperation with the World Trade Organisation. It is mandated to further the progress harmonization and unification of the law of international trade.

⁵⁰ *Id.*, p 560.

where the Act invariably creates a framework for renegotiating market access in the cloak of procurement.

At the national and international level, public accountability has rarely been a subject of legal regulation. As a concept or legal issue, public accountability gained momentum in the 1990s. This was in response to corruption and abuse of office with respect to donor funds particularly the IMF and World Bank. However, this entrenchment of basic and more often pronounced features in the national procurement regulations has been met with mixed feelings. The developing countries are very suspicious on the same and have argued that it is a back door attempt to introduce neo-colonization in the style of trade forums. This is reflected in the disparity in bargaining power at the WTO forums. The World Bank Guidelines do not provide for appropriate domestic preference margins for suppliers of goods and works. In effect, the sovereignty of a nation embodied within the internal management and domestic policies is something they modify at a fundamental level⁵¹.

These countries are faced with local logistics that go beyond the dictates of the requirements of government procurement at the WTO or the international level. They have further argued that the regional imbalances and poverty levels in these economies need to be addressed and these might require these countries to channel the resources in the said areas with little or no regard to procurement rules. There is therefore a very

⁵¹ Catherine H. Lee, *To Thine Oneself Be True: IMF Conditionality and the Erosion of Economic Sovereignty in the Asian Financial Crisis*, 24 *University of Pennsylvania Journal of International Economic Law* 875 (2003) p 877.

strong argument for incorporation of the local “preferences rule” if these government procurement initiatives have to work in these countries.

And as Wayne Wittig observes, procurement is a business process within a political system and therefore, failure to properly balance those elements can lead to wasted effort and poor development results within those countries⁵². He further notes that public procurement remains a big part of the economy of the developing countries, accounting for a large part of their Gross Domestic Product. In his view, it is an area of attention since resources are not being properly managed in these countries. The crux of his argument is that governing administrations in developing countries can reap benefits from improved management of their public procurement systems with a more focused approach on the control of their resources within their internal market and greater value can be achieved in national budgets while developing local industry. He concludes that despite the potential for developing local industry through public procurement, many local and international firms do not participate in public procurement because of a perception, and at times the reality that government are slow-payers, difficult to work with or have their own favoured suppliers for contract awards. In addition to these, there is a feeling among the suppliers that corruption plays a part in contract decisions. He suggests that there is need to develop a set of tools to make it easier and more cost effective to build the required capacity “in country” to understand not just the basic rules

⁵² Wayne Wittig, *Public Procurement and the Development Agenda*, International Trade Centre, p 1. See also Rajagopal Balakrishnan, *Crossing the Rubicon: Synthesising the Soft International Law of the IMF and Human Rights*, 11 *Boston University International Law Journal* 81 (1993), 105. Balakrishnan is in agreement with Wittig when he argues that because the conditionalities are political in nature, they may not be appropriate when dealing with such sensitive issues as procurement. Part of this view is buttressed by the feeling of asymmetry that characterizes such conditionalities. Indeed the third world countries are of the view that the conditionalities and strings are a manifestation of neo-colonialism.

but also why it makes sense to follow these rules. He argues that some corrupt practices could be caused by lack of understanding of the best practices in public procurement⁵³.

The use of aid to influence broad national development policies is said to go back to the Marshall Plan. The concentration of the World Bank and the bilateral donors on project loans throughout the 1960s and 1970s reduced the focus on general policy, though interest in it among lenders was never completely absent. Indeed in the mid 1960s, officials of the United States Agency for International Development (USAID) set out the basic rationale for attaching conditions to development lending- " In the long-run aid's "influence potential" is much more important than its resource contribution. This is true for two reasons: Total aid from all sources has probably contributed roughly 20% of total investments in the developing countries in the past few years. The use made of the remaining 80% is clearly much more important in accelerating growth than is the use of aid alone.⁵⁴

Furthermore, policies and procedures in import licensing arrangements, investment codes, marketing board pricing policies, power and transportation rate structure, tax provisions, to name only a few- affect economic development at least as powerfully as the presence or absence of adequate infrastructure or technical skills. Successful efforts to

⁵³ *Ibid.*

⁵⁴ *Ibid.*

influence macroeconomic and sectoral policies are likely to have a greater impact than the added capital and skills financed by aid."⁵⁵

The need for a public procurement system that is supported by appropriate legal framework cannot be overemphasized. A well-organized procurement system is one of the key attributes of good governance, as evidenced by increasing confidence that public funds are well-spent.⁵⁶

Despite the importance of government procurement in international trade, purchases made by governments are explicitly excluded from the rules of the World Trade Organization (WTO). The WTO does however have a plurilateral agreement on government procurement (GPA). This type of agreement only binds the signatories of the agreement. At present no African country is a member of the GPA. The reluctance of many developing countries to accede to the GPA suggests that the perceived costs of joining to outweigh the benefits. It further suggests that these countries have the desire to be able to discriminate against foreign suppliers when awarding government contracts⁵⁷. Policy factors, lack of potential negotiating leverage, uncertainty about potential gains and opening up markets to developed countries were some of the other explanations of developing countries for not signing the agreement.

⁵⁵ Nelson, Joan and Ranis Gustav (2006): Measures to Ensure the Effect, Use of Aid USAID Discussion Paper, No. 12, as quoted in Kwasi Anyemedu (2003), *Financing Africa's Development: Can Aid Dependence Be Avoided?*, available at www.codesria.org/Links/conferences/Nepad/anyemedu.pdf

⁵⁶ Nkinga, NSD, "Public Procurement Return-Tanzanian Experience, a paper presented a joint WTO-World Bank Regional workshop on procurement for the English-speaking African countries held at the Royal Palm Hotel Dar Es Salaam Tanzania 14th -17th January, 2003. See also Kovarik Nicholas D. Comments: Piggy-Back Laws: More Bang for Your Back-An Analysis of How Efficient Public Procurement Laws Benefit Counties, Bidders, and Taxpayers, *39 Gonzaga Law Review* 575 (2003-2004)

⁵⁷ Kruger, Paul (2006), Government Procurement in the TDCA And Cotonou Agreement[unpublished].

Many problems exist in developing and transition countries that keep local suppliers from taking advantage of the government marketplace. In general, these problems involve untrained or poorly trained workforces; inadequate accountability for government decisions; lack of transparency in the procurement process, as well as little or no information on the results of specific procurement transactions; and, "bureaucratic influence" which causes a contract to be awarded on the basis of subjective or unannounced criteria to an apparently specially favoured contractor⁵⁸.

As has been noted above, the issue of donor-imposed proper and balanced procurement system and state sovereignty is an area that has been given least attention yet presents a great need for address⁵⁹. A coordinated effort on the issues of ensuring transparency and accountability through a sound procurement system and aid are important because they are inextricably linked. The debt crisis, trade injustice and politically driven aid policy interact with each other to exacerbate poverty, inequality and environmental degradation across the developing world. The three issues are also linked because they are vehicles through which rich countries are pursuing their own narrow self-interest rather than the interests of the poor.

What makes their job more difficult is the double speak at the international level, where good governance is defined to suit the hegemonic interests of developed countries'

⁵⁸James Wamugo (2005) *Tackling Graft in Public Procurement, Adili*, Transparency International-Kenya, Issue No. 69,p 6.

⁵⁹ Many of the indicators and targets rely too heavily on World Bank criteria and analysis, giving the Bank an inordinate amount of power in determining whether countries strategies and systems are operational and 'suitable' for donors to align around.

governments and their multinationals, where neo-liberalism continues to rule the roost as the dominant economic paradigm despite the havoc it has wreaked on the continent through Structural Adjustment Programmes⁶⁰.

While African countries are making frantic efforts to clean up their governance act, there have been no parallel attempts by donor countries, including the IFIs to become more accountable and in the process to respect the economic and social rights of people in developing countries. SAPs have been discredited, but they have resurfaced under different guises as elements within PRSPs and as part of necessary reforms in NEPAD⁶¹.

Through the WTO and other multilateral agreements, including the EU/ACP Agreement, Western countries continue to extract concessions from developing countries that threaten the livelihoods of their people. Agreements such as Trade Related Aspects of Intellectual Property (TRIPS) limit the capacity of African countries to benefit from cheap technology transfer while attempts to force open public procurement in developing countries also have serious consequences for building indigenous entrepreneurs in the South. The lopsided global trading regime, where developed countries continue to spend billions subsidizing their exports is a major violation of the economic and social rights of people in developing countries by denying them the chance to develop their industries and agricultural sectors⁶².

⁶⁰ African Forum and Network on Debt and Development AFRODAD (2003/2004), Reality of Aid Africa Edition, available at realityofaid.org/africa/downloads/download.php?fn=RoA_Africa_2004_Chapter03.pdf - p. 9(1/07/07).

⁶¹ *Ibid.*

⁶² *Ibid.*

Notwithstanding the well-intentioned basis for imposing these good governance proposals on sub-Saharan African economies, the proposals contain several significant short-comings: First, these programmes under-emphasize and hence undermine the social and economic rights of the African people; and second, they are based on an ethnocentric, individualistic bias which presupposes that the individual rather than the community is the centre of the African society. In sub-Saharan Africa, this assumption is for the most part inaccurate. Other critics of these reforms programmes view them merely as a continuation of the protracted and injurious legacy of colonial, neo-colonial and imperial interference in African governments and their economies⁶³.

The good governance agenda presents its technical economic jargon as an ideologically neutral and universal antidote to “turmoil”, chaos, corruption, authoritarianism, and “disorder” of the post –colonial African experience⁶⁴.

1.5 JUSTIFICATION OF THE STUDY

This topic is particularly relevant in view of the current trends towards the establishment of global trading blocs and the consequent demand for the harmonization of procurement

⁶³ Gathii, James Thuo, Representation of Africa in Good Governance Discourse: Policing and Containing Dissidence to Neo-Liberalism Post-colonialism, Globalization and Law, *Law Journal Library*, third OWorld Legal Studies 1998-1999., p. 66-67.

⁶⁴ *Id.* An underlying idea here is that identity politics is perceived as a threat not only to international security, but to international economic order as well. Anne Orford suggests that this envisioning of ethnic chaos (among other threats) has been used to justify continued western intervention in the Third World in a bid to arrest the “crisis” and restore the world to international peace and security. Anne Orford, *The Politics of Collective Security*, 17 MICH J.INT’L LAW 373 (1996).

systems between states to the end that greater transparency, accountability and good governance may be achieved.

The cardinal justification is the need to assess and gain insight into the economic, socio-political dynamics of the efforts to initiate home-grown policies while borrowing from the best practices in moulding a steady and sound procurement regime. It identifies some of the challenges that Kenya (like any other Third World Country) has faced in its attempts to establish a legal framework for public procurement.

The study attempts to address unique aspects of procurement legal regime obtaining in Kenya. Additionally, procurement of goods and services is a much-contested area even at the global level. Indeed, it is one of the issues that remain unresolved at the WTO. By presenting a disciplined analysis on the issue and the political economy of procurement reforms, the study will seek to find out a proper balance between an effective public procurement regime and the pressures from and discussions by the development partners, including the WTO round of talks.

Equally important, the study is inspired by the author's personal experience in the field of procurement, being part of the team that was tasked with the implementation of Public Procurement Regulations, 2001 after dismissal of all public procurement officers by then Finance Minister David Mwiraria in May, 2003. Therefore, the personal initiative to carry out the study is borne out of the desire to examine the progress of development of a

steady framework for public procurement, while borrowing from the lessons learnt during the execution of the task mentioned above.

