

**FIGHTING CORRUPTION IN PUBLIC PROCUREMENT THROUGH
IMPLEMENTATION OF ARTICLE 9 OF THE UNITED NATIONS CONVENTION
AGAINST CORRUPTION: THE CASE FOR KENYA IN PUBLIC PROCUREMENT
REGULATION**

A Thesis Submitted in Partial Fulfilment of the Requirements for the award of Masters of Law
Degree (LL.M) of the University of Nairobi

By

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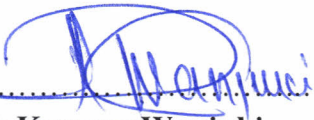
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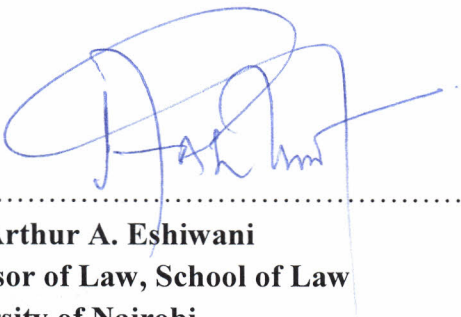
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DECLARATION

I, **Patrick KanyugoWanjuki**, do hereby declare that this is my original work and it has not been submitted and is currently not being submitted for a degree in any other university.

Signed..........Date.....20/11/2013.....
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Many other people contributed a great deal to this project. Even though I cannot mention each and every one by name, I remain very grateful for their support.

DEDICATION

This work is dedicated to my mother Lois Wambui for her love of education and the great lengths she went to see each one of us gets a decent education, something that she never had.

In her I see the strength of a woman who toiled as a farmhand during the day and by the light of the moon and stars she laboured on her own farm to see us through school and to put that meal on our plates so that today we inspire and give hope in our very little ways with humility that she taught us and continues to teach us.

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LIST OF ABBREVIATIONS AND ACRONMYS

| | |
|----------|---|
| ARB | Appeals Review Board |
| CTB | Central Tender Board |
| DAC | Development Assistance Committee |
| EACC | Ethics and Anti- Corruption Commission |
| KACC | Kenya Anti-Corruption Commission |
| KANU | Kenya African National Union |
| MTB | Ministerial Tender Board |
| NARC | National Alliance Rainbow Coalition |
| OECD | Organization for Economic Cooperation and Development |
| PPARB | Public Procurement Administrative Review Board |
| PPDA | Public Procurement and Disposal Act, 2005 |
| PPDR | Public Procurement and Disposal Regulations, 2006 |
| PPD | Public Procurement Directorate |
| UNCITRAL | United Nations Commission on International Trade Law |
| UNCAC | United Nations Convention against Corruption |
| WTO | World Trade Organizations |

TABLE OF STATUTES & CONVENTIONS

| No. | Description |
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| A | Statutes |
| 1. | Anti-Corruption and Economic Crimes Act, Act No 3 of 2003 |
| 2. | Constitution of Kenya, 2010 |
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| 4. | Exchequer and Audit (Public Procurement) Regulations, 2001 |
| 5. | Judicature Act, Chapter 8 |
| 6. | Penal Code , Chapter 63 |
| 7. | Proceeds of Crime and Anti-Money Laundering Act, Act No. 9 of 2009 |
| 8. | Public Officers Ethics Act, Act No 4 of 2003 |
| 9. | Public Private Partnerships Regulations, 2009 |
| 10. | Public Procurement & Disposal Act, 2005 |
| 11. | Public Procurement & Disposal Regulations, 2006 |
| 12. | Public Procurement and Disposal (Amendments) Regulations, 2013 |
| 13. | Public Procurement and Disposal (County Governments) Regulations, 2013 |
| 14. | Public Procurement and Disposal (Preference and Reservations) Regulations 2011 |
| 15. | Public Procurement and Disposal (Preference and Reservations Amendments) Regulations, 2013 |
| B | Conventions |
| 1. | African Union Convention on Preventing and Combating Corruption |
| 2. | Convention on Combating Bribery of Foreign Public Official in International Business Transactions |
| 3. | United Nations Convention Against Corruption |
| 4. | Warsaw Convention on International Carriage by Air |

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| 8. | Man Diesel SE v Kenya Electricity Generating Company Ltd (Application No. 45 of 2009) |
| 9. | Muema& Associates v Turkana County Council (Application No. 35 of 2008) |
| 10 | MruttuSalmann Associates v Catering & Tourism Development Levy Trustees, (Application No. 16 of 2008). |
| 11 | Okunda& A.N v Republic (1970) E.A 453 Constitutional Court. |
| 12. | Postmaster Corporation v Postal Corporation of Kenya (Application No. 43 of 2009) |
| 13 | Techno Brain (K) Limited v Horticultural Crop Development Authority (Application No. 22 of 2009) |
| 14. | Republic v Public Procurement Administrative Review Board ex parte Kenya Revenue Authority (Miscellaneous Application No. 540 of 2008) |

ABSTRACT

Rampant corruption in public procurement has been a major concern to the citizenry, multilateral financial institutions and international organizations. To address this concern public procurement regulations have been thought to be one way of dealing with the menace.

In cognizance of the seriousness of the problems and threats posed by corruption among them it's effects on sustainable development, the United Nations General Assembly¹ passed a resolution for a Convention Against Corruption that called for the need to fight corruption in public procurement by providing under article 9 that *“Each State Party shall in accordance with the Fundamental principles of its legal system take the necessary steps to establish appropriate systems of procurement, based on transparency , competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption”*.

Whereas it is settled that there is no one single definition of corruption, as it tends to mean different things to different people at different times, a working definition has however emerged which basically refers to the abuse of office for personal gain. Kenya being a signatory to the Convention has enacted various legal instruments to address corruption and one of them is regulation of public procurement which this study has attempted to interrogate how the Convention's statement of purpose to promote and strengthen measures to prevent and combat corruption has been realised through implementation of article 9.

¹Preamble to the United Nations Convention against Corruption at Page 5

CHAPTER I

1.0 INTRODUCTION

1.1 Background

Corruption in public procurement systems has remained prevalent across the world.² Its effects are untenable within any society. Despite the clear establishment that corruption negatively affects economic, social and cultural growth, the vice still persists. Although various approaches are in place in an attempt to curb corruption, public procurement regulation has been touted as one way of fighting corruption.

The major causes of corruption within the public sector has been cited to stem from depravity, sin, greed, poverty, lack of education, culture, political patronage, low earning capacity of civil servants, lack of monitoring and accountability in the public sector³ which calls for various approaches.

Article 9 (1) of the United Nations Convention against Corruptions (UNCAC) states “Each State Party shall in accordance with the Fundamental principles of its legal system take the necessary steps to establish appropriate systems of procurement, based on transparency ,competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption.”⁴ The article proceeds to list out preventive measures that signatory countries are required to take in respect of public procurement. It is against the above background that the study seeks to address how the issue of rampant corruption in public sector and specifically in public procurement which has been a major concern to the citizenry and multilateral financial institutions has been addressed through procurement regulation in Kenya.

²DeAses, AJ, Developing Countries: *Increasing Transparency and other Methods Of Eliminating Corruption in the Public Procurement Process*, Public Contract Law journal vol. 34, No.3 pg554

³Kibwana K, *The Anatomy of Corruption in Kenya*, Legal Political, Socio-Economic Perspectives

⁴ Article 9 of the UN Convention against Corruption

Kenya being a signatory of the Convention and in recognition of the provision of Article 65 which provides that *“Each State party shall take the necessary measure , including legislative and administrative measures , in accordance with fundamental principles of its domestic law, to ensure the implementation of its obligations under this convention“* has developed various legal frameworks to address the issue of corruption and these include the Constitution of Kenya, 2010, The Anti-Corruption and Economic Crimes Act⁵, Public Officers Ethics Act⁶ , The Penal Code⁷, Public Procurement and Disposal Act⁸ , Elections Act⁹ which repealed the Electoral Offences Act, Cap 66 of the Laws of Kenya and the Proceeds of Crime and Anti-Money Laundering Act¹⁰ among others.

Whereas Kenya has ratified the Convention, it is noted that it has not domesticated the Convention by direct implant as it has done with some conventions such as The 1992 Warsaw Convention on International Carriage by Air where it promulgated it through an Act of Parliament *“The Carriage by Air Act (Act No. 2 of 1993) which, in its long title defines itself as “An act of Parliament to give effect to the convention concerning International carriage by air , known as “ The Warsaw Convention as amended by the Hague Protocol 1955” to enable the rules contained in that convention to be applied with or without modification , in other cases and in particular , to non-international carriage by air , and for connected purposes”*¹¹

The purpose of the study was to investigate how Kenya has implemented the Convention’s article 9 obligations in its fight against corruption practices in public procurement and from the study findings make recommendations on how war against corruption could be won in the area of public procurement.

⁵ Act No 3 of 2003

⁶ Act No 4 of 2003

⁷ Cap 63 of Laws of Kenya

⁸ Act No 3 of 2005

⁹ Act No. 24 of 2011

¹⁰ Act No. 9 of 2009

¹¹The Carriage by Air Act (Act No. 2 of 1993)

The research has been undertaken using a doctrinal law in context approach by critically evaluating how procurement regulation in Kenya has been used to address the issues of corruption as an objective. The research is intended to be evaluative on the parameters of the procurement processes in the law such as how requirements are determined, specifications, publicity and setting of qualification criteria. The outcome has been an evaluation of the current law and how they are consistent in limiting the issues of corruption related to procurement. Key findings expected from this study is to determine whether the provisions of the legal framework regulating public procurement in Kenya are adequate in limiting and discouraging corrupt practices in public procurement in the context of UNCAS.

1.2 Statement of the Problem

The study explores the extent to which the United Nations Convention against Corruption (UNCAC) and in particular article 9 (1) has been implemented in the Kenya Public Procurement legal framework on the fight against corruption. The study while appreciating that there are several objectives that any particular regulation may intend to achieve focuses on the provisions enshrined in the Kenya's legal framework geared towards fighting corruption in public procurement.

As such the study does not address other legal frameworks that are intended to fight corruption nor dictates to the draftsman how the various sections of the current procurement legal framework ought to have been drafted, rather it merely endeavours to expose the provisions that have been drafted to achieve this objective and present possible means of achieving the fight against corruption thereof.

1.3 Significance of the Study

The contributions of this study will help in addressing the shortcomings of the current legal framework on issues of corruption in public procurement such as policy initiatives that would most specifically address corruption in a more transparent and accountable manner so as to promote good corporate governance in public procurement practice and to identify best practices that if implemented would guarantee and promote tenets of ethical business practices in public procurement. The study would also be of use as an exploratory or guide paper to lead to more research on the adequacy of the current provisions in the public procurement regulations in the fight against corruption.

1.4 Research Approach

1.4.1 Objectives of the Study

The main objective of this study is to perform a critical assessment of how Kenya has implemented the United Nations Convention on Corruption through Public Procurement Regulation. It will analyze the various provisions embedded towards the fight against corruption in Public Procurement.

1.4.2 Specific objectives of the study are:

To trace the history of public procurement regulation in Kenya and make an in depth analysis of the several provisions relating to fight against corruption contained in the Public Procurement & Disposal Act, 2005 and its attendant Regulations and at the same time explore the similarities of the provisions relating to fight against corruption contained in the Public Procurement & Disposal Act, 2005 and its attendant Regulations to those set out in the United Nations Convention on Corruption. Finally settle the issue whether Kenya has indeed implemented the United Nations Convention on Corruption in its Public Procurement Regulation and make proposals for reforms to address on the limitations in the law as it is.

1.4.3 Research Questions

The study seeks to find out whether Kenya has implemented article 9 of the United Nations Convention against Corruption as one of the international measures that address corruption through Public Procurement Regulation and whether there are any gaps.

1.4.4 Hypothesis

This study proceeds on the hypothesis that corruption in government procurement is rampant and both international and regional anti-corruption reforms have developed legal frameworks as a means of curbing it and present possible solutions and guidance as to which reforms are effective and there exists a multiplicity of legal instruments that address corruption but one that stands out is the Public Procurement Regulation; however the question is whether this procurement regulation has implemented the provision of article 9 of the United Nation Convention on Corruption as one of the International anti-corruption measure in public procurement.

1.5 Theoretical Framework

Legal positivism is the thesis that the existence and content of law depends on social facts and not on its merits. English jurist John Austin¹² formulated it that *"the existence of law is one thing; its merit and demerit another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard is a different enquiry."¹³*

The positivists' thesis does not say that law's merits are unintelligible, unimportant, or peripheral to the philosophy of law. It says that they do not determine whether laws or legal systems exist. According to positivists, law is a matter of what has been posited (ordered, decided, practiced, tolerated, etc). Good laws arise from good policies and good

¹²Austin, John (1832) "The province of Jurisprudence Determines" Ed. W.E Rumble, 1995 Cambridge: Cambridge University Press, (1790-1859)

¹³Ibid, at pg 157

policies emanate from philosophy: an understanding of fundamentals¹⁴. Whether a society has a legal system depends on the presence of certain structures of governance, not on the extent to which it satisfies ideals of justice, democracy, or the rule of law. What laws are in force in the particular system depends on what social standards its officials recognise as authoritative; for example legislative enactments, judicial decisions or social customs. It is classical law theory that “each state is sovereign and equal; however it has become impossible for any state to claim absolute sovereignty taking into account the rapid development in technology and international commerce. As a consequence of the interdependence between states both in commercial activities as well as in politics, any action taken by a state in international arena ends up having profound effect on another state.”¹⁵

Relationships between states therefore are as of necessity regulated through a complex web of international agreements. The relationship between international law and municipal law can be approached from two different views namely the positivists or naturalists eclectics. The positivists argue that International law is premised on state consent and that both municipal and international law exists separately. To them where municipal law allows application of international law, it is done merely in muted application.¹⁶ This is the approach adopted by dualist. The second school of thought is that referred to as the “Monists”. They view law as compromised of one whole, devoid of any strict divisions. These scholars say law is promulgated for the common good of mankind and that in order to ensure the well being of mankind international law must be regarded as superior to municipal law. A middle school of thought has also emerged, comprising of persons who consider international and domestic law as equals¹⁷ and that whatever the case , states are

¹⁴Dr. ImreLoerfler, Nurturing Nature. The (Kenya) Standard Newspaper, Wednesday, December 15, 2004

¹⁵Malcom N. Shaw; International Law, 5th Edition, 2003 at page 117

¹⁶ibid at page 122

¹⁷ibid at page 122

generally obligated by the provisions of the Vienna Convention of the Law of treaties to act in conformity with international rules.