1.6 HYPOTHESES

The study assesses and test the following hypotheses:

- a) Kenya's public procurement reforms are donor-driven and only serve the interest of the west;
- b) Public procurement reforms are protectionist;

1.7 RESEARCH METHODOLOGY AND DESIGN

Introduction

Methodology is a system of explicit rules and procedures on which research is based and against which claims for knowledge is evaluated. In this chapter the study identifies the following: the location of the study, population sample and area sample selected for the purpose of the study.

Research Design

The design of this study is a blend of survey, experimental and correlational study. This is informed by the need for as much accurate detail as possible to enable the researcher arrive at cogent and incisive conclusions and recommendations.

Location of the Study

The research was conducted in Nairobi, the administrative capital of Kenya.

Population Sampling

The study interviews focus on experts on procurement known to the researcher, and various agencies concerned with procurement and formulation of procurement policy. This includes respondents drawn from Public Procurement Oversight Agency (PPOA), Kenya Institute of Public Policy Research and Analysis (KIPPRA), Ministry of Finance and a section of the Civil Society engaged in policy analysis and related issues.

Area Sampling

The respondents are domiciled in Nairobi.

Target Population

The study targets the respondents from the institutions mentioned above and mainly procurement professionals numbering about fifteen (15), and a random sample of about 20 staff whose job descriptions have a bearing on public procurement. The latter were selected using random and availability method due to constraints of time and the fact that the research was carried out during working hours.

Primary Data

Primary data refers to the data that is collected for the first time specifically for the issue under investigation. The primary data in this case included interviews and questionnaire to source for crucial information from the groups categorized above. Primary data was

used to give an official opinion or position of the current situation in regards to the status of public procurement in Kenya.

Secondary Data

Secondary data is the data already existing having been collected for some other purposes other than the one under investigation. This method of data collection was used for extraction of relevant information about the problem under study. Under this study the data was drawn from the reviews of existing from the existing records, reports, literature published reports, internet and documented materials on the subject such as journals, newspapers, magazines and local administration records and reports.

1.8 ORGANIZATION OF STUDY

Chapter One

The proposal, laying the framework and the basis of arguments forms the first chapter. It gives an overview of the study.

Chapter Two

Evolution of Public Procurement in Kenya: a Historical Perspective

Chapter Two explores the historical perspective of public procurement in Kenya from 1997 when the Government of Kenya in collaboration with the World Bank commissioned a study to assess the country's procurement processes and systems, to date. It looks at the legal structures for the regulation of public procurement prior to the

enactment of Public Procurement and Disposal Act, 2005. It also examines the strengths and weaknesses of the old procurement rules.

Chapter Three

Challenges of Donor-Driven Reforms

Chapter Three examines the impact of the donor-introduced standards as embodied in multilateral agreements (for example the WTO's Agreement on Government Procurement) that have been advanced by the development partners and the Public Procurement and Disposal Act, 2005. It assesses their levels of efficacy, derived from disciplined experiences in the various Third World countries (Ghana, Philippines and Indonesia).

Chapter Four

A Review of Public Procurement Reform in Third World Countries

Chapter Four gives a review of three procurement systems in Third World countries and assesses their efficacy. It also explores the possible implications for investment by countries whose procurement laws have subscribed to the standards set by donors, and will develop some policy proposals for improving the effectiveness of legal institutions as an alternative to adopting the standards imposed by the development partners.

Chapter Five

Findings and Recommendations

This Chapter makes recommendations for comprehensive and clear reforms in the public procurement sector.

CHAPTER TWO

HISTORICAL PERSPECTIVE OF PUBLIC PROCUREMENT IN KENYA FROM 1997 TO DATE

2.1 Introduction

Chapter two explores the historical perspective of public procurement in Kenya from independence up to 2005. It also looks at the legal structures for the regulation of public procurement prior to the enactment of Public procurement and Disposal Act, 2005.

2.2 A History of Public Procurement in Kenya

In 1986, as a joint initiative between the Government of Kenya and the Development Partners, a study was conducted by SGS Consultants to evaluate public procurement systems in Kenya. The major finding of the study was that public procurement was not operating efficiently and that the state was incurring heavy losses through shoddy deals. The report strongly indicated the need for reforming the public procurement system.

In 1997, the Government in collaboration with the World Bank commissioned another study through the Public Procurement and Capacity Reform Project to assess the country's procurement processes and systems..⁶⁵

The study identified the need for a comprehensive review and an implementation of a reform process in the procurement systems. It revealed that the public procurement system in Kenya lacked transparency and fair competition. The study further revealed that procurement staff were not adequately trained and lacked professionalism. Lack of a professional body that would oversee and instil discipline among procurement officers made them vulnerable to corruption. One of the major recommendations from these two studies was that reforms in public procurement systems were paramount if government was to save resources annually lost through poor procurement procedures. The study argued that improvement in procurement systems had a direct and beneficial effect on the overall economic situation in the country.⁶⁶

⁶⁵ Walter Odhiambo and Paul Kamau (2003), *Public Procurement: Lessons from Kenya, Tanzania and Uganda*, Working Paper No. 208, OECD Development Centre, DEV/DOC (2003) 06, p19.

⁶⁶ The report, pointed out, as others carried out in other African countries, that procurement policies were pushing weak economies into further underdevelopment due to increasing budget deficits and corrupt practices that diverted funds to private hands rather than meaningful development projects. For an in-depth study on the nexus between corruption and development, see Pranab Bardhan, *Corruption and Development: A Review of Issues*, 35 *Journal of Economic Literature* 1320 (1997).

2.2 Initiation of Public Procurement Reforms

The World Bank, the African Development Bank (ADB) and International Trade Corporation, in conjunction with the Government of Kenya, initiated the public procurement reform process in the late 1990s, after receiving the second audit report on public procurement processes and systems. This reform process was meant to create a system that allowed, among other things, a proper delegation of authority, incentives, procurement thresholds, planning, and the development of supplies manuals.⁶⁷ The reform process focused on addressing the issue of procurement laws, establishing appropriate procurement institutions and entities, as well as creating adequate and timely evaluation and monitoring. The reforms would also increase transparency in procurement systems and create reputable agencies. The public procurement reforms also aimed at ensuring that the procurement laws were streamlined to conform to international procurement laws and standards.

A task force was established to lead the reform process. The team comprised mainly staff from the Ministry of Finance which was in charge of the co-ordination of the exercise. The team completed the report in 24 months and passed their recommendations to parliament. However, the draft Bill prepared by the task force on behalf of the Ministry of Finance took inordinately long before being approved by parliament.

⁶⁷ See World Bank Policy Journal, World Bank, 2000.

In response to the delay in parliamentary approval, the Minister for Finance approved the Exchequer and Audit (Public Procurement) Regulations 2001, which was put into use until the operationalisation of the Public Procurement and Disposal Act, 2005.

2.3 The NARC Government's Reform Strategy on Public Procurement

Since 2003 with the ascension of the NARC Government to power, there has been a strong objective to move the Kenyan economy to a strong and sustained growth path. It was thus realized that strengthening the institutions of governance was necessary as a pre-condition, mainly because good governance underpinned sustainable development. Indeed, research and experience had clearly shown that in many countries the world over, the quality of governance, including control of corruption have a significant impact on economic development and growth. This is the reason why the Government embarked on reforms in the area of governance as a key plank of its Economic Recovery Strategy.⁶⁸

The Government's governance reform efforts were multidimensional involving amongst others, creating a solid legal framework (the enactment of appropriate laws e.g., the Economic Crimes Act, the Public Officer's Ethics Act, etc) and the creation and strengthening of institutions involved in governance. Central to these reforms in the area of governance, were ongoing reforms of the public financial management (PFM) systems

⁶⁸ Odhiambo and Kamau (2003); Mosoti (2004).

as reflected in the PFM reforms strategy.⁶⁹ These reforms in the PFM arena were meant to greatly enhance transparency and accountability in the utilization of public resources and therefore improve service delivery to the public.⁷⁰ A major component of the reforms was streamlining the country's public procurement system. More specifically there was need to create a procurement system whose legal framework would be understandable; and one that would take into consideration the country's political, social and economic realities.

This saw the enactment of the Public Procurement and Disposal Act, 2005 and the Public Procurement and Disposal Regulations, 2006. The Act was given a commencement date of 1st January 2007 via Legal Notice No. 171 of 29th December 2006. The Regulations were gazetted through Legal Notice No. 174 of the same date.⁷¹

2.4 Philosophical Basis for Public Procurement in Kenya

The potential impact of public sector procurement on the delivery of social programmes, including services, has gained recognition throughout the world. In Kenya, like many other countries, discussions on reforming procurement centred mainly on blocking legal and procedural loopholes believed to be avenues for corruption and waste. These efforts remain justified, considering the legislative and regulatory weakness that has

⁶⁹ The Public Financial Management System aims to facilitate the provision of essential public services to the people of Kenya, by mobilizing public resources through the revenue and tax systems and channel these to the most needed and politically prioritized areas of service such as education, health, security, etc. The need to reform the Public Finance System was emphasized in the Economic Recovery Strategy (ERS) for Wealth and Employment Creation, 2003-2007. The Development Objective of the Programme is to strengthen Public Financial Management (PFM) systems to enhance transparency and accountability of, and responsiveness to, public expenditure through the effective implementation of Results Based Management (RBM).

⁷⁰ *Supra* note 5

⁷¹ Amos Kimunya (Minister for Finance) Operationalization of the Public Procurement, Press Release, 2007-02-16.

characterized procurement in the past.⁷² An efficient legal framework for procurement necessarily requires greatest levels of transparency and clear rules and procedures. This ensures that both the government and the suppliers follow the proper procedures, participate in true competition and avoid corrupt practices.

Evidence from other parts of the world shows that effective reform of public procurement will need attention in other equally important areas including the need to formulate policies clearly outlining the objectives of procurement and its expected contribution to broader national socio-economic goals; the need to develop an integrated procurement system that is well aligned with the planning, budgeting and overall public project management functions; and the need for clear audit mechanisms to pre-empt crises in procurement.⁷³

As has been stated in the first chapter, governments make considerable use of contracts to obtain goods and services, such as office equipment, computer systems, advertising and construction services (to mention but a few), from outside suppliers. These contracts are often referred to as public sector procurement contracts. They are of such a high volume that a government's decision in respect of how, when and with whom it contracts inevitably have effects upon a whole range of issues⁷⁴. As has been observed by many scholars, public procurement is "business" because it is a means for the state to obtain

⁷² *Ibid.*

⁷³ Odhiambo and Kamau (2003).

⁷⁴ Phoebe Bolton, *The Use of Government Procurement as an Instrument of Policy*, *The South African Law Journal*, 619 (2004). The ability to exercise discretion in the award of government contracts has been a source of valued political patronage. Beyond the capacity to bestow political favours upon particular interest groups, procurement has also on occasion, been a means for the illicit transfer of funds from governmental to private hands, as recent corruption scandals in several countries have demonstrated.

goods and services at reasonable cost but such procurement also has broader social, economic and political implications. This partly explains the reason why government procurement has been used as a vehicle for promoting objectives unconnected with the immediate object of procurement. In other words it is often employed to promote objectives, which are “secondary” or “collateral”⁷⁵ to the primary objective of procurement-acquisition of goods and services on the best possible terms.⁷⁶

It is in relation to such secondary objectives that public sector procurement became something of such enormous significance to Kenya. Prior to the enactment of the Public Procurement and Disposal Act,⁷⁷ discrimination, unfair practices and the marginalisation of people denied various groups in society the privilege of being economically active within the public procurement system. The public procurement system favoured large and established businesses and it was very difficult for newly established businesses to enter the system.⁷⁸

It is against this background that a framework anchored on multilateral commitments was adopted to seal the structural and institutional loopholes that were synonymous with the old system. However, despite the recognition of the important role that a proper and sound framework for public procurement, experience across the Third World has shown

⁷⁵ *Id.* Xinchao, who says that the common practice where each state entity that has access to government funding would make a procurement decision internally without transparency and open competition, had the almost direct consequence of inefficient government spending and widespread corruption among officials, levels more criticism against a non-unified procurement system. For more on this, see Tong Xinchao, *Chinese Procurement Law: Current Legal framework and a Transition to the World Trade Organization's Government Procurement Agreement*, 17 *Temple International & Comparative Law Journal* 139 (2003).

⁷⁶ Sue Arrowsmith, John Linarelli and Don Wallace, Jr., *REGULATING PUBLIC PROCUREMENT: NATIONAL AND INTERNATIONAL PERSPECTIVES* (2000)

⁷⁷ Act Number 3 of 2005.

⁷⁸ *Id.* note 1.

that its provisions must be subjected to careful scrutiny, by not just Kenya alone, but other developing countries too.⁷⁹

Section 7 (1) of the Public Procurement and Disposal Act provides thus:

7. (1) if there is a conflict between this Act, the regulations or any directions of the Authority and a condition imposed by the donor of funds, the condition shall prevail with respect to a procurement that uses those funds and no others.

This section has been the subject of much criticism, right from the legislative stages.

Noting the anomaly, one critic remarked:

“this clause is problematic...[it] raises several problems and, at least, in one sense casts doubts on the professional standards of the drafters and their understanding of the Kenyan law and practice. The main problem is the following: Kenya’s approach is dualist. This means that a bilateral, plurilateral or multilateral agreement does not automatically become Kenyan law until it is, in addition to ratification, passed into law as an Act of the Kenyan parliament. In other words, international agreements must be domesticated. In effect, any agreement which has not been converted into an Act of the Kenyan Parliament is not law in Kenya. Under the Judicature Act of Kenya, international, bilateral or plurilateral agreements are not sources of law and can therefore not be a basis for creating

⁷⁹ Mosoti, Victor. The WTO Agreement on Government Procurement: A Necessary Evil in the Legal Strategy for Development in the Poor World? 25 *University of Pennsylvania Journal of International Economic Law* 593(2004) at 598.

obligations or rights nor can courts look to them to resolve disputes. In this context, what [Clause 7] seeks to do is to override Kenyan law with rules that are not recognized under Kenya's judicial system. This is not only astonishing but in fact sets up a rule that is basically void. The other problem of course is that this is a blanket provision and overrides Kenyan law with any and all future international, bilateral and plurilateral agreements which means that if we were to have a procurement agreement at the WTO it would immediately override Kenya law even without giving the country any time to adjust policy and practices and make sure that any potential problems are looked at and resolved through couching the implementing law in Kenya appropriately."⁸⁰

Admittedly, the section has not been tested in any litigation involving public procurement in Kenya, hence lack of concrete judicial decisions on the matter. It is however expected that some day, it will be a subject of litigation, and especially so with the influx of foreign companies providing funds for development projects in the country.

Sharply conflicting attitudes towards procurement reforms share an uneasy existence in the contemporary Third World. The range of viewpoints is dependent on whether the reform efforts strengthen or weaken the sovereignty of states. One school of thought holds that if subscription to a multilateral practice or regulation would have the effect of working against or undermining the efforts towards development, then that should not

⁸⁰ See Sisule Musungu, *The Kenya Public Procurement and Disposal Bill, 2003: Comments on the Draft Provisions in the Context of the WTO Discussions on Transparency in Government Procurement (2003)*, as quoted in Mosoti 593(2004) at 616-617.

be adopted. In this regard, a desirable procurement structure must leave the government a window of latitude to promote local industry and provide a mechanism by which such actions can be properly quantified and accounted for at the international level. Many writers have argued that the process of globalization, such as liberalized trade; global capital flows erode State sovereignty.⁸¹ The other school of thought views donor-driven reforms in positive light. They argue that it fosters a stronger image of sovereignty for states, and particularly so for the developed ones.

At the core of these debates about relationship between sovereignty and globalization and its related practices, is the role of law. National law is the expression of sovereign power over a territory and a people. International law emanates from sovereign States, making sovereignty central to the substance and dynamics of international law, and hence their inconsistency with distinct sovereign aspirations.⁸²

2.5 Public Procurement in a Global Context

The potential for the rule of law nationally and internationally often finds its way into the analysis of globalization and its consequences, particularly seen against the efforts by international organizations to improve laws and legal systems around the world.⁸³

⁸¹ David P. Fidler, *Introduction: The Rule of Law in the Era of Globalization*, 6 *Indiana Journal of Global Legal Studies* 421 (1998-1999).

⁸² Black's Law Dictionary defines international law as the customary law, which determines the rights and regulates the intercourse of independent nations in peace and war. See Black, Henry Campbell, BLACK LAW DICTIONARY, St. Paul Minn. West Publishing Co. 1979, p. 733.

⁸³ David P. Fidler, 421 (1998-1999).

As Kanishka Jayasuriya argues, the traditional distinctions between national and international law are breaking down through the development of global regulatory networks between governments and between agencies of governments. The erosion of traditional concepts of national and international law can be seen in the phenomena of nationalization of international law and the internationalization of domestic law through the dynamics of global regulatory networks, manifested in the standardization of legal practices.⁸⁴ Globalization is thus seen as stimulating changes to the notion of the rule of law nationally and internationally. Globalization forces, particularly economic ones, are erecting a polycentric global order that is replacing the conceptions of law prevalent in Westphalian notions of sovereignty and State interaction. The polycentric global legal order is being built through global governance and not through traditional international law. Jayasuriya believes that the rules emanating from these global governance networks cannot be easily accommodated by traditional notions of national and international law.⁸⁵

2.6 Appraisal of the Public Procurement System Prior to the Enactment of the Public Procurement and Disposal Act, 2006

In the past decades, the public procurement system in Kenya has undergone significant developments. From being a system with no regulations in the 1960s, and a system regulated by Treasury Circulars in the 1970s, 1980s and 1990s, the introduction of the

⁸⁴ Kanishka Jayasuriya, *Globalization, Law, and the Transformation of Sovereignty: The Emergence of Global Regulatory Governance*, 2 *Ind. J. Global Legal Stud.* 425 (199).

⁸⁵ *Id.*

Public Procurement and Disposal Act (PPDA) of 2005 and the Procurement Regulations of 2006 has introduced new standards for public procurement in Kenya.

Before enactment of the procurement legislation, procurement corruption was facilitated by opaque regulations, and vague procurement procedures and policies spread over various government documents. The system was characterized by a general lack of transparency, with applicable procedures invariably inaccessible to the public. The system was also marred by widespread ministerial interference with tendering processes, with procurement officers often lacking the professionalism and capacity to resist pressures and manipulation exercised by senior officials and powerful politicians.

Staff capacity had also resulted in major inefficiencies along the procurement chain, resulting in poor planning and packaging of procurement contracts, general lack of supervision and monitoring of project implementation. Many situations of conflicts of interests had also occurred in the past, as the law did not prohibit public officials from participating in private enterprise.

Before the enactment of PPDA, Kenya had not yet enacted legislation on public procurement. Procurement was guided by regulations stipulated in the Exchequer and Audit (Public Procurement) Regulations of March 2001. The gazette notice, established the following key institutions to regulate public procurement in Kenya.

The Directorate of Public Procurement

The Directorate of Public Procurement (DPP), established within the Ministry of Finance by the procurement regulations, was the central organ for public procurement in Kenya. The directorate replaced the Central Tender Board, which was abolished in 2001. The DPP was charged with policy formulation and implementation and the overall oversight of public procurement in Kenya. The specific functions of the directorate were to:

- a) monitor the overall functioning of the public procurement process in Kenya and submit proposals for action to the Minister of Finance;
- b) prepare an operational manual and standard documents to be used in connection with public procurement;
- c) give instructions and on request, advice and assist procurement entities in undertaking procurement;
- d) present an annual report to the Minister regarding the overall functioning of the public procurement system, based on information provided;
- e) inspect the records of all procurement entities to the extent appropriate in order to check on the proper application of these regulations by them and take corrective measures as necessary;
- f) issue instructions to procurement entities for the purpose of ensuring that information about contract awards is being disseminated to the general public in an appropriate manner;
- g) develop, promote and support training and professional development of technical officials and other persons engaged in public procurement. In this regard, it

- h) ensures that all staff adhere to proper ethical standards; and
- i) maintain and update at all times a list of procuring entities and members and secretaries to Tender Committees of public procurement entities.

The DPP was headed by a director who is responsible for the execution of the policy of the Directorate and for the control and management of the functions of the Directorate.

Until it was dismantled in 2001, the Central Tender Board in Kenya used to act as the judge and jury in adjudicating tenders worth billions of dollars without reference to any one. This resulted in massive losses of public funds as senior government officials abused the system to their personal benefit. Unlike the Central Tender Board, the Directorate was largely a regulatory body. It did not engage in procurement.

ii) Ministerial Tender Committees

At the level of the ministries, the regulations established the Ministerial Tender Committees. These consisted of the chief accounting officers as chairmen of the committees and four other departmental heads. The role and responsibility of the Ministerial Tender Committees were to award tenders (where the contract value did not exceed Ksh. 500 000), to review tender documents and request for proposals, to approve bids through open tender and to approve variations of contract conditions previously awarded by the committee. Ministerial Tender Committees were dominated by civil servants that are in most cases easily manipulated by their seniors.

iii) The District Tender Committees

The District Tender Committees operated at the jurisdiction of a district, with district commissioners as chairmen. Other members of these Tender Committees were the departmental heads representing various ministries such as Agriculture, Rural Development, Health, Environment and Natural Resources, Roads and Public Works and Education. Other members include the district accountant, the district development officer, the district trade officer and the chairman of the county council. The functions of the District Tender Committees were similar to those of the Ministerial Tender Committees, namely to award tenders, to review tender documents and to approve variations in contracts. Like the Ministerial Tender Committees, Districts Tender Committees in Kenya were at the mercy of district commissioners.

iv) State Corporations and Central Bank Tender Committees

As in Tanzania, all state corporations or parastatals in Kenya were required to form Tender Committees to procure for goods, works and services. The committees comprised the chief executive of the corporation as the chairman and the financial controller as the alternate chairman. The members included the general manager, the chief finance officer, the chief technical officer and at least two board members. The functions of these committees were to award contracts, to review tender documents, to approve bids and to approve variations in tenders.

v) Local Authority Tender Committees

Local authorities, including city councils, municipal councils, town councils and county councils, were also required by law to procure goods, works and services through Tender Committees. The clerk to the local authority headed these Tender Committees. Other members of these committees included the chairman of the Finance Committee and all heads of major departments. The threshold for procurement for this entity was Ksh. 200 000 for Nairobi, Mombasa, Nakuru and Kisumu and Ksh. 100 000 in all other local authorities.

vi) Public Universities, Colleges and Schools Tender Committees

The Kenyan procurement regulations explicitly identified public universities, colleges, primary and secondary schools as procurement entities. In all these institutions, Tender Committees are responsible for the procurement of works, goods and services.