However before international law can become part and parcel of municipal law it must first be recognized through a process of signature and subsequently ratification. In Kenya, international law must first be ratified in order to be adopted as domestic law.¹⁸

Jurisdiction in Kenya is established under the Judicature Act¹⁹ and is the enabling statute for Kenya to adopt foreign laws into its Jurisdiction. It states that the Jurisdiction of the High Court, the Court of Appeal and all the subordinate courts shall be exercised in conformity with the common law and doctrines of equity and statutes of general application in force in England on 12th August 1897, and the procedure and practice observed in courts of Justice in England at that time in so far as the Circumstances of Kenya and its inhabitants permit and subject to such qualification as those circumstances may render necessary.

The position in United Kingdom is that customary international law is acceptable as part of domestic common law and common law is one sources of law in Kenya. However it is the prerogative of the sovereign to enter into treaties, but to give international law effect, parliament must legislate the treaty into municipal law. The position in Kenya is that where there is a clash between the municipal law and treaty law, the treaties should prevail, however where the conflict is with the Constitution, then the Constitution should prevail as the Constitution is the supreme law and is superior to even the international law²⁰.

¹⁸ Article 2(6) of the Constitution of Kenya 2010

¹⁹ Section 3 of Chapter 8 of the Laws of Kenya

²⁰ Okunda & A.N VS Republic (1970) E.A 453 Constitutional Court

Article 2 (1) of the Constitution of Kenya 2010 declares the Constitution as the supreme law of the Republic and binds all persons and all State organs at both levels of government but at the same time allows laws that are not inconsistent with the Constitution to have applicability in Kenya. However if the Constitution expressly allows recognition of international law within the municipal courts, then as soon as the treaty is ratified, then the international law takes precedence, but where no such provisions exist then , it must first be incorporated as municipal statute as international law under the dualist approach is just “other law” and inferior to the Constitution. In this respect Article 2 (6) of the Constitution of Kenya 2010 provides that “*any treaty or convention ratified by Kenya shall form part of the law of Kenya under the Constitution*”.

Generally treaties become operative whenever the contracting states decide they should, but normally they become operative upon execution of the consent to be bound or upon their ratification. The rationale for this principle is that since it is the prerogative of the executive to enter international agreements, to render treaties directly applicable without any intermediary after ratification and before becoming domestic law would amount to legislating law without recourse to the legislature, a clear conflict of the principle of the separation of powers and a breach of a fundamental Constitutional provisions.

Kenya has signed and ratified various conventions on the fight against corruption. However even though that creates an obligation to honour the treaties, the Government of Kenya has not implanted them as local laws but has instead enacted various laws to fight corruption. Article 2 (4) of the Constitution of Kenya 2010 recognises customary international law and international agreements provided they are not inconsistent with the Constitution. Therefore the fact that these conventions are not part of the Kenyan municipal law they shall be come laws in Kenya.

Kenya's enactment of the Public Procurement & Disposal Act²¹ may be said to have been an attempt to implement and enforce international obligations in the United Nations Convention against Corruption and other international anti-corruption instruments. The Act was enacted to harmonize and consolidate all laws of Public Procurement into one document for ease of reference and application. In fact the harmonization can be seen from the wordings of section 5(1) which provides that *"if there is a conflict between this Act or the regulations made under this Act and any other Act or regulations , in matters relating to procurement and disposal , this Act or the regulations made under this Act shall prevail."*²²

Before the enactment of this Act, the Public Procurement and Disposal system in Kenya²³ had been undergoing reforms since the mid 1990s, most notably within the periods covering 1997-2001 and 2005²⁴ with support of the World Bank and its rule based approaches. Previously the framework governing public procurement and disposal was amorphous. Treasury Circulars and Supplies Manual were in use from 1969 to 2001 when the government gazetted the Exchequer and Audit Act (Public Procurement), Regulations, 2001 which harmonized all the Treasury circulars and manuals governing procurement in the public sector.

The legal framework for public procurement includes: Public Procurement and Disposal Act²⁵, the Public Procurement and Disposal Regulations²⁶, Supplies Practitioners Management Act²⁷, the Public Procurement and Disposal Regulations (Preferences & Reservations)

²¹Act No 3 of 2005

²²Section 5 (1) of Act No 3 of 2005

²³Public Procurement Oversight Authority Brochure, August 2009

²⁴H.K Kirungu, Public Procurement Situation in Kenya Presented at the 2nd East African Public Procurement Forum, 19th August 2009, Nairobi. Kenya

²⁵Act No 3 of 2005

²⁶Regulations 2006

²⁷Act No 17 of 2007

Regulations²⁸, the Public Procurement and Disposal (Public Private Partnerships) Regulations²⁹, Public Private Partnerships Act, 2011 and now Public Procurement and Disposal (County Governments) Regulations³⁰, the Public Procurement and Disposal (Amendment) Regulations³¹, and Public Procurement and Disposal (Preferences & Reservations (Amendment) Regulations³². Previous decisions of courts and of the Public Procurement Administrative Review Board, The General Procurement Manual and other procurement manuals and circulars issued by the PPOA³³.

The objective of the PPDA is set out in Section 2 as inter alia to promote competition and ensure that competitors are treated fairly; to promote the integrity and fairness of those procedures; to increase transparency and accountability in those procedures; and to increase public confidence in those procedures. The public procurement system in Kenya has been undergoing rule based approach to reforms consistent with donor demands without considering other modern standard based approaches.

1.6 Literature Review

The study draws plenty from the various writings on the subject of the Corruption and regulation of public procurement. Of particular interest is the United Nations Convention against Corruption (UNCAC). The study focuses on corruption in the context of public procurement regulation. It is however, beyond the scope of this study to investigate the causes of corruption more generally as it is something that can only be explained at a macro level taking into account the broader issues of society, economy, culture and human frailty among others.

²⁸Preferences and Reservations Regulations 2011

²⁹Public Private Partnerships Regulations 2009

³⁰County Governments Regulations 2013

³¹ Public Procurement & Disposal (Amendment)Regulations 2013

³²Preferences & Reservations (Amendment) Regulations 2013

³³The Public Procurement and Disposal General Manual in its text in Page 5 Clause 1.3 lays claim to force of law. It states: This Public Procurement and Disposal General Manual is issued by the Public Procurement Oversight Authority (PPOA) in accordance with Section 9 (c) (i) of the Public Procurement and Disposal Act, 2005. Compliance to the instructions contained in the manual is mandatory.

In his paper, Phillip Muganda Kichana states that “...it is evident that there has always been inertial on the part of Kenya’s state authorities to put in place legislation to combat procurement corruption. Now that the Act and the Regulations are finally in place, it is incumbent upon all oversight bodies to subject public entities engaged in procurement and disposal of assets to the standards set under the Act. Moreover, they should insist on an integration of all the acts of Parliament to fight corruption to ensure harmony between them and the Constitution of Kenya.”³⁴

Walter Odhiambo and Paul Kamau state that Kenya in opposing Government Procurement Agreement during the Doha meetings stated that “Public procurement decisions are sovereign rights and should not be brought into WTO and as East African Community they will not sign the GPA but will work on their individual procurement systems with an aim of attuning them to international standards. This is relevant to the fact that the international community is concerned about the integrity of the procurement regime in the country hence the need to build investor confidence which will result in a marked improvement.”³⁵

The context of public procurement provides an opportunity for corrupt practices to take place and it is clear that public procurement, as a sphere of government activity is one of the areas in which bureaucratic corruption manifests itself. Peter Trepte says that Procurement function is not the cause of corruption but merely provides an opportunity for corruption³⁶ and that the cause of corruption lies elsewhere and may be conditioned by a number of factors such as low pay, commercial usage, culture, state of market development , political rent seeking and so forth.

³⁴The Procurement Act is not Tamper Proof- www.tikenya.org (last accessed on 15th July, 2013)

³⁵Odhiambo Walter and Kamau Paul(2003),Public Procurement: Lessons from Kenya, Tanzania and Uganda, OECD development centre, working paper no 208, Dev/Doc(2003)06 pp. 10

³⁶Peter Trepte, Transparency and Accountability as Tools for Prompting Integrity and Preventing Corruption in Public Procurement (2005) (Paper to OECD Expert Group meeting on Integrity in Public Procurement) pp.2

Though there are also several other reasons put forward to explain why the field of public procurement appears to be susceptible to corruption, which include the large sums that are involved, non commercial nature of contracting entities, the nature of the relationships between public officials and government bodies, the existence of wide discretion, bureaucratic rules and budgets that may not be tied to specified goals, as well as non-performance related pay, the study shall not delve to interrogate those reasons but will address the issue of regulation as a preventive measure of corruption.

Corruption in public procurement can take the form of public, private or auto corruption. Private corruption manifests itself as collusion, price fixing, maintenance of cartels or other uncompetitive practices committed by suppliers which prevent the government from obtaining value for money and auto corruption occurs when a public official wrongly secures for himself or an associate such as a close friend or family member the privileges which rightly belong to the public by by-passing or manipulating the formal procedures necessary for the award of these privileges. This type of corruption might manifest itself in public procurement where conflicts of interest cause an official to corruptly favour the company in which he has an interest.

Dekel³⁷ argues that integrity in the procurement system is the primary objective of public procurement regulation procedures and argues that it should be given priority whenever there is a conflict between fighting corruption and other procurement objectives such as value for money, economy, and efficiency e.t.c.

Bardhan³⁸ says that “in a majority of cases corruption ordinarily refers to the use of public office for private gains, where an official who is an agent entrusted with carrying out a

³⁷O. Dekel , “The Legal Theory of Competitive Bidding for Government Contracts” (2008) 37 Public Contract Law Journal , pp 257-258

³⁸P.Bardhan, Corruption and Development: A review of Issues” ,(1997) Journal of Economic Literature , pp 1321

task by the public (the principal) engages in some sort of malfeasance for private enrichment which is difficult to monitor for the principal". He further says it's important to keep a distinction between "immoral" and "corrupt" transactions such as when one pays a blackmailer it is immoral but he is paying him to stop revealing some information which may be unpleasant to him but which may be neither illegal nor corrupt³⁹. He also says that there is need to take note of the distinction between political and economic corruption though it may be blurred. For instance campaign contributions to political parties or gift giving to lobbyists for politicians.

Anechiarico and Jacobs⁴⁰ say that bribery is just one form of corruption. There are many other types of corrupt conduct; thievery for example, government employees steal or misuse government property, they defraud the government and taxpayers by arriving late, leaving early, doing private work on the job, or not working at all, officials pad expense Accounts, expropriate subordinates labour, government cars, phone, duplicating machine all for their private use which strictly speaking are all acts of corruption."

Anechiarico and Jacobs⁴¹ further say that "corruption is a social, legal, and political concept laden with ambiguity and bristling with controversy. That conceptions on what is corrupt are constantly evolving, previously what was acceptable conduct is now deemed to be unethical, and previously unethical conduct is now deemed criminal and therefore the politics of corruption have become more unsettled , unpredictable and intense".

³⁹P.Bardhan, Corruption and Development: A review of Issues" ,(1997) Journal of Economic Literature , pp 1321

⁴⁰ F. Anechiarico and J. Jacobs , The Pursuit of Absolute Integrity : How Corruption Control Makes Government Ineffective (Chicago: University of Chicago Press 1996) , Chapter 1 PP Page 15

⁴¹ Ibid pp 16

John Linarelli⁴² says that on the whole corruption results in numerous undesirable consequences and the governments should implement legal and institutional measures to detect it and penalise corrupt agents in both the public and private sectors.

The efforts of the Organisation of Economic Cooperation and Development (OECD) to control and deter corruption have had profound effect on the fight against corruption. OECD has issued recommendations and declaration condemning bribery in international transactions and setting forth anti-corruption proposals relating to procurements financed by bilateral aid programmes.

1.7 Research Methodology

The study has been undertaken using secondary sources of materials such as books, articles, legal instruments, Resolutions of the UN Conventions and materials sourced from the internet. The study is evaluative on the parameters of the procurement process in the law such as how requirements are determined, specifications, publicity and setting of qualification criteria in that the outcome will be an evaluation of the current law and how they are consistent in limiting the issues of corruption related to procurement. Whereas appreciating there are other laws that have been enacted to deal with corruption and in particular the Constitution of Kenya 2010, The Anti-Corruption and Economic Crimes Act⁴³, Public Officers Ethics Act⁴⁴, The Penal Code⁴⁵ and Elections Act⁴⁶, Proceeds of Crime and Anti-Money Laundering Act⁴⁷ the study is purely on the Public Procurement regulation in Kenya as it is.