In the public universities, the vice-chancellors were the chairmen of the committees, while principals/heads of colleges chair College Tender Committees. Other members of the University Tender Committees included the deputy vice-chancellors, finance officers, college principals, at least two faculty heads and two council representatives who were not members of the academic staff. In the colleges, members of the board included the principal, deputy principal, the finance officer and at least two departmental heads. In schools, the Tender Committees consisted of the headmaster/headmistress, the deputies, at least two members of the board of governors, the chairman of the teachers-parents association, two staff members and the matron. The functions of the entities were again to award contracts and review bids subject to the specified thresholds.

vii) Co-operative Societies Tender Committees

Co-operative societies were among institutions governed by the public procurement regulations. This was rather surprising, given that co-operative societies are seen more as civil society entities than public institutions. The regulations stipulated that co-operative societies shall establish Tender Committees for purposes of procurement of goods, works and services. The chief executive of the society was the chairman of the Tender Committees. Other members include the deputy chief executive, at least four members of the society and at least four directors. The role and responsibility of these Tender Committees were to award contracts, to review tender documents, to approve bids through open tender and to approve variations of contract conditions previously awarded.

viii) The Public Procurement Complaints, Review and Appeals Board

This was the body that handled all complaints as well as appeals on matters to do with public procurement in Kenya. An independent person from the private sector appointed by the Minister of Finance headed the board. The other members of the board are the permanent secretary (Treasury), the solicitor-general, the permanent secretary (Provincial Administration) and three members appointed from business and professional associations. The board had legal power to arbitrate by declaring the legal rules or principles that govern the subject matter of a complaint, restraining the procurement

entities from further action, annulling in whole or in part an unlawful procurement act and revising an unlawful decision by the procuring entity. The board could also order procurement proceedings to be terminated. Since its inception in 2002, the private sector-led Procurement Appeals Board has cancelled contracts it deemed illegal or unprocedural.

2.7 An Appraisal of the Public Procurement and Disposal Act, 2006

Public Procurement and Disposal Act, 2006 was not designed to operate in isolation and independent from other anti-corruption legislations. While it has fairly progressive provisions, it was to supplement what the Public Officer Ethics Act, the Anti-Corruption and Economic Crimes Act, the Financial Management Act, and other related laws had already set in motion. An evaluation of some of the sections of the laws that preceded the Procurement and Disposal Act, for example parts of the Anti Corruption and Economic Crimes Act section 26 and 27 (in the case of Christopher Ndarathi Murungaru v. Kenya Anti-Corruption Commission and the Attorney General⁸⁶), have been ruled to be unconstitutional by the High Court. The direct import of this is that the Procurement and Disposal Act is not well supported by other legislation rendering it at the mercy of public procurement officials.

The objectives for the enactment of the Public Procurement and Disposal Act, 2005 were noble. However, the following questions beg for answers: How does the Act have teeth to

⁸⁶ Miscellaneous Civil Application no. 54 of 2006 O. S)

curb another Anglo Leasing, or even Goldenberg- like scandal in Kenya? Are the procurement procedures tamperproof? Is there a well researched and documented nationwide anti-corruption policy? Are the laws being legislated by Parliament in pursuance of enforcing that policy? Do these laws reinforce each other? Other than establishing institutions, does the law have capacity to change the culture in public procurement? If the answers to all these questions are not in the affirmative, all the resultant laws are disparate attempts that cannot succeed in fighting corruption in the public sector.

At the beginning of the 2000s, Kenya finally engaged in major procurement reforms under the combined pressures from the business community - that was complaining that inefficient procurement resulted in poor infrastructures and inefficient services – and donor push for procurement reforms as a condition for lending. In spite of progress made, the new procurement regime still faces transparency, accountability and efficiency challenges, due to various impediments to the realisation of a sound procurement system.

Part I of the Act sets out the general objective for its enactment as establishing procedures for procurement and the disposal of unserviceable, obsolete or surplus stores and equipment by public entities. It aims to achieve certain specific goals, viz: to maximizing economy and efficiency; promoting competition and ensuring that competitors are treated fairly; promoting the integrity and fairness of those procedures; increasing transparency and accountability in those procedures; increasing public

confidence in procurement procedures; and, facilitating the promotion of local industry and economic development.

The Act states in the preamble that it has been put in place “to establish and for the disposal of unserviceable, obsolete or surplus stores, assets and equipment by public entities....” This is expected to maximize economies of scale, promote competition and ensure the fair treatment of competitors. It is important that there is added emphasis on the disposal of unserviceable, obsolete or surplus stores and equipment as these have tended to be overlooked in the enthusiasm to streamline procurement. This is unprecedented as its enactment accords even the private sector a fair chance to supply the state with goods and services in a transparent manner.

In the event of conflict with other statutes and the provisions of international agreements, the Act also bestows superiority on its own provisions, except where there are conditions imposed on the donor of funds.⁸⁷

Part II of the Act creates the institutional structure that regulates public procurement. The Public Procurement Oversight Authority (“Authority”) is established as a public corporation. The main functions of the Authority are to ensure that the procurement procedures established under the Bill are complied with, to monitor the public procurement system, and to assist in the implementation and operation of the system. The authority is headed by a director. An advisory board, called the Public Procurement Oversight Advisory Board (“Advisory Board”), is also established by Section 21. The

⁸⁷ See sections 5,6 and 7 of the Public Procurement and Disposal Act, 2005.

Advisory Board consists of five members appointed by the Minister from persons nominated by prescribed organizations⁸⁸ and the director. The main functions of the Advisory Board are to give the Authority general advice; to approve the estimates of the Authority; and to recommend appointment or termination of the director. Before the enactment of the Public Procurement and Disposal Act, 2005, there was an appeals board known as the Public Procurement Complaints, Review and Appeal Board, which had been established under the Exchequer and Audit (Public Procurement) Regulations, 2001. The new Act anchored the board under a new name, the Public Procurement Administrative Review Board.⁸⁹

Part III of the Act deals with the internal organization of public entities in relation to procurement. A public entity must establish procedures for the making of decisions in relation to procurement. A public entity must also establish a tender committee, and other bodies as required under the Regulations. A public entity is responsible for ensuring that the Act, regulations, and directions of the Authority are followed. The accounting officer is primarily responsible for ensuring that the public entity fulfills that obligation. All other employees are vested with this responsibility as well, which creates an onus for employees to act as whistle-blowers. Provision is also made in Article 28 for procuring agents whose function is to carry out such procurement proceedings on behalf of a procuring entity as may be prescribed.

⁸⁸ The phrase, "prescribed organizations" is not defined in the Act, but is construed as those institutions which either monitor or are representative of collective interests in public procurement.

⁸⁹ Section 25(1) of the Public Procurement and Disposal Act, 2005.

Part IV sets out the general procurement rules, including rules about the choice of a procurement procedure. Section 29(1) and 29(2) require a procuring entity to choose the open tendering or one of the alternative procedures, such as restricted tendering or direct procurement under certain conditions. Restricted tendering is a procurement procedure where bids are obtained by direct invitation without open advertisement. This procedure can be used where it is believed that the value or circumstances do not justify or permit the open bidding process. Procurement entities in this case maintain a list of “pre-qualified providers” who are then directly invited to participate in the tendering. Restricted tendering is also possible at two levels: national and international. Restricted national bidding is the procurement where bids are obtained nationally by directly inviting prequalified providers. In case of a restricted international bid, only pre-qualified international firms are invited. In both cases, the procuring entity must demonstrate that open tendering is not viable or prudent. It needs to be noted here that the process of pre-qualification is often abused and is an important source for corruption in public procurement.

Direct procurement is a sole source procurement method used when exceptional circumstances prevent competitive bidding. This method is used mainly for low value procurements involving no contracts. In Kenya, where this method of procurement is used, procuring entities must prepare a description of all its needs and specify requirements of quality, quantity, terms and times of delivery. The procurement entities are free to negotiate terms with the sole candidate for the best deal.

Procurement cannot be split to avoid the use of a procedure. The Act also spells out a number of rules relating to the conduct of procurement proceedings including provisions relating to qualifications to be awarded a contract, confidentiality, and communications with the procurement entity. Provisions are included that prohibit inducements, misrepresentations, collusion, and influence on evaluations by persons not officially involved and conflict of interest. Procuring entities are prohibited from entering into procurement contracts with certain persons, including employees of the procuring entity, public servants, or persons and corporations related to such employees or public servants. There are also a number of rules that apply after procurement proceedings have been completed. These rules include requirements relating to records and the publication of notice of contracts. The amendment of contracts after they have been awarded is also regulated, including interests on contract's overdue amounts. Provisions are also made for inspections and audits in relation to both the procuring entity and the contractor.

Part V deals with open tendering. In such cases, the procuring entities are required to give and record reasons for the choice of other procedures. Open tendering can be at two levels: national and international. Open national procurement is a method of procuring goods, works and services which is open to participation on equal terms by all providers through advertisement of the procurement. This tendering process specifically seeks to attract domestic firms although foreign firms are allowed to participate. Open international tendering, on the other, hand is open to participation on equal terms by all providers although it specifically seeks to attract foreign providers. This type of tendering

is used where national providers may not provide competitive bids and ensure value for money.

Under an open tender, the procuring entity must prepare an invitation to tender as well as tender documents. If the value of the procurement is over a prescribed threshold, the invitation must be brought to the attention of those who may wish to submit tenders by advertisement in newspapers. Other provisions deal with how much time must be allowed for the submission of tenders, production of copies of tender documents, and tender security. A number of other provisions relate to the tender themselves, including how they are to be submitted and received. Particularly, the tenders will be opened by a tender opening committee subject to specific rules. Provisions are made for changes to tenders, clarification, and corrections of arithmetic errors.

Part V also specifies when a tender is responsive and when it is to be evaluated. For instance, the procuring entity is able to extend the validity period of tenders, subject to any restrictions prescribed in the regulations. Provisions are made for notification to the person submitting the successful tender and for entering into the ensuing contract. Consequences are imposed for a refusal to enter into a contract. Procuring entities are also prevented from imposing additional responsibilities as a condition of being awarded a contract. A provision is also included requiring international tendering if there would not be effective tendering otherwise.

Part VI provides for alternative procedures to open tendering. The first is restricted tendering, which is available if the costs of open tendering would be disproportionate to the value of the contract and the value of the contract is below the prescribed maximum. Restricted tendering is also available if there are only a limited number of suppliers. It is similar to open tendering, except that the invitation is given only to selected persons. The second is direct procurement, which is available if there is only one supplier, if there is an urgent need, or if the procurement is for goods and services in addition to those already supplied under another contract. In this procedure the procuring entity negotiates directly with the supplier. The third is the request for proposals, which is available to procuring services that are advisory or are of a predominately intellectual nature. In this procedure, the procuring entity invites expressions of interest by advertisements in the press. The procuring entity determines which people, who express interest are qualified to be invited to submit proposals. The proposals are evaluated, and the procuring entity negotiates a contract, subject to set limitations, with the successful applicant. The fourth is the request for cost quotes, which are available to procure goods that are readily accessible and for which there is an established market. In this procedure, the procuring entity prepares a request for quotes and gives it to selected persons. The successful quote is one with the lowest price that meets the requirements. The fifth is the procedure for low-value procurements, which will only be available for procurement if the estimated values of the goods, works, or services are at or below the prescribed maximum. The final alternative procedure is the specially permitted procurement procedures to be employed in exceptional cases when the directorate may give special permission to use a procurement procedure not otherwise available.

Public entities are allowed the flexibility to use alternative procurement methods such as selective invitation of tenders or single sourcing. This allowance opens for mischief by public officials who may resort to alternative procurement methods through hoodwinking the tender committee with false written reasons. It is also possible for bidders to collude among themselves or with a procurement officer and set abnormal prices in a given tender in order to win it. Bidders may quote very high or very low prices for services or other supplies whose relative value is known to the market. In addition, it is possible for procurement officers to leak information on a given tender to bidders without the procurement authority's knowledge. Procurement officers may provide negative insights to bidders who may then solicit a chance to provide clarifications.

Context related circumstances may also create specific vulnerabilities that require special attention and tailor made solutions. Emergency related procurement for example face a number of additional challenges that need to be taken into account when designing relevant policy options to address corruption risks in procurement processes. The crisis environment of most emergency settings creates very specific circumstances that are all the more likely to exacerbate corruption risks as providers are often unfamiliar with the local context. A number of factors provide unique opportunities as well as incentives for corruption in emergency situations, while the risk of being caught is considerably reduced by the circumstances.

These include logistical difficulties, extreme urgency and pressure to save lives during relief phase, massive inflows of funds overwhelming the government absorption capacity combined with disrupted local control and oversight mechanisms, lack of coordination of the various actors, and special incentives set by aid providers for receiving assistance.

Part VII provides for the review of procurement proceedings. A person who submitted a tender, proposal, quotes, or who might have wished to do so, may request a review by the procuring entity, which once received, initiates the procurement proceedings. The decision of the procuring entity is given by the accounting officer. The person who requested the review may request a further review by the review Board. The Review Board's decision can be appealed to the High Court. Time limits apply for each step in the review process.

Part VIII gives the Authority power to ensure compliance with the Act's regulations and directions of the Authority. The director can order an investigation of procurement proceedings and, after receiving the report, can make an order that gives directions to the procuring entity, cancels the procurement contract, or terminates the proceedings. The Review Board can be requested to review such an order and there is a further right of appeal to the High Court.

Part IX allows the Director to debar persons from participating in procurement proceedings for up to two years on specified grounds. A debarred person can request a review by the Review Board and there is a further right of appeal to the High Court.

Part X provides for the disposal of unserviceable, obsolete, or surplus stores and equipment. A public entity must establish a committee to recommend a method of disposal to the accounting officer in particular cases. The accounting officer is not bound by the recommendations, but if not accepted, written reasons for the rejection must be submitted to the committee. Except as allowed under the regulations, the stores or equipment cannot be disposed of to an employee. The Authority and the Director has the power to ensure compliance with Part X as they did under Part VIII. Special provisions are made for certain procurements and disposals by the armed forces, police, the Kenya Security Intelligence Service, and the Kenya Prisons Service. The Director is required to convene consultation meetings at least twice a year.

The exemption of national security and defence procurements from the new regulations should also be considered as a flaw of the system, as a number of corrupt security procurements have been exposed by the media, including the Anglo- Leasing scandal.

The exemption of development agreements from the provisions of the procurement regulations resulted in maintaining parallel procurement regimes, diluting the country's lines of accountability. Part XI concludes with provisions relating to regulations, offences, transitional matters, and consequential amendments.

The new procurement regime lacks a firm legal basis. As a result, the Minister of Finance can potentially simply repeal the regulations and retain a great deal of power that can be

used to hamper reform. In 2003 for example, all procurement officers were suspended, allegedly to purge procurement of corruption. Many believe that in reality, the Minister used his prerogative to assume control of public procurements.

2.7 General Comments

The law surrounding the assessment of competency and efficiency of public sector procurement in Kenya has not yet attained the level of certainty that should be demanded of it to be considered properly to satisfy the objectives for which it was enacted.⁹⁰ It is perhaps inevitable that the increasing complex nature of the effects of globalisation and internal pressure for reforms will bring further pressure to advance it in the near future, in a manner that does not prejudice local investments and industries.

In addition, other laws that would augment the Act are not in place. For instance, legislation on the freedom of information is yet to be enacted. It is evident that without freedom of information corruption would flourish for there is no accountability where secrecy reigns. Without open access to information oversight institutions such as Parliament, Civil Society Organizations and the general public cannot monitor government procurement and ensure its integrity. Thus, the delay in passing the Freedom of Information Bill has the potential of hampering the noble intentions of the law on procurement.

⁹⁰ The reforms were largely aimed at ensuring efficiency in the use of public resources to facilitate effective implementation of government policies. The sector had hitherto been fraught with serious abuses leading to losses and ineffective implementation of development projects.

The other challenge to the success of the Act is obviously its implementation by those concerned. It is a trite fact that a law is only as good as its implementation. The Act seems on the face of it to have what it takes to deal with corruption in procurement. However, for the Act to be successfully implemented there is need to upgrade the skills, knowledge and attitudes of procurement officials. This requires funding and time as acknowledged by the Act. It is a medium to long term objective that can only yield results progressively, and therefore, the Act cannot provide a “quick fix” to corruption in procurement.

The other external factor that may hinder the implementation of the Act is the continued perception of corruption in the public sector. There is widespread perception among the Kenyan public that corruption is as rife today as it was in previous regimes. If this perception is not managed, no amount of achievement attributable to the Act will have any real meaning.

The Act is not tamper proof. It is possible to rig procurement by including vague or ambiguous terms in procurement specifications, or indeed to omit certain essential details. The ostensible reason for such ambiguity is to create loopholes-where for example the market feels it cannot meet the requirements and does not therefore bid (leading to selective bidding) and can be exploited for corrupt purposes.

Granted, the legislation has endeavoured to reform the sector of public procurement. Corruption has been ameliorated to a considerable degree. Overall, it can be said that public procurement has come a long way. The movement from beginner to mature models of procurement has been an arduous one.

In the course of time, a number of concerns have been raised regarding the use and effectiveness of public sector procurement. Even where beneficial effects have been achieved, the cost of implications has been had been substantial, owing to longer tendering periods to secure participation by the relevant target groups, the training of emerging businesses as well as the administration associated with the enforcement of new laws.

The success of Kenya's public procurement reforms hinge largely on a number of factors. These include endorsement and support from policy makers, senior administrators and those responsible for the procurement of goods and services and works; and commitment at the highest levels of government to the attainment of the stated objectives. Effective monitoring and reporting systems are needed as is means by which bona fides of the target groups can be readily ascertained. It is also imperative that there be business development of target groups; motivation on the part of target groups to take advantage of opportunities presented; and a comprehensive training and skills development programmes to ensure that officials and service providers who engage in procurement activities are competent and conversant with all aspects of procurement.

The participation of donors in one way or the other in procurement reforms is appreciable. However some critics have questioned the continued use of parallel procurement regimes in certain projects being funded by the development partners when in fact that they have helped put in place the new structures. It would be expected that their use of the new systems would be a tacit expression of confidence in what they have helped create. One such example is the Sector Wide Approach Projects conducted under the banner of Governance, Justice Law and Order Sector (GJLOS) reform programme.

CHAPTER THREE

CHALLENGES OF DONOR-DRIVEN REFORMS

3.1 Introduction

Strengthening public sector performance has recently become a central part of the development agenda. Over time, many country leaders have come to appreciate the link between the performance of their public financial management system (PFM), including the procurement function, and the achievement of social and economic objectives.

While the performance of country procurement systems may have received increasing attention, improving procurement outcomes has yet to migrate towards the centre of the development agenda. When procurement issues are taken up, they are frequently analyzed ignoring wider public sector financial management or service delivery issues, with the result that proposals for reform often relate solely to the procurement process and rely exclusively on procurement professional for their implementation. This has had the ironic result that, even as procurement performance has become an important topic in the development debate, the traditional view that procurement is solely a technical function has been reinforced.

This chapter examines the impact of donor-introduced standards as embodied in multilateral and plurilateral agreements that have been advanced by the development partners and the public Procurement and Disposal Act, 2005. It provides new evidence on their inefficacy, derived from disciplined experiences in the various sub-Saharan countries.

3.2 Public Procurement and the Effects of Globalisation

Globalization has created the expectation of “convergence”, or prosperity for all.⁹¹ This expectation has, however, not lived to its realization, despite the fact that it has had its fair share in streamlining procurement practices worldwide.⁹² Some scholars have argued that it has instead widened the gap between the rich and the poor. That because of the resulting negative consequences and concentration of negative effects among vulnerable groups including indigenous peoples, ethnic minorities, the rural and poor women, the counter ideology of human rights has often been invoked.⁹³

Additionally, there has been the argument that the international financial institutions have used the concept to serve the interests of the more advanced industrialized countries-and particular interests within those countries-rather than those of the developing world.⁹⁴ The foregoing have lent themselves to a plethora of questions: How far should national economic liberalisation be a subject of international regulation? Does this lead to undermining national sovereignty to an unacceptable extent? Where there is a conflict between the goal of the global economic liberalization and the local pursuit of domestic social policy goals, such as job protection, should the local give way to the international?

Complicating matters is the problem brought about in a case such as where the pursuit of one set of international goals conflict with the pursuit of another set of international

⁹¹ See for example, Nancy Birdsall, *Life is Unfair: Inequality in the World*, 111 *Foreign Pol'y* 76, 77(Summer 1998).

⁹² Peninah Kihika (2005), *Towards a Sustainable Fight Against Corruption in Public Procurement*, *Adili*, Transparency International-Kenya, Issue No. 69, p.11.

⁹³ Barbara Earth, *Globalization and Human Rights as Gendered Ideologies: A Case Study from North East Thailand*, in *GENDER, TECHNOLOGY AND DEVELOPMENT* 9 (10, 2005, Sage Publications (New Delhi/Thousand Oaks/ London DOI: 10.1177/097185240500900106) p. 104.

⁹⁴ See generally, Joseph E. Stiglitz, *GLOBALIZATION AND ITS DISCONTENTS* 214 (2004). The text is a searing indictment of the policies of the international financial institutions.

goals. For example, the pursuit of trade liberalization, a goal reflected in the World Trade Organisation (WTO) system, may conflict with the international protection of human rights, a goal reflected in the plethora of human rights treaties and the growth of customary international human rights law.

One manifestation of the conflict can be seen through the rough edges as between trade liberalization and labour rights. While there is a school of thought which posits that there can be no conflict with the pursuit of another set of international goals because everyone's benefits from trade liberalization, as seen in the rise in living standards,⁹⁵ there is no guarantee that there will be equitable distribution of the resources arising from that growth, moreso in emergent democracies.

Across the globe, in the contestations involving the merits and demerits of the policies advocated by the IMF and World Bank with the market manipulations and series of frauds, examples of the Philippines and Ghana often crop up. The end argument most often is that no automatic or one-size-fits-all model for economic development can be applied uniformly across the spectrum of nations, cultures, and ideologies.

3.3 Balancing Protectionism and Liberalism

The scales become very difficult to balance where national governments are tempted to lessen social protection measures in order to be competitive in a global trading and investment economy. The consequences of such kind of action have weighed heavily on developing countries. There has been a decline in the standards for the protection of

⁹⁵ See for example, J. Sachs, "International Economics: Unlocking the Mysteries of Globalization, *110 Foreign Policy* 97 (1998).

labour rights. This therefore begs the question: What should be done where there is a conflict? A number of positions have been put forth.