⁴²John Linarelli "Corruption in Developing Countries and Economies on Transition: Economic and Legal Perspective" Chapter 7 in S. Arrowsmith and A. Davies (eds), *Public Procurement Global Revolution* (London: Kluwer Law International 1998)

⁴³ Act No 3 of 2003

⁴⁴ Act No 4 of 2003

⁴⁵ Cap 63 of Laws of Kenya

⁴⁶ Act No. 24 of 2011

⁴⁷ Act No. 9 of 2009

1.7.1 Scope and Limitations

The study while appreciating there are various types of corruption focuses on corruption in public procurement specifically. It only mentions but does not delve in various legal instruments that have been enacted to deal with corruption generally viz: The Anti-Corruption and Economic Crimes Act⁴⁸, Public Officers Ethics Act⁴⁹, The Penal Code⁵⁰, Elections Act⁵¹ or the Proceeds of Crime and Anti-Money Laundering Act⁵² but instead focuses on the provisions of the Public Procurement and Disposal Act, 2005 and its attendant regulations. This is in order to focus on corruption as relates to public procurement and identifies whether there are gaps that may need to be looked into in hastening the fight against corruption.

The study takes cognizance of the limitations that come with doctrinal law in the context of research especially the limited scope of restraining ourselves to the legal rules and principles although appreciating that law is a product of its context whose realm is political, economic, social and even cultural. This research methodology is unable to tell us about the impact or effect of the various provisions in the said legal framework on their consumers, those within the legal system, the business community or even society generally in the fight against corruption. It also cannot tell us how individuals or organizations feel about these laws. Answering questions about both the practical operation and effect of law requires a reorientation away from matters of legal doctrine and towards the social world. For example there are various arguments for and against corruption which have been raised, with those who support corruption purporting that corruption should be left to thrive as it greases administration and thus facilitates voluntary exchange and market equilibrium.⁵³ Further, they argue that bribes serve as

⁴⁸ Act No 3 of 2003

⁴⁹ Act No 4 of 2003

⁵⁰ Cap 63 of Laws of Kenya

⁵¹ Act No. 24 of 2011

⁵² Act No. 9 of 2009

⁵³ Linarelli, J. *Corruption in Developing Countries and in countries in transition: Legal and Economic Perspectives*. As reported in *Public Procurement: Global Revolution*, pp125- 137

lubricants within an economy and improve its efficiency.⁵⁴ Hence, it ensures that trade takes place without any impediments. Such observations may not be taken into account given that the approach here operates very firmly within the discipline of law.

1.8 Profile of Study

The study is broken down into the following chapters:

Chapter One

The chapter is the study proposal, discussed herein above. The Chapter introduces and defines to the reader what is corruption and in particular in relation to public procurement. The point of this chapter is to give the reader a general understanding of the research paper and the corruption issues that are canvassed in the context of public procurement regulation herein. The chapter also gives an analysis of the literature reviewed and the theory underpinning the study and lays down the research methodology adopted.

Chapter Two

The chapter looks at the International Instruments that have been developed in the context fighting corruption in the area of public procurement and then looks at generally the multiplicity of the legislation that have been enacted in Kenya in the pursuit of fighting corruption.

Chapter Three

The Chapter demonstrates how the United Nations Convention against Corruption has been implemented in the Kenya Legal framework on the regulation of public procurement. In particular it looks at evaluative issues on the parameters of the procurement processes in the law such as how requirements are determined, specifications, publicity and setting of

⁵⁴Lui F.T., *An equilibrium queuing Model for Bribery* (1995)

qualification criteria. It then canvases the various arguments that revolve around these corruption measures.

Chapter Four

The Chapter draws conclusions from the foregoing, as well as suggests some recommendations.

CHAPTER 2

2.0 INTERNATIONAL AND DOMESTIC CORRUPTION MEASURES IN THE CONTEXT OF PUBLIC PROCUREMENT REGULATION AND THEIR INFLUENCE ON KENYA REGULATORY FRAMEWORK

2.1 Introduction

The public procurement and disposal system in Kenya⁵⁵ has been undergoing reforms since the mid 1990s, most notably within the periods covering 1997-2001 and 2005⁵⁶ with support of the World Bank. Previously the framework governing public procurement and disposal was amorphous as Treasury Circulars and Supplies Manual were the ones in use from 1969 to 2001 when the government gazetted the Exchequer and Audit Act (Public Procurement), Regulations, 2001 which harmonized all the Treasury circulars and manuals governing procurement in the public sector.

With the promulgation of the Constitution of Kenya 2010, Kenya adopted a constitutional approach to public procurement regulation. Article 227 of the Constitution provides on Procurement of Goods and Services and in particular states that “ *When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost effective*” and “ *that an Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented...*”⁵⁷ Pursuant to article 261(1) of the Constitution of Kenya, 2010, the Constitution envisages new legislation governing procurement to be enacted by Parliament within four years from its date of promulgation.⁵⁸

⁵⁵Public Procurement Oversight Authority Brochure, August 2009

⁵⁶Kirungu H. K, Public Procurement Situation in Kenya. 2nd East African Public Procurement Forum. Nairobi. Kenya 2009,

⁵⁷Article 227(1) and (2) of the Constitution of Kenya, 2010

⁵⁸Fifth Schedule of pursuant to article 261(1) of the Constitution of Kenya, 2010

2.2 Use of Procurement Regulation in Preserving Integrity

The use of Public Procurement to achieve economic objectives is not in question as most procurement legal frameworks have not shied away to state that it is intended to facilitate promotion of industrial and economic development while maximizing economy and efficiency in how governments do business. The economic objective has largely been seen as the real impetus but with it comes other objectives that are social rather than economic such as preferences and reservations for nascent industries, minority and disadvantaged groups. One other objective that apparently runs through all legal systems is fight against corruption. Corruption has loosely been defined as abuse of public office for individual/private gain. However preventing corruption in public procurement has generally been seen as primarily the concern of the government or the agency financing the project⁵⁹. Other parties have also seen need to fight corruption as an aspect of moral and political concern. This has been largely due to the adverse impact that corruption has on international trade opportunities. As a result some governments and even agencies have seen the need to fight corruption outside their own jurisdiction and they have therefore introduced measures to deter their own business from becoming involved in corrupt activity elsewhere⁶⁰.

Some have argued that a multilateral treaty may prove to be the most effective way to require countries to adopt measures to stop or discourage corruption outside their borders, however the reality is that governments are unlikely to be willing to agree to a treaty or obligation when they are benefiting from the same behaviour that the treaty wishes to criminalise⁶¹. The following section discusses the International and regional initiatives that target corrupt practices beyond the local jurisdiction in Public Procurement Regulation.

⁵⁹S. Arrowsmith , J. Linarelli and D. Wallace Jr, *Regulating Public Procurement: National and International Perspectives* (Kluwer;2000), Page 51

⁶⁰*ibid*

⁶¹OECD Document C(94)/75/final (1994); P. Nicholas , "Outlawing Transnational Bribery Through the World Trade Organizations" (1997) 28 *Law and Policy in International Business* 305 at 356-7 for a short summary of OECD efforts

2.3 The OECD Regime of Anti- Corruption Measures in Public Procurement and the Convention on Combating Bribery of Foreign Public Official in International Business Transactions

The Organisation for Economic Cooperation and Development (OECD) has been at the forefront in trying to address issues of corruption in public procurement. The OECD was the first organisation to attempt to criminalise overseas bribery through a convention.⁶²The Convention on Combating Bribery of Foreign Public Official in International Business Transactions is an OECD instrument which targets the offering side of the bribery transactions, it entered into force on 15th February, 1999 and aims to eliminate the supply of bribes to foreign public officials, with each country taking responsibility for the activities of its enterprises and what happens within its jurisdiction.

It was enacted following a high level meeting of the OECD Development Assistance Committee (DAC) on Anti-corruption held on 6th to 7th May, 1996 which made proposals for Bilateral Aid Procurement and expressed a common concern on corruption by restating that “corruption undermines good governance, it wastes scarce resources for development, whether from aid or from other public or private sources, with far reaching effects throughout the economy; it undermines the credibility of, and public support for , development cooperation and devalues the reputation and efforts of all who work to support sustainable development and it compromises open and transparent competition on the basis of price and quality”⁶³. The DAC therefore recommended that “Members introduce or require anti-corruption provisions governing bilateral aid-funded procurement and draw to the attention of the international development institutions to which they

⁶²S. William and A Eyo “ Fighting Corruption in Public Procurement through OECD: A review of recent Initiatives” (2009) Public Procurement Law Review, pp NA103-113

⁶³ Commentaries on the Convention on Combating Bribery of Foreign Public Official in International Business Transactions@ OECD 2011

belong, the importance of proper implementation of the anti-corruption provisions envisaged in their rules of operation.”⁶⁴

The main obligation imposed by the convention on all participating countries is that “ *each party shall take such measures as may be necessary to establish that it is a criminal offence under its laws for any person to offer, promise, or give of any undue pecuniary or other advantage , whether directly or through intermediaries , to a foreign public official , for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.*”⁶⁵ This obligation is supported by subsequent articles which provide for appropriate criminal and civil sanctions against firms that are guilty of foreign bribery and discourage accounting and financial recording mechanism that disguise or hide foreign bribes.

Apart from the legally binding OECD Anti-bribery Convention, OECD has also passed several non-binding instruments all aimed at reducing corruption in public sector. One of these non binding instruments is a recommendation for further combating Bribery of foreign public Official in International Business Transactions which was released on 9th December 2009 and hoped to strengthen the convention as regards fighting foreign bribery as it calls for the implementation of non binding provisions.

Another non-binding instrument in the context of public procurement was a 2003 Recommendation on Guidelines for Managing Conflicts of Interest in Public Sector. This recommendation suggested that member States implement a set of Guidelines on Managing Conflicts in the public sector. The guidelines defined a conflict of interest as “ *a conflict between the public duty and private interest of a public official , in which the*

⁶⁴ Recommendation of the Development Assistance Committee on Anti-corruption Proposals for Bilateral Aid Procurement

⁶⁵ Article 1 (1) of the Convention on Combating Bribery of Foreign Public Official in International Business Transactions@ OECD 2011

public official has private – capacity interests which could improperly influence the performance of the official duties and responsibilities.”⁶⁶

The above provisions and guidelines are not limited to public procurement but in the wide scope it means they also impact on public procurement field. The Convention and the Recommendation specifically address transparency and sanctioning of legal persons (debarment) in relation to public procurement. In October 2008, the OECD council adopted a Recommendation on Enhancing Integrity in public procurement. The Recommendation adopts a total approach to curbing corruption in public procurement by recommending that member states take steps to develop a policy capacity framework that enhances integrity in the entire procurement cycle from the stage of needs assessment to contract management and payment. The Recommendation contains 10 Principles, which Member States should take into account in promoting governance and fighting corruption. In addition to the Principles, the OECD has developed a Checklist to guide governments in the implementation of the Principles. The Checklist guide policy makers in establishing a procurement policy framework that minimises the risk of corruption and guidance on how to implement the procurement policy framework.

The recommendations make specific commitments on corruption in public procurement; that member countries should support the efforts in the World Trade Organisation to pursue an agreement on transparency in government procurement; member countries laws and regulations should permit authorities to suspend from competition for public entities found to have bribed foreign public official in contravention of that members’ national laws and; member countries should require anti-corruption provisions in bilateral aid funded procurement, promoted the proper implementation of anti-corruption provisions in international development institutions, and work closely with development partners.

⁶⁶ Article 10 of the Guidelines for Managing Conflicts of Interest in Public Sector

The OECD measures illustrate the inability of countries to implement mandatory anti-corruption measures. However the recommendations do not qualify as treaties and it has been argued that the structure and operation of OECD as an international organisation may preclude it from serving as a catalyst for meaningful reforms.⁶⁷

2.4 The United Nations Convention on Corruption

The United Nations General Assembly through its resolution 55/61 of 4th December, 2000 established an adhoc committee for the negotiation of an effective international legal instrument against corruption. The Committee submitted its final text on the Convention on Corruption to the UN General Assembly for its consideration and action. The convention was adopted for signature, ratification and accession by the General Assembly through Resolution 58/4 of 31st October, 2003 to address this scourge.