It has been argued that social rights should not be subject to trade-offs and should be promoted regardless of the implications on the world economic growth. Another argument has been that liberalization should not be pursued because it is harmful in other ways, an argument which has been the bone of the contention by the trade unions and rights-based NGOs. The other objection arises from the view that trade liberalization pursues an elitist agenda, driven by global capitalism and fundamentally undemocratic modus, and that there is no evidence of its capacity to raise living standards.⁹⁶

In many parts of the world, especially in Western Europe and North America, historical experiences point to the use of public procurement in achieving many 'non-economic' goals.⁹⁷ They have been used as a tool to (i) achieve traditional foreign policy goals such as protecting national security; (ii) stimulate national economic activity in particular sectors of the economy; (iii) protect national industry against foreign competition; (iv) improve the competitiveness of key industrial sectors; (v) remedy regional disparities within the state; (vi) improving environmental quality; and (vii) securing social standards nationally.⁹⁸

⁹⁶ Christopher McCrudden and Ann Davies, "A Perspective on Trade and Labour Rights," *Journal of International Economic Law* (2000) 43-62, at p. 50.

⁹⁷ J.M Fernandez Martin, *THE EC PUBLIC PROCUREMENT RULES: A CRITICAL ANALYSIS* (Clarendon Press: Oxford 1996, Chapter 2 and 3).

⁹⁸ Christopher McCrudden, *International Economic Law and the Pursuit of Human Rights: A Framework for Discussion of the Legality of 'Selective Purchasing' Laws under the WTO Government Procurement Agreement*, *Journal of Int'l. Econ. Law* (1999) 3 at p. 47.

3.4 Achievement of Social Outcomes

Striking an equilibrium between liberalization of the economy and the achievement of other non-economic values has proven one of the most difficult issues of this decade in many industrialized countries. For example, tension has manifested itself as between economic efficiency and environmental protection, or labour market flexibility and fair labour standards, or deregulation and distributive justice.⁹⁹

The conservative view has always put the government as the regulator of market participants, sometimes encouraging markets through competition law, or restraining them in some material particular, for example through legislating and putting under constant review, minimum wage law. But as has been expounded in the preceding chapters, the proactive participation of the government in the market itself cannot be gainsaid, taking into account the volumes in purchasing public works, supplies, and services. The interplay of these two roles (as a market purchaser and as a regulator) in the realm of ensuring social justice presents an enduring problem, especially in light of conditionalities that attend the awarding of contracts.¹⁰⁰ This issue brings to bear when the idea of social policy achieves a “meta-operational” perspective to include the definition of the contract, the qualification of contractors, and the criteria for the award of the contract.¹⁰¹

⁹⁹ *Id.*

¹⁰⁰ Christopher McCrudden, Using Public Procurement to Achieve Social Outcomes, *Natural Resources Forum* 28 (2004)257

3.5 Protection of Human Rights

The use of public procurement for domestic human rights purposes, albeit not well documented, is established. In the United States, for example, it has been employed as a tool in racial and gender mainstreaming, while Canada has employed it in preferentially awarding federal contracts to persons of Aboriginal extraction. The South African government has also used targeted procurement as part of its policy on social integration.¹⁰²

Yet, although the use of public procurement involves the furtherance of social objectives in the various objectives described above, there is a crucial difference between them. While several of them clearly depend on protectionism and discrimination against foreign contractors in order to effectuate their social objective (and presumptively the types of measure that international trade law is likely want to tackle), several others do not.¹⁰³ Failure to distinguish between these two groups of measures results in all (unfairly) being treated as protectionist and presumptively invalid under international trade law disciplines. To some, the conditionality may still seem suspicious given the classic economic argument that if a government believes that a certain practice is unacceptable, then it should act against that practice directly. The argument therefore is that direct legislation, for example, and not the use of indirect financial incentives or sanctions, might be seen as the best way of enforcing required norms without unacceptable side effects, all other things being constant.

¹⁰² McCrudden, note 6 at p.8.

¹⁰³ McCrudden, p.9.

3.6 Furthering Environmental Goals

An example presents itself in the way public procurement was used to achieve environmental goals (popularly referred to as “green procurement” in the 1990s across the globe. Implicit in this initiative were the efforts to integrate social policy goals into procurement. Its development came to be seen as one part of a raft of initiatives to promote the general goal of sustainable development. Given that sustainable development has taken on an important social dimension, there is an increasingly growing interest in the social aspects of procurement. More particularly, the debate has centred on how aspects of social procurement can be combined with the green procurement to achieve “sustainable procurement”,¹⁰⁴ thus addressing both social and environmental issues. The discourse on sustainable procurement serves to create a broad nexus between social linkages and procurement.

This ideology is partly based on principle. When governments and public bodies award public contracts, there is a legitimate expectation by the communities they serve that the contracts go to the contractors who do not violate the basic norms of that community. The award of these contracts, therefore have a politically symbolic character. Public procurement by definition goes beyond a mere economic activity by the administration and proceeds to debunk the myth that state activity is neutral and ignores social criteria,

¹⁰⁴ Sustainable procurement (also called green procurement) is a spending and investment process typically associated with public policy, although it is equally applicable to the private sector. It is a tool which allows governments to leverage public spending (between 15 to 25 % of GDP) in order to promote the country's social, environmental and economic policies. SPP contributes to create markets for appropriate technologies and innovative solutions. In this way, it is used to address issues of social policy, such as inclusiveness, equality and diversity targets, regeneration and integration.

as opposed to politically self-evident inclinations in other areas of state activity. And as McCrudden explains, this consideration is strengthened, by way of example, by a company tendering for a contract at a lower price because it engages in unacceptable practices that enable it to cut costs.¹⁰⁵ Using the example of a company systematically using slave labour and bidding for a government tender at considerably below any other offer, McCrudden posits that it is not unreasonable that infringement of basic human rights norms such as these should not be rewarded by public bodies in the form of contracts for companies guilty of such practices. Public bodies might reasonably be expected to take account of, and discount, any competitive advantage acquired as a result of such inequitable treatment.¹⁰⁶

Apart from the reasons of principle, award of public contracts can be effective in providing a substantial inducement for contractors to adopt good practices, for example the “contract compliance” policies by the United States government to encourage employment equality. A case in point is Myanmar where litigation is being used in America to put pressure on American corporations operating in Burma.

The explanation lies in the fact that when the potential of more orthodox command and control regulation seems of limited effectiveness at home, or cannot be exercised abroad, it is unsurprising that states will resort to public procurement as one of their arsenal. The explanation for the popularity of a nexus between public procurement and social policy

¹⁰⁵ H. Watchel, “Labour’s Stake in the WTO” *37 American Prospect* (March–April 1998), at page 34, as paraphrased and expanded by McCrudden, Christopher McCrudden, *International Economic Law and the Pursuit of Human Rights: A Framework for Discussion of the Legality of ‘Selective Purchasing’ Laws under the WTO Government Procurement Agreement*, *Journal of Int’l. Econ. Law* (1999), 3 at p.10.

¹⁰⁶ *Id.*

lies in part, then, in the power of procurement and the comparative weakness of other regulatory mechanisms, and in part in reasons of principle.¹⁰⁷

The crux of the argument here, then, is that it is not wrong in principle for a government to use its economic and financial power to promote a socially desirable objective, or to distance itself from socially undesirable practices. If this argument holds, then there should be no presumption that the use of public procurement for social policy purpose is presumptively illegitimate. It is appropriate that particular uses of this regulatory tool should be scrutinized for protectionist effects.

The legitimate concerns, however, continue to plague this seemingly noble argument. For instance, there is a danger that irrespective of the intention behind ostensibly non-protectionist social uses of procurement, the effect will be protectionist. Foreign contractors, may, for example, find it more difficult in practice to comply with social policy requirements. Of equal concern, perhaps, is the suggestion that if social policy objectives are incorporated in the process by which tenders are awarded, the process may no longer be fully transparent.¹⁰⁸ Since the general tendency is to increase the types of social policies that are then attached to public procurement, the transparency of the process decreases even more over time. The absence of transparency contributes to the risk that those awarding the contract will succumb to the protectionist pressures.¹⁰⁹

¹⁰⁷ *Id.*

¹⁰⁸ The larger the number of extraneous criteria that are taken into account, the less easy it is to protect the decision made on the award of a tender.

¹⁰⁹ Christopher McCrudden, *International Economic Law and the Pursuit of Human Rights: A Framework for Discussion of the Legality of 'Selective Purchasing' Laws under the WTO Government Procurement Agreement*, *Journal of Int'l. Econ. Law* (1999), 3 at p.11.

3.7 Conclusion

In making a case for a minimum threshold of protectionist policies that a government may impose, it is not proposed that potential contractors from other countries be locked out of public procurement. Granted, national public procurement measures which keep out potential contractors from other countries have proven one of the most difficult areas of international disciplines, and more difficult to regulate than tariff barriers. So many reasons can be ascribed to these. First, the problematic aspects of public procurement are often “shadowy, administered on a discretionary basis and only secondarily designed” to limit external penetration of domestic procurement market.¹¹⁰ Second, whereas tariffs are seen as an external economic policy tool, and thus each nation accepts that its tariffs are an appropriate subject for international economic negotiation, different considerations prevail regarding procurement. International disciplines over the latter involve the acceptance of external regulation of measures previously regarded as internal economic policy tools, such as protecting sectors of domestic industry from external competition.¹¹¹ Third, the ability to exercise discretion in the award of government contracts has been a source of valued political patronage. Beyond the capacity to bestow political favours upon particular interest groups, procurement has also, on occasion, been a means for the illicit transfer of funds from

¹¹⁰ G.C. Hufbauer, J. Shelton Erb and H.P. Starr, “The GATT Codes and the Unconditional Most-Favoured-National Principle”, *12 Law and Policy in International Business* 59 at 66 (1980).

¹¹¹ *Id.* at 67

governmental to private hands, as recent corruption scandals in several countries, Kenya included, have demonstrated.¹¹²

¹¹² P. Low, A. Mattoo and A. Subramanian, "Government Procurement in Services", *20 World Competition* 5 at 6.

CHAPTER FOUR

A REVIEW OF PUBLIC PROCUREMENT REFORM IN THIRD WORLD COUNTRIES

4.1 Introduction

Chapter Four gives a review of three procurement systems in Third World countries and assesses their efficacy. The premise for the comparative assessment is to explore the challenges that other Third World Countries have faced in their bid to reform the public procurement sector. It also explores the possible implications for investment by countries whose procurement laws have subscribed to the standards set by donors, and will develop some policy proposals for improving the effectiveness of legal institutions as an alternative to adopting the standards imposed by the development partners.

From country case studies, further political economy factors that are likely to affect procurement corruption risks can be identified. Although by nature these factors are essentially country specific, many transparency, accountability and efficiency challenges cut across contexts and are invariably observed in most developing countries, such as vague and dispersed procurement rules, weak control and oversight mechanisms, political interference or lack of capacity of procurement officers.

4.2 Progress and Challenges of Procurement Reform in Third World

Countries

4.2.1 Indonesia

Public procurement is a central pillar in the Government's ongoing efforts to improve governance. Indonesia has regulated the public procurement regime by way of Presidential Decrees, ministerial directives and letters of information, and other decrees and instructions by Governors, Mayors and Bupatis.¹¹³ Procedures and practices have evolved over the years in response to various efforts to improve the legal framework for procurement.