It entered into force on 14th December, 2005 and sets out a broad range of standards, measures and rules to fight corruption. In its forward note it postulates that the convention introduces a comprehensive set of standards, measures and rules that all countries can apply in order to strengthen their legal and regulatory regimes to fight corruption.⁶⁸

The United Nation Convention against Corruption (UNCAC) is one of the most comprehensive conventions addressing corruption and represents one of the major landmark in the global fight against corruption. It calls for the need to fight corruption in public procurement by providing under Article 9 (1)⁶⁹ as follows: “ *Each State Party shall in accordance with the Fundamental principles of its legal system take the necessary steps to establish appropriate systems of procurement, based on transparency , competition and objective criteria in decision-making, that are effective, inter alia, in preventing*

⁶⁷John Linarelli “ Corruption in Developing Countries and Economies on Transition: Economic and Legal Perspective” Chapter 7 in S. Arrowsmith and A. Davies (eds) , Public Procurement Global Revolution (London: Kluwer Law International 1998) pp 131

⁶⁸UN Convention on Corruption, Forward note

⁶⁹ United Nations Convention on Corruption

⁶⁹ The Anti-Corruption and Economic Crimes Act

corruption. Such systems, which may take into account appropriate threshold values in their application, shall address inter alia:

- a) The public distribution of information relating to procurement procedures and contracts, including information on invitations to tender and relevant or pertinent information on the award of contract , allowing potential tenders sufficient time to prepare and submit their tenders;*
- b) The establishment, in advance , of conditions for participation, including selection and award criteria and tendering rules , and their publication;*
- c) The use of objective and predetermined criteria for public procurement decisions, in order to facilitate the subsequent verification of the correct application of the rules or procedures;*
- d) An effective system of domestic review, including an effective system of appeal , to ensure legal recourse and remedies in the event that the rules or procedures established pursuant to this paragraph are not followed.*
- e) Where appropriate, measures to regulate matters regarding personnel responsible for procurement, such declaration of interest in particular public procurements, screening procedures and training requirements”.*

The provisions of this article form the discourse in Chapter three below as to how it has been implemented in respect to the fight against corruption in public procurement in Kenya.

2.5 The Africa Union Convention on Preventing and Combating Corruption

The African Union in its pursuit of the need to respect human dignity and to foster the promotion of economic, social and political rights in conformity with the provisions of the African Charter on Human and People's Rights and other relevant human rights instruments, acknowledges that corruption undermines accountability and transparency in the management of public affairs as well as social economic development on the continent, adopted in the year 2003 the African Union Convention on Preventing and Combating Corruption 2003. The convention has already been ratified by 53 African countries including Kenya which ratified it on 2nd February, 2007.⁷⁰

One of the Convention's objectives is to promote and strengthen the development in Africa by each State Party, of mechanisms required to prevent, detect punish and eradicate corruption and related offences in the public and private sectors.⁷¹ The convention thus covers both the public and private sectors unlike most of the other International conventions and has provided offences that range from bribery both domestic and foreign, diversion of property by public officials, trading in influence, illicit enrichment, money laundering and concealment of property. The convention provides for prevention, criminalisation, regional cooperation and mutual legal assistance as well as recovery of assets.⁷²

In relation to public procurement the Convention provides that "*in order to combat corruption and related offences in public service, states parties commit themselves to ensure transparency, equity and efficiency in the management of tendering and hiring procedures in public service.*"⁷³

⁷⁰http://www.africa-union.org/list_of_countries_which_have_signed_ratified/acceded_to_the_convention/htm=Africa (last updated on 6th August 2013)

⁷¹Article 2 (1) of the African Union Convention on Preventing and Combating Corruption

⁷²http://www.biac.org/pubs/anti-bribery_resource/section_1.htm#africa (last accessed on 13 August 2013)

⁷³Article 7 (4) of the African Union Convention on Preventing and Combating Corruption

Of particular interest is the criminalisation of the acts of “ *offering, giving, solicitation or acceptance directly or indirectly , or promising of any undue advantage to or by any person who asserts or confirms that he or she is able to exert any improper influence over the decision making of any person performing functions in public or private sector in consideration thereof , whether the undue advantage is for himself or herself or for anyone else , as well as the request , receipt or the acceptance of the offer or the promise of such an advantage , in consideration of that influence , whether or not the influence is exerted or whether or not the supposed influence leads to the intended result.* ”⁷⁴

This article brings into the ambit of the convention the various corrupt practices and especially the misuse of discretion in procurement decision making so as to favour a particular party. Further the convention requires that “*all or designated public officials to declare their assets at the time of assumption of office, during and after their term of office in the public service.* ”⁷⁵

Other preventive measures provided under the convention are “*easy access to public information, establishment of anti-corruption agencies, participation of the civil society and media in the fight against corruption.* ”⁷⁶

2.6 Procurement Regulation in Kenya in the Context of Fighting Corruption

It is acknowledged that enforcement of domestic anti-corruption laws by governments has the potential to deter corruption significantly; however institutions matter a lot as weak government facilitates corruption.⁷⁷ In 2003, the Government of Kenya began to implement reforms to address inefficiency in the use of public resources and weak institutions of governance. Reforms included the development of anti-corruption strategies to facilitate

⁷⁴ Ibid , Article 4 (1)(f)

⁷⁵ Ibid, Article 7 (1)

⁷⁶ Ibid, Article 12

⁷⁷ John Linarelli “Corruption in Developing Countries and Economies on Transition: Economic and Legal Perspective” Chapter 7 in S. Arrowsmith and A. Davies (eds) , Public Procurement Global Revolution (London: Kluwer Law International 1998) pp 133

the fight against corruption and the enactment of the Public Officer Ethics Act⁷⁸ the Anti-Corruption and Economic Crimes Act⁷⁹, the Financial Management Act⁸⁰, and the Public Procurement and Disposal Act⁸¹. The latter was to make the public procurement process more transparent, ensure accountability, and reduce wastage of public resource.

However the post 2003 activities were not the starting point of regulation of public procurement in Kenya but were essentially in response to the anticipated United Nations Convention on Corruption and the change of Government from KANU to the NARC.

Several legal frameworks have addressed corruption and the following is a clear indication of how issues of corruption have been addressed by a multiplicity of legal instruments:

2.6.1 The Constitution of Kenya 2010

The Constitution of Kenya (2010) introduced major changes regarding the war on corruption in Kenya. In particular Article 227 provided that that there should be a system that is fair, equitable, transparent, competitive and cost effective. It further goes on to provide on the principles to govern acquisition of goods and services and in particular states that “*an Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following.....(d)sanctions against persons who have defaulted on their tax obligations, or have been guilty of corrupt practices or serious violations of fair employment.*”⁸²

Chapter six of the Constitution on leadership and integrity⁸³ stresses the importance of any public official to follow the law. The Constitution in particular establishes an Independent Ethics and Anti-corruption commission with powers and guarantee of independence for purpose of ensuring compliance and enforcement of the provisions of the said Chapter Six

⁷⁸ Act No. 4 of 2003

⁷⁹ Act No. 3 of 2003

⁸⁰ Act No. 6 of 2004

⁸¹ Act No. 3 of 2005

⁸² Article 227 (2)(d) of the Constitution of Kenya, 2010 ,

⁸³ Ibid, Chapter six pg. 51

in the fight against corruption.⁸⁴The Constitution provides checks and balances that will ensure public officials are not involved in corrupt practices.

The third part that relates to the Executive⁸⁵ demands that the secretary to the cabinet should not be a member of parliament.⁸⁶ Put differently, ministries will be run by professionals rather than politicians. This would lower cases of corruption within ministries.

2.6.2 The Anti-Corruption and Economic Crimes Act⁸⁷

The new Ethics and Anti-Corruption commission Act, has a bearing on public procurement in Kenya. The Act states that corruption and economic crimes include abuse of public office, rigging of government tenders, grabbing land, bribery, fraud, embezzlement, breach of trust and offences involving dishonesty. The Act had set up the Kenya Anti-Corruption Commission as an agency expected to spearhead the war against graft. The Act was however amended in section 2, by deleting the definition of “Commission” and substituting thereof the following new definition⁸⁸— “Commission” means the Independent Ethics and Anti-Corruption Commission established under section 3 of the Independent Ethics and Anti-Corruption Commission Act, pursuant to Article 79 of the Constitution.”⁸⁹The PPDA borrows the definition of Corruption from this Act by providing under 3 on definitions that “*Corruption has the same meaning assigned to it in the anti-corruption and Economic Crimes Act, 2003 and includes the offering, giving, receiving or soliciting of anything of value to influence the action of a public official in the procurement or disposal process or in contract execution.*”⁹⁰

⁸⁴ Ibid, Article 79

⁸⁵ Ibid, Article 152

⁸⁶ Ibid, Article 152(3)

⁸⁷ Act No 3 of 2003

⁸⁸ Act No. 22 of 2011

⁸⁹ Ibid, Section 36

⁹⁰ Act No. 3 of 2003

2.6.3 Public Officers Ethics Act⁹¹

The Act guides the creation of mechanisms required to monitor the integrity of public servants by demanding that they declare their wealth followed by government audits. This could help to prevent practices relating to conflict of interest and soliciting of favors. The Act has been put on the spot because it prohibits the public disclosure of the information relating to the declaration of wealth without prior consent. Some argue that such information should be publicized.

2.6.4 The Penal Code⁹²

The Penal Code also deals with issues related to abuse of office and provides that “ *any person who, being employed in the public service does or directs to be done, in abuse to the authority of his office , any arbitrary act prejudicial to the rights of another is guilty of a felony*”⁹³ and also provides general rules as to criminal responsibility and in particular provides that “*ignorance of the law does not afford any excuse for any act or omission which would otherwise constitute an offence.*”⁹⁴ However, the penalties under the Code appear to be rather lenient as they are pegged to a maximum of Kenya shillings one million or to an imprisonment for term not exceeding ten years or to both and this resulted to the enactment of the Anti-Corruption and Economic Crimes Act⁹⁵, whose penalties are different and deterrent in nature.

2.6.5 Public Procurement and Disposal Act, 2005⁹⁶

In 2003, the Government of Kenya began to implement reforms to address inefficiency in the use of public resources and weak institutions of governance. This resulted into the enactment of the Public Procurement and Disposal Act. The objective of the Act is to streamline public procurement in Kenya and ensure transparency hence reducing cases of corruption within the public sector. The Act is also intended to make the public

⁹¹ Act No. 4 of 2003

⁹² Cap 63 of Laws of Kenya

⁹³ Section 101 of Cap 63 of Laws of Kenya

⁹⁴ Section 7 of Cap 63 of Laws of Kenya

⁹⁵ Act No. 4 of 2003

⁹⁶ Act No 3 of 2005

procurement process, more transparent, ensure accountability, and reduce wastage of public resources.

The Public Procurement Act and Regulations contain provisions relating to corruption practices including; splitting or inflating procurement⁹⁷, inappropriate influence on evaluation and unsolicited communications⁹⁸, no fraudulent practices⁹⁹, collusion¹⁰⁰, conflict of interest¹⁰¹ and makes it clear that no person, agent or employee shall be involved in any corrupt practice in any procurement proceedings.¹⁰²

2.6.6 Elections Act¹⁰³

Related to this, is the Elections Act¹⁰⁴ which provides for offences that constitute electoral corruption for example selling of voters cards and other malpractices in electoral matters.

2.6.7 Proceeds of Crime and Anti-Money Laundering Act¹⁰⁵

Proceeds of Crime and Anti-Money Laundering Act offers guidance on how to deal with money laundering. It is closely tied to corruption as the Act contains provisions relating to the fighting money laundering. Such entails identification of money laundering, tracing, freezing, seizure and confiscation of the stolen property/wealth. It borrows heavily on article 7 of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions which provides that *“Each party which has made bribery of its own public official a predicate offence for the purpose of the application of its money laundering legislation shall do so on the same terms for the bribery of a foreign public official, without regard to the place where the bribery occurred.”*¹⁰⁶

⁹⁷ Act No 3 of 2005 at Section 30

⁹⁸ Ibid, Section 38

⁹⁹ Ibid, Section 41

¹⁰⁰ Ibid, Section 42

¹⁰¹ Ibid, Section 43

¹⁰² Ibid, Section 40

¹⁰³ Elections Act No. 24 of 2011

¹⁰⁴ Ibid

¹⁰⁵ Act No. 9 of 2009

¹⁰⁶ Article 7 of the Convention on Combating Bribery of Foreign public officials in International Business Transactions© OECD 2011

2.7 Conclusion

It is unfortunate that despite a multiplicity of the above legal frameworks well intentioned to fight corruption, corruption still remains a menace affecting each and every sector of the economy. In procurement the persons who have the requisite knowledge of its prohibition are the very persons who indulge it by exercising discretion that otherwise promote corrupt practices.

CHAPTER 3

3.0 RELEVANCE AND APPLICABILITY OF THE CONVENTION'S ARTICLE 9 OBLIGATIONS IN PUBLIC PROCUREMENT REGULATION IN KENYA IN THE CONTEXT OF THE FIGHT AGAINST CORRUPTION

3.1 Introduction

It is widely acknowledged that the concept of corruption varies from one social economic setting to another. The definition of Corruption in the context of public procurement has been said to be a moving target, this is because there is no single definition but rather a target of proposed anti corruption actions that seek to minimise or eradicate corruption. The term corruption has come to mean different things to different people. For purpose of this study the focus is in the context of public procurement.

UNCAC neither offers nor attempts to define what corruption is save for stating that the Convention shall apply to the prevention, investigation and prosecution of corruption and to the freezing, seizure, confiscation and return of the proceeds of offences established under the Convention.

3.2 Mandatory obligation to prohibit corruption

In deed Article 9 of UNCAC contains a mandatory obligation as the convention sets out the objectives that any procurement system should ensure it embraces which are; *transparency, competition and objective criteria in decision-making that are effective, inter alia, in preventing corruption.* The Public procurement as regulated under PPDA clearly prohibits corrupt practice and section 40 of the PPDA is affirmative on the issues as it states “*no person, agent or employee shall be involved in any corrupt practice in any procurement proceedings and that if a person or an employee or agent of a person contravenes the provision of this section the person shall be disqualified from entering into*

*a contract for the procurement; or if a contract has already been entered into with the person, the contract shall be voidable at the option of the procuring entity.*¹⁰⁷

The PPDA criminalises the offence of fraudulent practice and provides the liability of such offence as *“that the person shall be disqualified from entering into a contract for the procurement; or if a contract has already been entered into with the person, the contract shall be voidable at the option of the procuring entity”*¹⁰⁸ and the procuring entity retains the right to use other legal remedy that it may have.