Before the reform process was initiated, the public procurement system in Indonesia was subject to systemic abuse. It was severely prone to corruption and collusion, lacked transparency, and failed in its principal objectives: to procure goods and services for the government with due consideration to maximizing economy and efficiency, and promoting competition and fair and equitable treatment of all suppliers, contractors and consulting firms. Owing to these weaknesses, the non-economic influence on public procurement resulted in substantially higher cost of public projects and services. It also acted as a hefty direct tax on the intended beneficiaries of government investments, the poor and the vulnerable who could least afford it.¹¹⁴

¹¹³ Heads of district governments

¹¹⁴ World Bank, INDONESIA COUNTRY PROCUREMENT ASSESSMENT REPORT: *Reforming the Public Procurement System*, East Asia and Pacific Region March 27, 2001

In a nutshell, the public procurement system was plagued with the following problems: A multiplicity of legal instruments regulating different aspects of public procurement constituted a source of confusion with the risk of overlapping jurisdiction, and the lack of clarity in important policy and procedural requirements; basic principles and policies governing public procurement were not anchored at a sufficiently high juridical level of the law, with an effect on the level of transparency and clarity of the regulations, and it has made enforcement difficult; absence of a single agency with a mandate for formulation of procurement policy, and monitoring compliance, and for ensuring clear and enforceable sanctions and enforcement mechanisms; weak compliance with existing procurement rules and procedures, lack of oversight and enforcement.¹¹⁵

The World Bank made public procurement an important issue in its Country Assistance Strategy for Indonesia. World Bank-financed projects in Indonesia had hitherto operated in a difficult operational environment, in very large part due to the flawed system of public procurement. The World Bank took a number of measures to try to protect its projects from the consequences of such an environment. These ranged from improved project design through greater community involvement in order to reduce opportunities for corruption, and strengthening mechanisms for monitoring and supervision of ongoing projects to investigating cases of alleged fraud and corruption by the World Bank's Corruption and Fraud Investigation Unit. Government appointment of a Steering Committee and Working Group to develop a strategy and a time bound action program to reform the public procurement system.

¹¹⁵ *Id.*

Reforms in public procurement in Indonesia commenced in 2003 via a Presidential Decree.¹¹⁶ This came to be at a time when fair competition did not exist. The previous regulation provided for the advertisement of trading opportunities, but this hardly happened. In addition, there were many restrictions on suppliers and contractors from other provincial governments.¹¹⁷

The markets were too small to sustain new companies and the costs of participating in the tender processes were exorbitant. The government bought goods or services at a price much higher than the market price. These were the conditions.

The country then tried to learn what other countries had done to reform public procurement. It also tried to learn about institutions responsible for developing policies for public procurement. It had been quite challenging. Many people with no knowledge of public procurement had become members of tendering committees. The lesson comprised following a set template as provided for by the Bretton Woods institutions. The template provided for the establishment of a public procurement regulatory authority, a dispute resolution mechanism and a minimum qualifications that the persons charged with the responsibility of conducting procurement in the public sector must have.

4.2.1.1 The Reform Agenda

¹¹⁶ Presidential Decree Number 80 of 2003.

¹¹⁷ Indonesia has 33 provincial governments and about 200 district governments.

Since 2005, the Government initiated three reform agenda for public procurement, viz, establishment of a regulatory framework; institutional development; and, development of capacity and human resources for the sector.

The three reform agenda entailed the establishment of the National Public Procurement Agency (NPPA) whose functions comprised:

- i) development of a national procurement policy and strategy;
- ii) development of systems to support the delivery of procurement services; monitoring and evaluation of the performance and delivery of procurement services;
- iii) development of an adequate supply of qualified human resources and certification of procurement staff;
- iv) development of the agency as the principal source of legal, professional and technical advice and support to practitioners on all procurement-related matters, and
- v) establishment of an independent Procurement Complaints and Disputes Resolution Body.¹¹⁸

Other reform initiatives include enactment or promulgation of new regulations; launching of e-procurement and creating room for open bidding and tendering. Under PD 80, there

¹¹⁸ See Strengthening National Public Procurement Processes: Indonesia , available at <http://pid.adb.org/pid/TaView.htm?projNo=43219&seqNo=01&typeCd=2> (accessed 14/07/2010).

no longer are barriers that keep out contractors and suppliers from other provincial governments. Indonesia, however, has a barrier for international enterprises. It has a certain procurement threshold for international construction companies to come to Indonesia, and the threshold is more than IDR 50 billion (US \$ 5b). Below that threshold, international companies are not allowed to engage in construction in Indonesia. The Decree also secures the independence of the project leader and the tendering committee. Small enterprises and projects are protected to a certain value. If a small enterprise can do the job, then bidding is open only to small enterprises.

The system has enhanced efficiency and efficacy of public procurement, and endeared the country to ADB, OECD among other multilateral development partners. The system has diminished corruption. In this sense, the reforms have made Indonesia an attractive country in which to invest.

In 2008, the Government introduced e-government. This was thereafter anchored on a Presidential Decree in 2009

4.2.1.2 Challenges of Public Procurement in Indonesia

Despite the positive steps made towards a reformed public procurement in Indonesia, there still abound some challenges which the government will have to surmount: limited competition and economy in public procurement; segmented markets and unfair practices; leakages and corruption; bureaucracy in public and private sector, complicated methods of payments and bureaucracy in certification

system. Noteworthy is the fact that these challenges, to a large extent, are similar to those that Kenya faced before the enactment of the law on procurement.

One of the lessons learnt from the Indonesia experience is that public procurement reform must, of necessity, be coordinated with other reform areas-financial management, anti-corruption civil service salary system, among others. This stems from the fact that public procurement sector is inextricably related to these other departments.

To address some of these challenges, the Government took several initiatives to improve governance, such as: legal and judicial reforms including the establishment of an Ombudsman's Commission to address corruption, and the appointment of a Law Reform Commission; measures taken to formulate a civil service reform strategy; draft laws to strengthen public financial management; the establishment of an Anti- Corruption Commission; and, the establishment of the Partnership for Governance Reforms in Indonesia under the sponsorship of the UNDP, the World Bank and ADB. ¹¹⁹

4.3 Ghana

The Ministry of Finance had assumed trustee responsibility mandated by Financial Administration Regulations, 1979 LI 1234) Part XII, Section 651. Under the "Public Supplies and Equipment" clause of the laws, it was to ensure that procurement of public

¹¹⁹ See Republik Indonesia, Baseline Benchmarking Assessment of Indonesia's Public Procurement System as at May 2007 Using the OECD/ DAC Joint Venture for Procurement Methodology, Version 4, 2006.

supplies and equipment and their use is an integral part of budgetary management and that purchases are made in the most economical way.

Ghana was a victim of unfair market conditions. It faced competition from subsidized products of rich countries. It was legally able to protect itself from such unfair competition by raising its applied tariffs, but had been disallowed from doing so by international financial institutions on which the country depends for loans. An additional challenge was that the current negotiations in the WTO was likely to have an outcome in which Ghana would have to reduce its bound tariffs on agricultural products; while the Economic Partnership Agreement negotiations with the EC could also lead to obligations for Ghana to reduce its tariffs, possibly to zero.

4.3.1 Rationale for Reform of Public Procurement

The need for procurement reform was articulated in the findings and recommendation of the various World Bank Studies on public procurement in Ghana: Country Procurement Assessment Reports [CPAR] of 1985; 1986, Gosta Westring's report of 1997 and Country Portfolio Performance Review [CPPR] of 1998. These reports highlighted the unacceptable features in the Government's procurement system and advocated a comprehensive reform in Ghana. This was also endorsed in the comprehensive Development Framework initiative in Ghana in 1999 by a consultative team drawn from both the donor community and the Government.

From the perspective of Ghana's Development Partners an open and transparent public procurement system is considered an absolute necessity as it is central to the new approach of moving away from project lending to programme lending. This was consistent with the Government admission that indeed the public procurement sector was in need of reform.

Under the Comprehensive Development Framework (CDF), Donors/Development Partners required a good procurement system to allow their resources to be pooled and controlled by the Government under one basket funding.

4.3.2 Size of Government Procurement

Public procurement in Ghana accounts for up to 50 to 70% of imports, representing between 18.2% to 25.48% of the country's Gross Domestic Product (GDP). About 80% of non-staff emoluments Government expenditure pass through the procurement process.

Public entities spend large sums of money through the public procurement process and in view of mounting budget constraints, it is important that Government introduces efficient public procurement procedures and systems that would ensure value for money.

4.3.4 Current Procurement Practices

The reform agenda was further necessitated by a plethora of procurement practices for acquisition of goods, works and services which had various deficiencies. These included: lack of a unified system and multiplicity of practices for procurement services; procuring entities used World Bank and other donor procurement guidelines alongside fragmented national procurement practices; multiplicity of donor procedures which stretched the nation's limited human resource capacity for quality and consistent performance.

Based on the reviews and studies, the PPOG confirmed the following deficiencies in the current system: absence of a comprehensive and well-articulated public procurement policy; lack of a comprehensive legal regime to safeguard the integrity of the public procurement system; absence of a central body with the requisite capability, technical expertise and competence to develop a coherent public procurement policy, rules and regulations to guide, direct, ensure trained manpower, as well as adequately monitor public procurement.

Ministry of Finance exercised oversight responsibility for rational allocation and utilization of the country's public resources, hence, its obligation to ensure a well regulated procurement system. Procurement was considered part of budget and financial management in the national economy. Improvements in the public procurement system

therefore have direct and beneficial effect on the overall economic performance of the economy.

As part of the reform process, the Ministry of Finance in 1996 embarked on an exercise to reform the government's Public Procurement System as an integral part of a wider Public Financial Management Reform Programme (PUFMARP).

4.3.5 Purpose/Goals of Public Procurement Reform (PPR)

The cardinal goal was to eliminate the various shortcomings in the public procurement process through provision of a comprehensive procurement law and standard tender documents supported by relevant institutional and administrative structures and an oversight body, which would promote the use of public procurement as a tool for national development; harmonize the application of procurement related rules in local and international conventions and treaties; promote the integrity of the public procurement system and public confidence in the procurement process, among others.

Another goal was to streamline the procedures and practices for procurement of goods, works, services, as well as disposal of stores and equipment. It was also geared towards establishment of an effective monitoring system to ensure proper utilization of public funds for enhanced economic growth.

4.3.6 Procurement Reform Process in Ghana

This has involved extensive consultation at national and international levels; reviewed international best practices and considered how leakages in public expenditure programmes could be mitigated. This was effected in stages:

4.3.6.1 Formulation of the Reform Proposal

Ministry of Finance, in January 2000, established the Public Procurement Oversight Group (PPOG), with mandate to consult broadly and make firm proposals for the fragmented public procurement system and reform the process in its entirety.

The Ministry, acting through the PPOG, commissioned a Team of Consultants, who undertook series of studies, on the current state of public procurement in Ghana.

Subsequently, the Public Procurement Reform Proposals were produced and they covered the following: policy; legal framework, which is Draft Procurement Bill was produced which has received stake holders comments and subsequent legal drafting), institutional structures, procurement procedures, arrangements for capacity building.

4.3.7 Challenges

4.3.7.1 Lack of Government ownership within the bureaucracy

The Project was run mainly by consultants, with strong support from Government Ministers and from the DPs. However, there was notable lack of support within the key bureaucratic levels. Also conspicuous was the high turnover of Government of Ghana /donor key officials. This resulted in more delays.

4.3.7.2 Poor project design, lack of donor harmonisation

There was allegiance of donors with consultants/suppliers, and not the government, which in turn generated conflict and undermined Government of Ghana ownership, this notwithstanding the fact that public procurement was essentially within the domain of government.

4.3.7.3 Capacity restraints

This usually manifested itself in the form of inadequate staffing of Project Management Team, including needed technical experts & administrative personnel. Initial staffing included needed technical experts within Government assigned to the programme.

4.3.7.4 Incentives for Government staff

This led to difficulties in: properly managing the contract for the technical consultant; failure to incorporate existing local capacity into component design.