3.3 Collusion in Public Procurement

Collusion as an offence under PPDA is established under section 42¹⁰⁹ where it states that *“no person shall collude or attempt to collude with any person-*

- (a) to make any proposed price higher than would otherwise have been the case;*
- (b) to have that other person refrain from submitting a tender, a proposal or quotation or withdraw or change a tender, a proposal or quotation; or*
- (c) to submit a tender, a proposal or quotation with any specified inclusions or exclusions.*

The Act has provided the penalties to apply in case of contravention and these include;

- (a) both persons referred shall be disqualified from entering into a contract for the procurement; or*
- (b) if a contract has already been entered into with either person referred, the contract shall be voidable at the option of the procuring entity and the procuring entity retains the right to use other legal remedy that it may have.*

¹⁰⁷Act No. 3 of 2005, Section 40

¹⁰⁸Ibid, Section 41

¹⁰⁹Ibid, Section 41

Suppliers and contractors may engage in corrupt activities including bid suppression (contractors agree to refrain from bidding or agree to withdraw a previously submitted bid), bid rotation schemes (bidders collude to take turns being the lowest bidder) or they may agree to divide the pie (contractors agree in advance the winning bid). These avenues of corruption can be reduced by the procuring entity conducting adequate due diligence of the contractors.

3.4 Conflict of Interest

Conflict of interests remains a major issue in public procurement. Article 9(1)(e) of UNCAC provides that *"where appropriate, measures to regulate matters regarding personnel responsible for procurement, such declaration of interest in particular public procurements, screening procedures and training requirements"*.¹¹⁰ This article as relates to conflict of interest has been implemented under the Kenyan legal framework under various provisions. There are rules that prohibit government officials from taking positions of conflict of interest. The rules are helpful in that they reduce the opportunity for corruption to take place and eliminate the suspicion of any corruption hence ensuring competition for the government contracts. The Public Officer Ethics Act¹¹¹ and the Public Procurement and Disposal Act, 2005 contain provisions relating to conflict of interest rules. A public officer is expected to use his best efforts to avoid being in a position which puts him in conflict between his personal interests and public duties and is not allowed to take part in the procurement proceedings.¹¹² Notable in the PPDA is section 43(1) which provides that *"an employee or agent of the procuring entity or member of a board committee of the procuring entity who has a conflict of interest with respect to a procurement-*

¹¹⁰UN Convention on Corruption

¹¹¹Section 12 (1) of Act No. 4 of 2003

¹¹²Section 43 (1) (a) of Act No. 3 of 2005

- (a) *Shall not take part in the procurement proceedings ;and*
- (b) *Shall not, after a procurement contract has been entered into, take part in any decision relating to the procurement or contract. ”*

The employee is therefore required to not only refrain from doing anything that would bring his action into question but should also disclose and failure to disclose may render the contract voidable at the option of the procuring entity which also retains its rights to use other legal remedy that it may have.

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3.5 Competition

In the context of procurement competition is enhanced through competitive bidding process whose elements may include; public notification of bidding opportunities, documents that clearly set out the needs, describe the bidding process, contract terms and conditions, and the criteria for choosing the winner and opening of sealed bids in the presence of bidders are all geared towards the promotion of transparency in the competition.¹¹³ Section 2 (b) of PPDA provides competition as one of the objectives of the Act and states that the procedures in the Act are intended “*to promote competition and ensure that competitors are treated fairly*”. In the case of request for quotations or proposal, PPDA provides that the request for quotations “*must be given to as many persons as necessary to ensure effective competition and must be a minimum of three persons unless that is not possible.*”¹¹⁴ This is to ensure that there is adequate competition and that there is no discrimination. PPDA¹¹⁵ specifically outlaws discrimination of candidates who wish to participate in public procurement except where participation is limited by express provision of the Act or its attendant regulations. The capping of the maximum cost of tender documents at one thousand (1000) Kenya shillings ensures there

¹¹³Arrowsmith S. L, Linarelli J, Wallace D. *Regulating Public Procurement. “National and International Perspectives”*. pp3

¹¹⁴ Section 89(3)(b) of Act No 3 of 2005

¹¹⁵ *ibid.* Section 39(1)

is wide participation as exorbitant tender fee can indirectly affect participation and hence promote corruption.

It is however important to note that sometimes competition may prejudice value for money for instance negotiation is not allowed in case of competitive bidding as it is assumed that it can amount to discussions being made in favour of particular firms. Section 75(b) of PPDA provides that “*with respect to direct procurement the procuring entity may negotiate with a person for the supply of goods, works or services being procured.*” Such a provision is not provided in the case of competitive bidding. In the case of request for quotations or proposal, PPDR provides that a minimum of three persons must be requested to submit the quotations. However, a tenderer who wishes to participate is under a duty to read the tender notice and comply with its requirement.¹¹⁶

3.6 Non Discrimination

PPDA¹¹⁷ specifically outlaws discrimination of candidates who wish to participate in public procurement except where participation is limited by express provision of the Act or its attendant regulations. In an application for review of *Muema & Associates v Turkana County Council (Application No. 35 of 2008)* the board held that restriction of the Applicant from participating in procurement proceedings is a breach section 39(1) which prohibits any discrimination.

3.7 Objectivity

The requirement to apply clear and objective criteria communicated to all candidates in the evaluation of tenders and selection of the bidder for the award, limits the range of discretion that can be exercised by the procurement officers. This is done by providing a list of procurement procedures to choose from and setting clear conditions to guide the

¹¹⁶Cathy International Ltd v Office of the President, Police Department (PPARB Application No. 31 of 2009)

¹¹⁷Section 39(1) of Act No. 3 of 2005

choice of the decision. Secondly by determining the procedures to be followed and any deviation requiring clearly documented approval and justification thereto ensures that there is objectivity in procurement decisions and effectively addresses opportunities that may give rise to corrupt practices. PPDA for instance under section 66(2) provides that there is need to ensure that the evaluation criteria are as to the “*extent possible objective and quantifiable.*” This promotes objectivity and limits discretion which may be abused.

3.8 Publicity

The UNCAC requires that there should be procedures on how to solicit bids from a minimum number of tenderers. This is intended to ensure that that the procurement agents do not simply contact those tenderers with whom they prefer to deal with either because they have an interest or are basically shell companies owned by persons to whom the procurement agents have a pecuniary interest with. Publicity prevents the procurement agents from dealing with only those tenderers who are prepared to pay bribes and widens the pool of tenders thereby making it less likely that only designated tenderers are selected to participate.

Section 54 (1) (2) of the PPDA which replaced the Exchequer and Audit (Public Procurement) Regulations, 2001 provides that the “*procuring entity shall bring to the attention of those who may wish to submit the tenders and in case of national advertisement, the invitation to tender should be in one or more English newspaper or other publications that, together, have sufficient circulation outside Kenya to allow effective competition for the procurement , posting on the procuring entity’s website and or at any conspicuous place reserved for this purpose in the premises of the procuring entity as certified by the head of the procuring unit.*”¹¹⁸

¹¹⁸Sections 54(2) and 71(b) of Act No. 3 of 2005

The period allowed for tender preparation, that is, between advertisement and deadline for submission of international tenders is 21 days¹¹⁹ and 14 days in case of national tenders. In case of International tenders, The Public Procurement Oversight Authority's manual further provides that the notice must also be published in media of wide international circulation or on widely read internet sites, in the English language. In addition where the Procuring Entity (PE) believes it is necessary to ensure wide competition, it may send the notice directly to embassies, chambers of commerce and potential bidders. The *procuring entity* is required to keep a record of any bidders to whom the notices are sent directly in the procurement file. It provides examples of publications as the Economist, Newsweek, Times, while examples of dedicated websites are given as dgmarket, UN Development Business.¹²⁰

3.9 Preferred Procurement Method

Open tendering method is the preferred and the default method of procurement under PPDA and alternative procurement methods are only allowed if specific conditions are met. It is the responsibility of the procurement unit to ensure selection of the most appropriate method so as to guarantee value for money and transparency. The imposing of use of preferred procurement procedures on the procurement agents and only allowing alternative procurement procedures which may entail more limited or no publicity in well defined and justifiable means works towards ensuring that opportunities for corrupt practices such as discrimination are minimized.

3.10 Transparency

Transparency is a means of achieving other objectives such as accountability. Best practices of public sector governance demand appropriate disclosures of key information to government stakeholders so that they understand the performance and operations of the government. This principle demands the disclosure of information relating to government

¹¹⁹Regulation 6 of the *Public Procurement and Disposal Regulation (Amended) 2013*,

¹²⁰ Public Procurement Oversight Authority (2009): *Public Procurement and Disposal Manual, First Edition. Chapter seven*, pg. 5- Invitation to tenders.

decisions, actions and transactions undertaken in the public interest. In the context of corruption in public procurement, the principle of transparency is used in the sense of the availability and distribution of information relating to procurement opportunities, procedures of the processes involved, including information on invitations to tender and relevant or pertinent information on the award of contract, allowing potential tenders sufficient time to prepare and submit their tenders.

Transparency is one of the objectives of public procurement and means openness but could as well be associated with publicity for contract opportunities. This may take such forms as requirement for public advertisement of contract opportunities and publicity of the rules that govern each procedure. There is need to have full disclosure to suppliers of the specific rules laid down for the particular procurement. UNCAC under Article 9(1)(a) provides that *“the public distribution of information relating to procurement procedures and contracts, including information on invitations to tender and relevant or pertinent information on the award of contract, allowing potential tenders sufficient time to prepare and submit their tenders.”*

The opening of tenders to potential bidders enhances transparency. The PPDA has achieved this objective by for instance requiring Procuring Entities to use Standard Bidding Documents which are prepared and distributed out by the Public Procurement Oversight Authority¹²¹. These Bidding Documents are set out in the Third Schedule of the Public Procurement and Disposal Regulations [2006].

For instance Standard tender documents for Request for Proposals impose a duty on the Procuring Entity to read the technical scores aloud at the time of opening financial proposals. In an application for review in the case of *Gibb Africa Ltd/Canarail Consultants Inc. v Kenya Railways Corporation (Application No. 48 of 2010)* the Board

¹²¹ Section 9 (i) of Act 3 of 2005

held that failure to read out the technical scores at the time of opening the financial proposal rendered the whole procurement process subjective and did not meet the threshold of integrity and transparency.

Whereas transparency is an important value in public procurement, it is important to realise that it can also have costs and in certain ways it can detract from, as well as support public procurement objectives¹²²

3.11 Specifications

Preparation of bids starts with preparation of specification by qualified personnel. The responsibility is shared by the user and technical department and coordinated by the procurement unit.¹²³ This ensures that there is involvement of the users and reduces procurement officers' information asymmetry and essentially is a measure of curbing corruption.

Specification forms a very critical part of the bidding documents hence preparation of bidding documents should not commence before specifications are ready. The evaluation criteria which forms part of bidding documents is partly based on the specification. The specification in international tendering should as much as possible be based on international standards but should not refer to a particular trademark, name, patent, design, type, producer or service provider or to a specific origin unless there is no other intelligible way of describing the requirements.¹²⁴

¹²²S. Kelman, Procurement and Public Management (1990) p.8

¹²³ Public Procurement Oversight Authority (2009): *Public Procurement and Disposal Manual, First Edition. Chapter seven*, pg. 1

¹²⁴ Public Procurement Oversight Authority (2009): *Public Procurement and Disposal Manual, First Edition. Chapter seven*, pg. 5

3.12 Integrity and Fairness

Fair and transparent rules of participation are key elements of a sound procurement system as provided under Article 9(1) of UNCAC. Access to participation should be based solely on qualifications and preferably be determined on a pass or fail basis in order to avoid arbitrariness in the decision making process¹²⁵. For instance PPDA¹²⁶ requires procuring entities to indicate their technical and performance requirements when advertising tenders or request for proposal. This provision is clear that the procuring entity should not mention any trade mark, patent, name, patent, design, type, producer or service provider or to a specific origin. This is to avoid any preference for any particular brand in order to encourage fairness and competition in the procurement process. An exception is only allowed where there is no other intelligible way of expressing these requirements or where there are other equivalents. A good example would be such trademarks which have become generic names for that particular type of product such as Bic biro pens.

3.13 Contract Opportunities

Procurement serves as one avenue through which the public interacts with the private sector and how such interaction is managed is very important in fostering a sense of fairness and widening the base of participation by the private sector in public procurement.¹²⁷ Article 9(1) (a) of the UNCAC¹²⁸ requires that each party to ensure that there is “*public distribution of information relating to procurement procedures and contracts, including information on invitations to tender and relevant or pertinent information on the award of contract , allowing potential tenders sufficient time to prepare and submit their tender*”.

¹²⁵Odhiambo Walter and Kamau Paul(2003),Public Procurement: Lessons from Kenya, Tanzania and Uganda, OECD development centre, working paper no 208, Dev/Doc(2003)06 pp 34

¹²⁶ Section 34 of Act No. 3 of 2005

¹²⁷ Public Procurement Oversight Authority (2009): Public Procurement and Disposal Manual, First Edition. Chapter Five, 5.1

¹²⁸United Nation Convention against Corruption

Timely notification of bidding opportunities is essential as it allows all parties to know the opportunities. It involves bringing to the attention of those who may wish to submit bids and the deadline for submitting tenders; it may take such forms as advertisement of the tender notice which is the publication of an announcement of tendering proceedings.

In the case of **Cathy International Ltd v Office of the President, Police Department** (Application No. 31 of 2009) the Board held that the Procuring Entity has a duty to take such steps that are reasonable to bring the invitation to tender to the attention of those who wish to submit their tenders. Under section 54(2), a Procuring Entity is required to advertise a tender at least twice in a newspaper of national circulation that has been regularly published for at least two years before the date of issue of the advertisement. In the instant case there was a change of submission dates which was advertised five times in at least four newspapers. It was held that any serious tenderer could not have failed to read the notice.

The content of the invitation to tender notice should be sufficient to inform all the bidders on the procurement requirements, such as key specifications and conditions of execution so as to allow the bidders make informed decision in order to be responsive and competitive. Bidders should have sufficient time to allow publication of tender announcement and submission. Competition is a composite result of clarity of specifications, time and transparency of the method selected.¹²⁹ It is provided under the regulations that the minimum time for preparation of tenders by the bidders shall be a period of fifteen (15) days,¹³⁰ for national tenders, while time for international tendering that is between advertisement and deadline for submission of tenders is twenty one (21) days.¹³¹ Until the Enactment of the Exchequer and Audit (Public Procurement) Regulations, 2001, there were no publication of government tenders; instead invitation to

¹²⁹ Public Procurement Oversight Authority (2009): Public Procurement and Disposal Manual, First Edition. Chapter seven, pg. 1

¹³⁰ Regulation 40 of the Public Procurement and Disposal Regulations, 2006.

¹³¹ *Ibid*, Regulation 36.

tender was done through individual contacts which allowed corruption to thrive in government procurement.

3.14 Tender Documents

Tender documents are an essential interaction document between the procuring entity and potential bidders. They officially specify the procurement requirements and the proceedings in a legally binding manner¹³² as they furnish all information necessary to prospective bidders to prepare bids. The general outline is set out in the Public Procurement Oversight Authority Manual.¹³³

It is mandatory for the Procuring Entity to use the correct tender documents, this was cited in the case of **Mruttu Salmann Associates. v Catering & Tourism Development Levy Trustees**, (Application No. 16 of 2008), in which the Board noted that under section 29(1) and (4) of the Act, Procuring Entities are required to use standard tender documents as may be prescribed and that failure of the Procuring Entity to use the standard form for Request for Proposals was in breach of the law. Further in the application for review of **Postmaster Corporation v Postal Corporation of Kenya** (Application No. 43 of 2009) the Board held that the procuring entity cannot arbitrary change the tender documents thereby using criteria not set out in the tender documents as provided under PPDA.¹³⁴

3.15 Evaluation Criteria

Procurement regulations ordinarily sets out objective evaluation criteria against which bidders may be judged so as to ensure that the potential bidders are properly qualified. Article 9(1)(c) of UNCAC provides for “*the use of objective and predetermined criteria for public procurement decisions, in order to facilitate the subsequent verification of the correct application of the rules or procedures;*”

¹³² : Public Procurement Oversight Authority (2009): Public Procurement and Disposal Manual, First Edition. Chapter seven, pg.6.

¹³³ Ibid

¹³⁴ Section 31 (1) and 31 (3) (a) of Act of 3 of 2005

Evaluation criteria should be based specifically on the capability and resources of prospective bidders to perform the particular contract satisfactorily, taking into account their; experience and past performance on similar contract; capabilities with respect to personnel, equipment, and construction or manufacturing facilities; and financial standing. However evaluation of such past performance must not be unfair, subjective or discriminatory¹³⁵.

The criteria relating to technical ability of the tenderer are used to ensure that only qualified tenderers win contracts and not those that win only because they have corrupted their way. General suitability criteria on the other hand may include provisions relating to probity to the extent that the issue of a tenderer's professional conduct which covers previous acts of corruption may as well be evaluated. Article 227(1) (d) of the Constitution of Kenya, 2010 is of interest as it provides the need to have policies that "*sanction against persons who have defaulted on their tax obligations, or have been guilty of corrupt practices or serious violations of fair employment.*"¹³⁶ These requirements enhance transparency as the qualification criteria are guaranteed to be made public at the very outset and also deter corrupt behaviour.

3.16 Bid Examination and Evaluation

Bid evaluation is carried out by an Evaluation Committee¹³⁷ of the Procuring Entity and entails ascertaining whether the bids meet the eligibility requirements, the process tests the responsiveness of the bids which conforms to all instructions, requirements, terms and conditions of bidding documents, without material deviation, reservation or omission. There is first a preliminary examination which determines whether the following are submitted in the correct form; bid security, its form, the amount and whether correctly

¹³⁵Brinks Security Services Limited v Egerton University ((Application No. 23 of 2008), (2008-2010) PPLR

¹³⁶Article 227 (2)(d) of Constitution of Kenya, 2010.

¹³⁷Regulation 6 of the Amended Regulations provides that "Regulation 16 of the principal regulations is amended by deleting and substituting therefor a new paragraph – (1) For each procurement, the procuring entity shall establish an Evaluation, Inspection and Acceptance & Negotiations Committee for the purposes of carrying out the evaluation of the tenders or proposals or negotiations or inspection and acceptance of goods, works or services.

signed and authorized; the correct number of copies submitted; valid period of the bid; and any required sample submitted which meets any other key requirement. Bids that qualify at the examination stage and do not have any material deviation are subjected to further evaluation. Material deviation could be in the form of unacceptable time schedules, unacceptable alternative technical details such as design, materials or workmanship, and finally unacceptable counter-proposal to key contract terms and conditions such as payment terms, price adjustments, sub-contracting or warranties.¹³⁸

The evaluation process must be completed within set deadlines in order to ensure there are no delays and specifically the regulations provide that “a procuring entity shall, for purposes of section 66 (6) of the Act, evaluate the tenders within a period of fifteen days after the opening of the tender”¹³⁹. Further, in order to ensure the integrity of the evaluation process “under no circumstances may any member of the committee enter into direct communication with any of the tenderers participating in a tender or proposal that such evaluation committee is considering.”¹⁴⁰ In an application for review in the case of ***Techno Brain (K) Limited v Horticultural Crop Development Authority (Application No. 22 of 2009)***, it was held that a member of the Evaluation Committee should not have direct communication with the tenders pursuant to the Regulation 16 (8) having been established that the Chairman of the Evaluation Committee had communicated with the bidders directly through e-mails.

¹³⁸ Public Procurement Oversight Authority (2009): *Public Procurement and Disposal Manual, First Edition. Chapter seven*, pg. 9

¹³⁹ Regulation 15(1) of (Amended) Regulations 2013

¹⁴⁰ Ibid, Regulation 6(6)

3.17 Award Criteria

The requirements to formulate and publish the rules of the particular award procedure such as the award criteria to be used ensures that there is transparency of the rules but it is also meant to constrain the discretion of the procurement agents to safeguard against poor decision making.

Award criteria may be based on the lowest price or a combination of the price with other criteria which are all set out in the bidding documents. This ensures that the procurement agents are held accountable for their actions as they are regulated as rules are laid down about how the process should be conducted rather than relying on individuals to make decisions on the facts of each case and by extension to safeguard against abuse.

Rule based decision making and limited discretion ensures that decisions can be monitored so as to prevent decisions being made on the basis of corrupt motives and helps to ensure that tenderers submit tenders that best match the procuring entity's priorities, thus ensuring value for money.

3.18 Contract Award

The procurement entity is required to award a contract only when all conditions are met and the Tender Committee¹⁴¹ approves. This happens when the final report of the Evaluation Committee is forwarded to Tender Committee for consideration.¹⁴² The Committee can approve a submission, reject a submission with reasons or approve a submission, subject to minor clarifications by the procurement unit of the Evaluation Committee.¹⁴³

The Tender Committee has no authority to modify submissions with respect to the recommendations for a contract award or in any other respect or to reject any submission

¹⁴¹Established under Regulation 10(1) of PPDR

¹⁴²Public Procurement Oversight Authority (2009): *Public Procurement and Disposal Manual, First Edition. Chapter seven, Page 17*

¹⁴³Regulation 11(1) of the Public Procurement and Disposal Regulations, 2006.

without justifiable and objective reasons.¹⁴⁴ The Procuring Entity can however conduct a post –qualification evaluation of a successful bidder, to determine whether the bidder is qualified to perform the contract effectively if that condition was indicated in the bidding documents. A bidder can be rejected after post –qualification and the second lowest bidder subjected to post qualification until the bidder who has capacity to perform is identified.¹⁴⁵

3.19 Conditions of Contract

PPDA provides that “*no contract is formed between the person submitting the successful tender and the procuring entity until the written contract is entered into*”.¹⁴⁶ It is envisaged that the contract documents should define the scope of work to be performed; the goods to be supplied; the rights and obligations of the Procuring Entity and of the supplier or contractor. However the parties must have capacity to enter into contract as PPDA¹⁴⁷ provides that “the person has legal capacity to enter into a contract for procurement.” In addition to the general conditions of contract, any special conditions particular to the specific goods or works to be procured and the location of the project are included.

PPOA pursuant to PPDA¹⁴⁸ is required “*to prepare and distribute manuals and standard documents to be used in connection with procurement by public entities*” and among these standard documents are various contracts as provided in the Third Schedule of the PPDR. The conditions of contract provide a balanced allocation of risks and liabilities which removes discretion from the parties involved in contract implementation and hence a deterrence of corrupt practices.

¹⁴⁴Ibid, Regulation 11(2)

¹⁴⁵ Section 67(1) and 67 (2)

¹⁴⁶Ibid, Section 68(3)

¹⁴⁷ Ibid, Section 31(1) (b)

¹⁴⁸Ibid , section 9(2) (c)

3.20 Information on Awards

In order to ensure that there is no information asymmetry UNCAS requires that pertinent information on the award of contracts is made available. The objective here is to ensure that both the winning and unsuccessful bidders obtain information to enable them make informed decisions in case they would wish to appeal against the decision of the procuring entity. The tenderers are also encouraged to attend bid opening and take notes during such meetings. PPDA requires Procuring Entities to notify both the successful tenderer and the unsuccessful tenderers at the same time¹⁴⁹ but before the expiry of the validity period of bids. The successful bidder must accept the offer within seven days and if the tenderer fails the next person is considered for the contract award and the first successful tenderer loses the bid security.

Regulation 19 of PPDR (amended) Regulations 2013 provides that “a *procuring entity shall notify an unsuccessful tenderer in writing and shall in the same letter provide reasons as to why the tender, proposal or application to be pre-qualified was unsuccessful*”. This is a departure from the previous regulation 66(2) which required the unsuccessful tender to request the information but now its mandatory to provide the information. There is also requirement that every procuring entity to report to PPOA on quarterly basis information of all public contracts as directed by PPOA from time to time. The Public Procurement Oversight Authority (PPOA) is then required to publish notices of the contract awards by procuring entities together with such other information as it may be prescribed.¹⁵⁰ The requirement to either notify the tenderers of the successful tenderer or to publish a contract notice serves to alert tenderers to the possibility of corruption where the outcome is not consistent with the expectations especially in instances where public bid opening meetings are held as unexpected deviations between bid prices as read out.

¹⁴⁹ Public Procurement Oversight Authority (2009): *Public Procurement and Disposal Manual, First Edition. Chapter seven, Page 19*

¹⁵⁰ Section 46(1) of Act No. 3 of 2005

The lowest evaluated prices in the award decision assist in disclosure of any malpractice. Further these requirements are intended to ensure that there is transparency in the procurement process and some level of accountability in order to avoid corrupt practices.

3.21 Independent Domestic Review

The knowledge that actions and decisions made can be reviewed by an independent organ is in itself deterrence to engaging in corrupt practices. Procurement agents are expected to be held accountable of their actions. The UNCAC envisages that each of the member state has regulations on procurement and will ensure that there is use of Independent and *effective system of domestic review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the rules or procedures established are not followed*. This is so as to ensure that decision makers are held accountable to their decisions as well as enhancing transparency.

PPDA established the Public Procurement and Administrative Review Board (PPARB)¹⁵¹ with the functions of dispute resolution between dissatisfied bidders and the procuring entity where a candidate who claims to have suffered or risk suffering loss or damage due to breach of a duty imposed on a procuring entity may seek administrative review . It was continuation of the former Public Procurement Complaints, Review and Appeals Board (PPCRAB) established under the 2001 Exchequer regulations. However section 93 limits the audience before PPARB to only aggrieved candidates who are defined under section 3 of PPDA as “....a person who has submitted a tender to a *procuring entity*”. This definition leaves no room of bid challenge by third parties and PPARB has adopted this view. PPARB does not recognise and accommodate the citizens in the proceedings who may have evidence to challenge the integrity of the procurement process.

¹⁵¹Ibid, Section 25

In an application for review in the case of *Lyle and Prescott International v The Kenya Meteorological Department (Application No. 41 of 2008)* the Board heard that the Applicant was not among the eight firms who had submitted bids. The Board stated that procurement process is a race governed by rules set out in the Act, Regulations and Tender Documents. The mere purchase of the documents does not entitle a bidder to be a candidate as one can only enter the race by returning the tender documents before the set deadline¹⁵² and that it is only a bidder who acts in accordance with the rules and required format, who can lodge a complaint and therefore the Applicant was not a candidate within the meaning of section 3 of the 2005 Act.

However with the promulgation of the Constitution of Kenya, 2010 this problem appears to have been addressed by Article 258(1) which provides that “every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention. This will be especially so when the citizen go to court to compel PPARB to give them audience on matters that touch on corruption.