4.3.7.5 Implementation problems

There was lack of harmonisation of procedures for each component, leading to implementation delays. There had also been lack of teamwork on part of donors resulting in inefficient allocation of overall resources. Additionally, there have been difficulties in setting up and maintaining proper sequencing of reform components, making overall project management more difficult.

The cardinal lessons learnt from the Ghana experience is that when the programme design is kept simple, it is easily implementable. The reform process must also have clear monitoring framework, which allows for some degree of flexibility to adapt to immediate positive reform needs.

4.4 Philippines

The only attempt to date to document the challenge of managing the politics of change in the area of procurement reform is a 2006 World Bank study that looks at a successful effort to reform public procurement regulations in the Philippines.¹²⁰ The paper specifically analyses the sequence of events that ultimately led to the passage of the Government Procurement Reform Act of the Philippines.¹²¹

The challenges that public procurement in the Philippines faced were similar to the ones outlined in the case studies of Ghana and Indonesia.

¹²⁰ Available at

(<http://www.wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2005/10/31/00009034120051031141413/Rendered/PDF/340440Man01Politic0Reform.pdf>)(accessed 12/11/09).

¹²¹ Republic Act No. 9184.

was ultimately more effective to implement a less than ideal reform with strong government ownership than a “state of the art” reform with little ownership.

While influential politicians had to be mobilized to champion the bill, these reform champions had to be supported by a core group of reformers within the government. This core group of reformers needed to be armed with sufficient technical knowledge and tools. In other words, reform had to be backed up by solid technical analysis that helps ground debates, disagreements and political opposition.

The reform technical group also needed strong links to civil society and the business community. Reformers from both the executive and civil society had to work together. As civil society had to be mobilized to get the legislature to act, an often underestimated and neglected aspect of the reform process is the implementation of a strategically targeted media campaign.

In all the above case studies, the challenges that the various public procurement reform processes faced were similar and which the reform process in Kenya could easily identify with. Noteworthy is the fact that the countries have made significant positive steps towards reform. It would therefore be advisable to examine the challenges they faced in the process and take key lessons that would then inform public procurement reform in Kenya.

4.5 Public Procurement and Social Justice

Granted, many of Kenya's large corruption scandals have involved public procurement, either from foreign or local companies, where resources are skimmed off over-invoiced contracts. This has largely painted a sordid picture of procurement in Kenya. While the law on procurement has been advanced as a means of arresting runaway corruption, in this sector, it is surprising that there is no concrete policy on how this should be done without bringing forth injurious results to the fledgling domestic industries. Even more surprising is the contestation over the advantages and pitfalls of the Public Procurement and Disposal Act. Of all these, no aspect has attracted as much debate as the interest in the concept of sovereignty, appearing as having been attacked at section 7(1) of the Act.

CHAPTER FIVE

FINDINGS AND RECOMMENDATIONS

5.1 Introduction

The final chapter of this study seeks to state the findings and synthesize the discussions in the preceding chapters in a way that may be useful in making a case for comprehensive and clear reforms in the public procurement sector in Kenya.

From the foregoing, it has been noted that the reform process in public procurement is essentially a consultative process between the Government and the Development Partners.

The reforms are not protectionist. The objectives as spelt in the Public Procurement and Disposal Act, 2006: to maximize economy and efficiency; promote competition and ensure that competitors are treated fairly; promote the integrity and fairness of those procedures; increase transparency and accountability in those procedures; increase public confidence in procurement procedures; and, facilitate the promotion of local industry and economic development.

There is an ongoing wave of reform of public procurement laws and policies around the world. In Africa, these reforms are conducted at the national and regional levels. At the national level, the discussion has focused on Kenya. Additional examples would include the East African countries of Uganda, Tanzania, Guinea Bissau, and Gambia. All these

reforms efforts are geared towards a fairly open public procurement systems in most of the developing world.

These resultant public procurement systems seem to converge quite comfortably with respect to the basic design principles of efficiency, non-discrimination, and transparency. Regarding transparency, it may closely resemble the requirement of WTO GPA and what has so far crystallized from their discussions in that respect. Hopefully, developing countries should then find it less costly to become signatories to the WTO GPA and in the process avail themselves of a lock-in facility for their reform gains through adherence to the multilateral process. This is crucial in particular for African countries where weak or deliberately lax enforcement of laws and policies allow some government officials to compromise the effectiveness and integrity of the public procurement process. Although it may be deemed undesirably intrusive, developing countries that have unique challenges, particularly those in Africa, should consider becoming signatories to the WTO GPA and should engage in a thorough cost-benefit analysis of the agreement.

5.2 Findings:

5.2.1 The Political Economy of Public Procurement Reform in Kenya

In Kenya for example, a study¹²² published in 2006 revealed that the political economy of procurement is invariably characterized by procurement corruption, which was facilitated by opaque regulations, and vague procurement procedures and policies spread over

¹²² Available at http://www.law.nyu.edu/ecm_dlv/groups/public/@nyu_law_website_journals_journal_of_international_law_and_politics/documents/documents/ecm_pro_059625.pdf

various government documents. The findings cited these as the impediments to realization of a sound and steady public procurement system.

The system was characterized by a general lack of transparency, with applicable procedures invariably inaccessible to the public.¹²³ The system was also marred by widespread ministerial interference with tendering processes, with procurement officers often lacking the professionalism and capacity to resist pressures and manipulation exercised by senior officials and powerful politicians.

Staff capacity also resulted in major inefficiencies along the procurement chain, resulting in poor planning and packaging of procurement contracts, general lack of supervision and monitoring of project implementation. Many situations of conflict of interests also occurred in the past, as the law did not prohibit public officials from participating in private enterprise.

At the beginning of the 2000s, Kenya finally engaged in major procurement reforms under the combined pressures from the business community - that was complaining that inefficient procurement resulted in poor infrastructures and inefficient services - and donor push for procurement reforms as a condition for lending. In spite of progress made, the new procurement regime still faces transparency, accountability and efficiency challenges, due to various impediments to the realization of a sound procurement system, including the following:

¹²³ The findings were based on the situation prior to the enactment of Public Procurement and Disposal Act, 2005.

5.2.2 Lack of a Sound Legal Framework

The new procurement regime lacked a firm legal basis. As a result, the Minister of Finance can potentially simply repeal the regulations and retain a great deal of power that can be used to hamper reform. In 2003 for example, all procurement officers were suspended, allegedly to purge procurement of corruption. Many believe that in reality, the Minister used his prerogative to assume control of public procurements. This has however been taken care of with the coming into effect of the Public Procurement and Disposal Act, 2005. The Act now provides for clear procedures for the appointment of procurement officers, provides for an open institutional design or structures for transparent and consultative public procurement.

5.2.3 Unnecessary Exemptions

The exemption of national security and defence procurements from the new regulations should also be considered as a flaw of the system. To date, while few flaws can be pointed at as having led to a scandal, they nevertheless present potential pitfalls which could be utilized to undermine the noble objectives of public procurement law.

The exemption of development agreements from the provisions of the procurement regulations results in maintaining parallel procurement regimes, diluting the country's lines of accountability.

5.2.4 Lack of a Procurement Policy

Kenya still lacks a comprehensive policy on public procurement. In the absence of such policy, successive governments have been able to misuse public procurement as a political patronage tool.

The study concludes that while development partners increasingly recognise the need to rely on national procedures and systems, they are still reluctant to use them as these procedures and systems are often corrupt and inefficient, creating parallel structures that ultimately undermine national systems.¹²⁴

5.3 Recommendations

The study on public procurement in Kenya identified promising methods to achieve a well functioning procurement system with lower incentives for corruption. These typically include measures that foster accountability, establish true market conditions within the civil service, promote competitive and merit based human resource management and effectively address staff capacity issues. The study further distinguished between: 1) supply side interventions adopted by government to improve internal processes such as e-procurement, forensic audits, selective sanctioning, voluntary disclosure programmes and 2) demand side interventions that include external monitoring

¹²⁴ This partly explains why some development partners elect to bypass national procurement systems through direct procurement couched as "Sector Wide Approaches."

arrangements, reporting and access to information, information sharing and collective action, norms and conventions, among others.

5.3.1 Continuous Training on Procurement Law and Policy

A well planned and systematic training programme is required not only to improve the quality of the procurement processes but also for effective implementation and success of the broader procurement reforms. Four key recommendations for developing human resources for good public procurement are: Development and introduction of regular and customized training for senior government officials, project managers and procurement practitioners. Training would need to cover the principles of public procurement, government procurement rules and procedures, requirements of international financial institutions and development partners, ethics of public procurement, Government's anti-corruption program, and also the preparation of technical specifications, development of evaluation criteria and methodology, other commercial and legal aspects, record keeping, handling of disputes, and contract management.

Priority should be given to training in the counties with weak human resource capacity. Selected universities and other institutions of higher learning should be directed to include project management and procurement modules in undergraduate courses, on national and international procurement and contracting in the public and private sector.

After the establishment of capability for a continuous training program, a cadre of reformers and career streams for project managers and procurement practitioners should be created and developed.

5.3.2 Enforcement of Procurement Laws and Implementation of Policy

Even though there are certain problems with the laws and rules governing the various procedures in public procurement, most of the problems with Kenya's current public procurement regime are because of weak compliance with the rules and that they were not strictly enforced.

Thus, mechanisms for compliance and enforcement of rules must be central to any reform initiatives of the public procurement system. International experience suggests that the following four elements are essential for an effective compliance and enforcement system: strong political will to fight corruption and to resist pressure from the strong vested interests; means to ensure that public servants observe well established and clear procurement rules; existence of an enforceable complaints and review mechanism for aggrieved bidders; and, strong oversight of public procurement by public bodies including Parliament, auditing agencies and civil society.

Many of the reforms recommended in this chapter are important in themselves but they also complement each other by addressing different aspects of the above elements of an effective enforcement mechanism. For example, observance of the rules by public servants will be enhanced by building the capacity of the PPOA charged with oversight

and enforcement. Strengthening of the audit functions will ensure proper application of the rules, and a code of conduct and ethics for all public servants involved in procurement will help set strong standards. Enlightenment of bidders on procurement processes will be enhanced by greater transparency through the publication of a Public Procurement Bulletin and clearer rules for disclosure of information during the bidding process. The law will establish clear rules for complaints and how they are to be handled.

Additionally, oversight by public bodies will be enhanced by requiring the PPOA to provide an annual report on public procurement to Parliament and to the public, and because of increased transparency in the procurement process, civil society will have better opportunities to confirm whether the rules are being observed.

Enforcement could be enhanced by strengthening internal controls, effective auditing and a functioning enforcement capacity within all agencies. This will entail a requirement for strict application of sanctions in cases of malfeasance or non-performance, conducting annual corruption surveys on the experience of contractors, suppliers and consultants dealing with government agencies in public procurement. Views of civil society about corruption in public procurement can be used to gauge reform progress.

Government agencies should also be required to use approved standard bidding and contract documents, and to request individual approval of documents, if the standard documents are not used.

In a nutshell, building the core accountability mechanisms of government is the best guarantee against abuse of procurement procedures.

While Kenya has made considerable progress in public procurement reform, there is still room for improvement with regard enhancing enforcement of the law on public procurement. There still are challenges that are yet to be overcome. There is need to energize the media campaign on the benefits of a sound procurement system and sustained political goodwill to ensure that the tempo of reform is maintained.

As has been noted, there is need to borrow from the best practices from the countries that have successfully conducted public procurement reform. The lessons learnt from such processes in Ghana, Indonesia and the Phillipines should be useful in this regard. A lot can also be gleaned from the challenges they have faced since then.

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