3.22 Independent Judicial system

The judiciary plays a significant role against corruption. A corrupt judiciary undermines the legal and institutional mechanisms that help in the fight against corruption. Courts should be independent and free from political interference so as not to be seen to favour any accused person irrespective of the social class. UNCAC recognises the importance of the independence of the judiciary and indeed under Article 11 provides that “*bearing in mind the independence of the judiciary and its crucial role in combating corruption, each State Party shall, in accordance with the fundamental principles of its legal system and without prejudice to judicial independence, take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary.*”

¹⁵²Cathy International Ltd v Office of the President, Police Department (Application No. 31 of 2009)

The recent reforms especially in the Judiciary and Public prosecution are expected to strengthen the fight against corruption and help in prosecuting perpetrators of corrupt practices regardless of their position in government will serve as deterrence measures from participating in corruption. In order to avoid delays in the procurement process that are often causes of corruption in the procurement, PPDA provides that *“in no case should any appeal under the Act stay or delay the procurement process beyond the time stipulated in the Act or regulations.”*¹⁵³

3.23 Prequalification.

The UNCAC highlighted above and specifically Article 9 advocates for the need *“to establish appropriate systems of procurement , based on transparency , competition and objective criteria in decision making , that are effective , inter alia , in preventing corruption”*. Prequalification is the process of identifying potential bidders on the basis of compliance criteria to determine their qualification and be able to conduct tender on a short list of pre-qualified bidders having demonstrated their capacity and intention to respond. The process seeks to evaluate the technical and financial capability of competitors. A notice inviting interested candidates to submit applications to be pre-qualified¹⁵⁴ is placed in the print media.

The procedure for pre-qualification as provided in the regulations¹⁵⁵ provides; first that the pre-qualification tender document shall include an outline of the procurement requirements including the nature and quantity of goods, works and services, and the location and timetable for delivery and performance of the resultant contract. Secondly the criteria for pre-qualification must be disclosed. Thirdly all necessary information to enable the candidates to prepare and submit applications to be pre-qualified must be given. Fourth candidates are to be given not less than seven¹⁵⁶ days to prepare and submit pre-

¹⁵³Section 97(2) of Act No 3 of 2005

¹⁵⁴ Public Procurement Oversight Authority (2009): *Public Procurement and Disposal Manual, First Edition. Chapter seven, pg.4*

¹⁵⁵ Regulation 23, 24 and 25 of the *Public Procurement and Disposal Regulations, 2006*

¹⁵⁶ Regulation 9 of the *Public Procurement and Disposal (Amended) Regulations, 2013*

qualification tender, and finally the list is approved by the Tender Committee and final bid documents issued to all the pre-qualified candidates and thereafter the process follows that of normal open tender without pre-qualification.¹⁵⁷

Prequalification process is often abused and is a major source of corruption in public procurement as persons with interest ensure that only those that they have interest are invited to participate in the request for quotations. To mitigate on this risk requests for quotations should be done on a rotational basis and a clear procedure put in place. In order to enhance transparency all the prequalified list of the particular category may be invited to participate in the quotations through the procuring entity's website hence eliminating the discretion as to who to participate. It should also be mandatory to disclose where there is a likelihood of conflict of interest. Further in order to enhance participation, prequalification documents are supplied free of charge¹⁵⁸ and must be issued out for a minimum of seven days.¹⁵⁹

3.24 Language

Prequalification and bidding documents normally state the language to be used in preparation and submission of the bids required. In Kenya, the requirement is that international tender documents should be in the English Language.¹⁶⁰ Preparation of documents in a national language ensures that there is more participation. The contract signed with the winning bidder should be written in the language so selected for the bidding documents, and this language should be the one that governs the contractual relations between the Procuring Entity and the winning bidder.

¹⁵⁷Regulation 23, 24 and 25 of the *Public Procurement and Disposal Regulations, 2006*

¹⁵⁸Regulation 12(3)(c) of the Amended Regulations 2013

¹⁵⁹Regulation 9 of the *Public Procurement and Disposal (Amended) Regulations 2013* provides that "the procuring entity shall allow the candidates at least seven days to prepare and submit their applications to be pre-qualified.

¹⁶⁰Section 71(b) of Act No. 3 of 2005

In the application for review, *Man Diesel SE v Kenya Electricity Generating Company Ltd* (Application No. 45 of 2009), a bid security by the applicant was found to be non-compliant for reason that it was in a foreign language.

In instances where bidders submit documents such as certificates in a language other than that stipulated by the procuring entity, they are usually required to also submit a translated version together with the translation certificate to authenticate the translated version.

3.25 Currency Provisions and Conversion rates

The bid price is the sum of all payments in various currencies required by the bidders. For the purpose of comparing prices, bid prices should be converted to a single currency selected by the Procuring Entity (local currency or fully convertible foreign currency) and stated in the bidding documents. Section 71 on International Tendering provides under sub clause (e) provides that “ *a person submitting a tender may in quoting prices or providing security, use a currency that is widely used in International Trade and that the tender documents specifically allow to be used*”.¹⁶¹

The Procuring Entity should make conversion by using the exchange rates for those currencies quoted by an official source (such as the Central Bank) or by a commercial bank or by an internationally circulated newspaper for similar transactions on a date selected in advance, such source and date to be specified in the bidding documents. In an application for review, *H. Young & Company (EA) Ltd v East African Portland Cement Company Ltd*, (Application No. 23 of 2009), the Board held that the option of which currency to use would be subject of contract negotiation after the award.

Such provisions ensure that there is transparency in the evaluation process as bidders know how the exchange rates to be used in comparing their bid prices to those from other

¹⁶¹Section 71 (e) of Act No. 3 of 2005

countries will be determined. This removes elements of discretion on the part of the procurement agent which would otherwise be amenable to abuse.

3.26 Time for Preparation of Bids

The time allowed for the preparation and submission of tenders is required to be determined with due consideration of the particular circumstances of the project, the magnitude and complexity of the contract. However to avoid wide discretion in Kenya, time allowed for preparation and submission of bid documents under National tenders is 14 days¹⁶² whereas for International tenders are 21 days¹⁶³ and for expression of interest the notice is required to provide a minimum period of 7 days¹⁶⁴ for tenderers to submit their expressions of interest. Procuring Entities are also encouraged to convene pre-bid conferences and arrange site visits; this ensures that bidders are given an opportunity to seek clarification on the tenders which essentially minimizes procurement officers information asymmetry which could otherwise be misused for corrupt purposes.

3.27 Submission of Bids

Bidders are required to submit bids by mail or by hand. However use of electronic systems though is permitted as a means of submitting bids¹⁶⁵ is not used in Kenya due to failure to guarantee that the system is secure. This should be the way forward provided the system maintains the confidentiality and authenticity of bids submitted, uses an electronic signature system or equivalent to keep bidders bound to their bids, and only allows bids to be opened with due simultaneous electronic authorization of the bidder and the Procuring Entity.

¹⁶² Regulation 13 of the *Public Procurement and Disposal (Amended) Regulation*, 2013

¹⁶³ Regulation 11 of the *Public Procurement and Disposal (Amended) Regulations*, 2013

¹⁶⁴ Regulation 15 (2) of the *Public Procurement and Disposal (Amended) Regulations*, 2013

¹⁶⁵ Section 135(1) (e) of *Public Procurement and Disposal Regulations, 2006* provides for the offence of opening any sealed bid including such bids as may be submitted through the electronic system prior to the appointed time.

3.28 Contract Management

Most abuse and corruption in procurement process arise during contract administration. Corruption risks exist in the contract implementation stage in cases of unjustified variation of orders, diversion of goods for personal use/resale or receipt of the less quantity of goods or of a lower quality of goods. Corruptions may also take such forms like bidders submitting low prices in order to ensure that they secure the contract and then employ contract variations as a method of varying their otherwise low prices or supplying substandard goods or services.

To address this concern Public Procurement & Disposal Act, 2005 has provisions on contract management which involves the preparation of all the procurement documentation, the processing of such documentation, monitoring contract implementation, approving and administering contract variations and modifications, and possibly cancelling or terminating contracts. In accordance with Section 47 of PPDA as read with Regulation 31 of PPDR variations to contracts that arise from open tendering or alternative procurement procedure are only effective if duly approved by the tender committee of the procuring entity in writing and that such price or quantity variations are based on the prevailing consumer price index obtained from the Central Bureau of Statics or the monthly inflation rate issued by the Central Bank of Kenya; the quantity variation for goods and services does not exceed ten percent of the original contract quantity; and that such variations should be executed within the period of the contract.

As relates to substandard goods, the law gives procurement entities powers to carry out technical inspection and testing of the goods or works at any reasonable time or place, including during manufacturing or construction; prior to shipment; on delivery or completion; or prior to final acceptance.

An Inspection and Acceptance Committee is established pursuant to Regulation 6(3) of the Public Procurement and Disposal (Amended) Regulations¹⁶⁶ with clear functions and which are among inspection, where necessary to test the goods received. It is intended to ensure that the contractual obligations of the parties are duly enforced and therefore prevents corruption that usually arises during contract execution especially as pertains to contractors' performance.

3.29 Segregation of Duties

The regulations require that all procurements should be handled by different officers in respect of procurement initiation, processing and receipt of goods, works or services. PPDA in particular establishes different institutional structures all with different mandates. Firstly it spells out the roles of the accounting officer and among them is to establish the tender committee, the procurement committee and to ensure that the procuring entity establishes a procurement unit.¹⁶⁷ The Evaluation, Negotiations, Inspection and Acceptance Committee is established pursuant to Regulation 6 (1) and (3) of the PPDR amended regulations 2013 which provides that “*for each procurement, the procuring entity shall establish an Evaluation, Inspection and Acceptance & Negotiations Committee for the purposes of carrying out the evaluation of the tenders or proposals or negotiations or inspection and acceptance of goods, works or services*” and that “*no person shall be appointed as a member of the Evaluation, Negotiations, Inspection and Acceptance Committee if such a person is a member of the tender committee of the procuring entity*”¹⁶⁸.

For instance in an application for review in the case of *Muema & Associates v Turkana County Council* (Application No. 35 of 2008) the Board annulled the procurement proceedings on finding that there was no Tender Opening Committee nor Evaluation

¹⁶⁶Public Procurement and Disposal (Amended) Regulations, 2013

¹⁶⁷ *ibid.* Section 7

¹⁶⁸Regulation 6(3) of the PPDR (Amended) Regulations 2013

Committee and that the Tender Committee had opened the tender and evaluated the bids contrary to section 60 (1) (b) of the Act. This segregation of responsibilities is intended to ensure that there is no misuse of powers when it comes to making procurement decisions.

3.30 Establishing Payment Procedures

Lack of proper payment procedures engenders corruption, for instance where payments are done before the delivery of goods or full payments for partial delivery, there may arise challenges of enforcing delivery. PPDA provides that in instances where there is advance payment, such payments must be supported with advance bank guarantee in order to ensure enforcement of each of the party obligations to the contract. PPDA also acknowledges that delay tactics in payment of suppliers' amounts due could be used as an avenue of corruption and to mitigate against it provides under section 48 that "*unless the contract provides otherwise, the procuring entity shall pay interest on the overdue amounts and such interest shall be in accordance with prevailing commercial bank rates*".¹⁶⁹ The need for sufficient, clear and documented payment procedures is to close loopholes that may be used for corrupt practices.

3.31 Oversight of Procurement Process

Article 36 of the UNCAC provides that there is need to ensure the existence of a body or bodies or persons specialised in combating corruption through law enforcement. Kenya under the Anti-Corruption and Economic Crimes Act¹⁷⁰ established the Kenya Anti-Corruption Commission- KACC but was repealed in 2011¹⁷¹ and replaced by the Ethics and Anti-Corruption Commission (EACC) which has been in the forefront against corruption although it has registered inconsiderable success. EACC aims to investigate corruption and economic crimes, avert corruption and educate the public on the dangers of corruption. According to EACC almost 80% of all cases of corruption have a procurement

¹⁶⁹ ibid. Section 48

¹⁷⁰ Act No 3. of 2003

¹⁷¹ Act No. 22 of 2011

element to it.¹⁷² EACC is empowered to institute civil proceedings against a person and may refer investigated persons for trial in criminal proceedings. Since inception, it has experienced challenges in prosecuting corruption cases and in obtaining favourable verdict against the perpetrators of corruption. In the past, EACC has complained of not having “teeth” to effectively fight corruption and it was intended that the Ethics and Anti-Corruption Commission Act would give EACC more power to prosecute. However, although the Bill had proposed to give EACC power to prosecute suspects without seeking the permission of the Director of Public Prosecution¹⁷³, the politics of the day made that a pipe dream. The only achievement in the new Act is the provision that it is an offence for public officers to open bank accounts outside Kenya. The Office of the Director of Public Prosecutions is another office established to prosecute all offences. The office enjoys constitutional powers to prosecute all offences including corruption.¹⁷⁴ The Director of Public Prosecutions receives reports from the EACC for purposes of prosecuting and he can direct the Commissioner of Police to investigate any matters or reports of corruption.

3.32 Right to Information

The Constitution of Kenya, 2010 under Article 35 gives every citizen the right of access to information held by the state¹⁷⁵ and further under Article 258 (1) it grants “every person the right to institute court proceedings claiming that the Constitution has been contravened or is threatened with contravention”¹⁷⁶. However courts have been conservative in granting the right to information as was in the case of **Famy Care Limited v Public Procurement Administrative Review Board & another [2012] eKLR** where the petitioner an Indian bidder was aggrieved by the tendering process and sought the right to access certain information retained by PPARB. The court while acknowledging the right to information is recognised in international instruments to which Kenya is party however stated that the

¹⁷² Institutional Support for Good Governance, Appraisal Report, African Development Bank, (June 2006)

¹⁷³ Namunae B. Bill gives KACC teeth, outlaws accounts in foreign Banks. The Daily Nation, May 19, 2011 p2

¹⁷⁴ Constitution of Kenya 2010, Article 157

¹⁷⁵ The Constitution of Kenya 2010, Article 35 (1)(b)

¹⁷⁶ Ibid. Article 258 (1)

right of access to information protected under Article 35(1) of the Constitution of Kenya has an implicit limitation that is, the right is only available to a Kenyan citizen.

The court went on to state that “A reading of the Constitution and an examination of words “*person*” and “*citizen*” within the Constitution could only lead to one conclusion; That the definition of a citizen in Articles 35(1) and 38 must exclude a juridical person and a natural person who is not a citizen as defined under Chapter Three of the Constitution. Therefore for purposes of Article 35(1), a citizen is a natural person who is a citizen of Kenya as defined by Chapter Three of the Constitution. It therefore excludes juridical persons from the enjoyment of the right to access to information protected by Article 35(1).” It would therefore seem that the procurement entities can hide behind this interpretation and withhold information that would otherwise be incriminating to them as they cannot be compelled to disclose where the complainant is a foreign bidder.

3.33 Stakeholders Participation

In order to enhance transparency of the procurement process the procurement entity is required under PPDR regulation 12(8) to invite at least two observers to attend Tender Committee meetings in case where the value of the contract is estimated to be above fifty million shillings.¹⁷⁷ However the failure of an invited observer to attend a meeting does not nullify the procurement proceedings.¹⁷⁸

In an application for review of **Joel E. D. Nyaseme & Associates v National Oil Corporation of Kenya**(Application No. 15 of 2009) the applicant alleged that the Procuring Entity flouted regulations 12 (8) and (9) which stipulate that observers be invited to attend tender committee meetings where the value of the contract is estimated to be above Kshs.50 Million. The Board noted that the tender which had been recommended

¹⁷⁷Regulation 12(8) of the Public Procurement & Disposal Regulations,2006 and as amended by Regulation 2013

¹⁷⁸Regulation 12 (10) of the Public Procurement & Disposal Regulations, 2006.,

for award by the Procuring Entity's Evaluation Committee to its Tender Committee was for Kshs.17,900,000.00 exclusive of VAT, and that this was the only bid, being considered for award by the Tender Committee. The Board found that as this amount was below the Kshs.50 million stipulated in Regulation 12(8) which requires observers at tender committee meetings and as such the Procuring Entity did not breach the said Regulations. What is clear is that had the value been above Kshs.50 Million there would have been a breach.

Participation of civil society is also the premise of Article 13 of the UNCAC and provides that “ *each state party shall take appropriate measures within its means and in accordance with fundamental principles of its domestic law, to promote the active participation of individuals and groups outside the public sector , such as the civil society, non-governmental organizations and community based organizations , in the prevention of and fight against corruption and to raise public awareness regarding the existence , causes and gravity and threat posed by corruption.*”¹⁷⁹

Kenya has vibrant civil society with one of the major player in the country in the fight against corruption being Transparency International (TI) which has a chapter in Kenya. TI conducts studies to determine the various levels of corruption and lobby's the public against the vice.

3.34 Time taken to make Evaluation and Award decisions

Delay in award in public procurement tendering has been a major challenge as the regulations only provided that the evaluation should be carried within thirty days from the date of tender submission.¹⁸⁰

The Board has had occasion to deal with the meaning of this Regulation as was in the case of *De La Rue International Ltd v Kenya Revenue Authority* [Application No 68/2007].

¹⁷⁹ UN Convention on Corruption, Article 13

¹⁸⁰ Regulation 46 of the Public Procurement & Disposal Regulations, 2006

In that case the Board stated that *“This regulation is worded in mandatory terms and therefore it must be complied with without deviation.”* Further, when the matter went to the High Court in *Republic v Public Procurement Administrative Review Board ex parte Kenya Revenue Authority (Miscellaneous Application No. 540 of 2008)*, Nyamu J. (as he then was) stated that *“it is clear to the court that the provision is worded in mandatory terms...”* when dealing with this Regulation.

Both the review Board and the Courts have restrained themselves from making determination as regards time taken to make awards provided that the bids are still valid. This has resulted to delay in award as what is regulated is the time for evaluation but not the time to award.

However this has now been addressed under the new regulations which provide that the tender award must be rendered within 30 days from the date of the tender opening. Previously awards could remain outstanding until the tender validity period expires.

3.35 Conclusion

The above provisions all intended to address corruption have resulted in several improvements in the manner in which public procurement is managed. However, there are still weaknesses that need to be addressed as 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 corruption. The fight against corruption in public procurement as a reform agenda does not end with creating new laws and institutions. Reforms must address weaknesses in the enforcement of these laws and regulations. As long as the laws are not enforced, corruption and mismanagement of public resources will continue despite Parliament churning new laws on public procurement regulatory environment.

CHAPTER 4

4.0 CONCLUSIONS AND RECOMMENDATIONS

4.1 Conclusions

Strengthening the legal framework presents a possible avenue of addressing corruption problem although a shift in the behavioural attributes of the citizenry especially cultivating a corruption free culture should be critical in the fight against graft.

Whereas procurement function provides an opportunity for corruption, procurement regulation can only seek to reduce or eliminate those opportunities by removing the incentives for corruption as it cannot address all forms of corruption and cannot address opportunities which do not arise in procurement context. Some of the measures that have been taken to curb corruption and ensure accountability in the public sector have however yielded different results. This is because the incentives or opportunities lie elsewhere.

It is no doubt that there has been a lot of focus on reforms in procurement regulation to not only address corruption but they are however not always implemented and even where they are implemented there is no guarantee that they will be effective. Indeed to the contrary, they are frequently distorted and subverted so that what remains is the form rather than substance and as years pass the origins and purposes of these measures are often forgotten and the measures become permanent features of the government and its bureaucracy and contribute very little, if anything, to the prevention or detection of corruption.

There is need to have in place different accountability systems such as transparency, participation and accountability to citizens especially with the devolved governments, otherwise the first thing that will get devolved is central government's corruption.

The enactment of a new Constitution in Kenya, the growth in stature of non-governmental organisations fighting graft, the continuing expansion of civic knowledge and the

increasing democratic space presents a good opportunity in the war against corruption; however more time is required in order to put in place the necessary structures.

The current legislation has loopholes that may encourage corruption. One worrying area is the termination of procurement proceedings at any time without entering into a contract pursuant to section 36(1) of the Public Procurement & Disposal Act, 2005. This provision may be abused by accounting officers who are not satisfied with the person likely to be awarded the tender if the indications are that the outcome will not be favourable.

Public participation is necessary to aid war against corruption. The public has no automatic place before the Review Board or the High Court save for invoking the public interest Article 258(1) of the Constitution. In practice, the proceedings of the Review board are not open to the public but only to those in dispute. As such accountability to the general public is absent.

Conflict of interests remains a major issue in public procurement. Although rules prohibit government officials from taking positions where there is conflict of interest, such is not always the case especially when it relates to politicians.¹⁸¹

Imposing very strict procurement regulation based on the argument that corruption is a serious problem and requires more regulation runs the risk of imposing regulations which eliminate any possibility for the procurement officers to exercise any discretion instead of reducing the opportunities for corruption which effectively curtails exercising discretion that could be used to obtain better value for money.

Splitting of procurement so as to avoid a procurement procedure is expressly prohibited under Section 30(1) of PPDA, direct procurement and low value procurement approaches are the most abused methods of procurement and they create a viable avenue for

¹⁸¹In 2005, the then minister of Co-operative Development, Njeru Ndwiga was granted stamp duty exemption of KShs.6m in respect of his firm Kinondo Holdings Limited to purchase land in his home. The land was used to secure a loan of KShs.40m from Co-operative Bank. The minister's company won a tender to insure the Kenya Co-operative Creameries which fell under his ministry of co-operative development.

corruption. The excessive use of request for quotations instead of the preferred open procurement method is a clear indication that there is failure to observe legal framework that is already in place. Public procurement regulation is only effective if there is a favourable environment of enforcement and implementation of the procurement laws.

4.2 Recommendations

The elimination of corruption in public procurement in Kenya like many other developing countries depends on much more than good procurement rules. It will depend on long lasting and credible reform of the executive, legislative and judicial organs of the state that surround the procurement system and upon which a properly functioning procurement system depends for its viability. Underlying any regulation is the need to promote transparency and accountability in public procurement. There is need to look at the critical areas that have been identified as impediments in the fight against corruption.

There is need to build capacity of all stakeholders in the procurement process and Oversight bodies so that they can monitor the public procurement system in the country and especially deter corruption practices. As currently constituted, Public Procurement Oversight Authority (PPOA) established under Section 8(1) of the PPDA with the responsibility to ensure that the procurement procedures are complied with, is highly understaffed to carry out its oversight mandate.

There is need to integrate training in the procurement process in order to empower those in charge of procurement and contractors. The training will assist in ensuring that the standards are known, understood and how to identify and detect corrupt practices and to ensure enforcement of the standards. Training should be used to instil professionalism in the procurement profession.

In a bid to enhance transparency, public officers should disclose any personal interests they have and declare their wealth status prior to taking public office. Furthermore, there should be penalties for non-disclosure and breach of the conflict of interest rules. Another aspect of the rules is to forbid the receiving of gifts by public officers from potential or current contractors. Codes of conduct should be compulsory part of any procuring institution, but should not just remain on paper. Codes of conduct are supposed to serve as an obstacle for private interests to interfere with those of the government. Enforcing these rules will ensure integrity in the procurement process and make it easier for public officials to renounce corruption.

Strengthening institutions that fight corruption such as the judiciary, anti-corruption agencies and empowering non-governmental agencies coupled with de-linking corruption from politics and de-ethnicizing politics may assist in the fight against corruption.

Civil society plays a critical role in communicating and verifying information to citizens as well as holding government officials accountable. Religious groups, Trade Unions, non-governmental and other community based organisations have also a role to play in creating awareness in society. Whereas the Government may offer information to the citizens, it may fail to present it clearly or communicate in ways that reach the average person. The civil society may therefore become the public watchdog who verifies that the information presented by the government represents the government actual financial state of affairs. The public should be persistent in demanding that impunity must stop among the political class.

Local media, likewise, can play a watchdog role over the government in that the media is well placed to access and spread the information widely and clearly. The media is bolder in reporting corruption and scandals within the government.

In order to combat corruption from both the giver and the receiver it is necessary to make it mandatory for firms bidding government contracts to put in place internal control measures which can detect, deter and combat corruption. Such measures can take the form of the organization's employees submitting declaration forms that they have not been involved in any corrupt activities. Furthermore, it should be mandatory for organizations to declare in their annual reports the internal control mechanisms which they have put in place.

Corruption in the civil services may partly be attributable to poor pay. Petty corruption is manifested by taking of bribes as a survival strategy by the employees. A government reform program should extend competitive salaries and benefits to the civil service which would assist the civil servants to avoid corruption. Raising of salaries should include reducing the cost of living and improvement of infrastructure by the government to realise improved welfare.

Offering and receiving of bribes is a criminal offence and the perpetrators should be fined or imprisoned as provided by the law. The current penalties include a fine not exceeding Kshs.4 million or imprisonment for term not exceeding 10 years or both for an individual and if corporate body, fine not exceeding Kshs.10 million. Depending on the amount of the bribe, the penalties may not be punitive enough to deter corruption.

Whistle blowing should be encouraged. Contracting firms and government agencies should put in place whistle blowing policies and procedures to be followed that will enable the reports on corrupt practices to be made anonymously by others. With the Witness Protection Act¹⁸², already in place, it would provide a legal framework for witness protection and might encourage more people to report corrupt transactions and testify in court proceedings.

¹⁸²The Witness Protection Act No 16 of 2006

The procurement processes should be automated through implementation of e-procurement. This will ensure transparency especially as it will enable sufficient audit trails to be carried out. An automated system will also contain checks and balances which can help curb corruption and will result in higher compliance levels

Complaints persist that bid evaluation is questionable in public procurement. Evaluation committee members may not have the technical expertise necessary to evaluate bids properly and as such are prone to be influenced by other factors. To resolve this challenge, technically competent evaluation committee members, experts, observers and monitors should be involved in the evaluation process to ensure transparency. Impartial evaluation and comparison of bids should be executed by competent evaluators without influence or interference by bidders or other parties.

Procurement of security services or products is often classified as top secret and are exempted from the Procurement Regulations which creates an opportunity for corruption. The exemption is often applied by the government even when the contract in question does not relate to national defence or contract. In such instances promoting transparency or accountability as the public is not privy to such information is difficult. One way of resolving this challenge is through establishment of a procedure to oversee security procurements by inter-ministerial committees or by the Parliamentary Public Accounts Committee.

From the foregoing discussion article 9 of the United Nations Convention on Corruption as drafted has been implemented in the Kenya Public Procurement Regulation legal framework and more so in the current Public Procurement & Disposal Act, 2005 and its attendant Regulations. However there is need for further research to interrogate the effectiveness of these anti-corruption provisions in the Kenya public procurement regulations.

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