

PERFORMANCE CONTRACT AS A TOOL FOR MANAGEMENT

A CASE STUDY OF THE STATE CORPORATIONS SECTOR

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DECLARATION

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

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This research project has been submitted for examination with my approval as the candidate's University Supervisor.

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DEDICATION

I dedicate this research project to my family members for their love, support, patience, encouragement and understanding. They gave me the will and determination to complete my masters.

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ABSTRACT

The Government of Kenya introduced Performance Contracting in the Public Service as one of the tools to improve service delivery. Since its introduction in 2004, when only a few State Corporations were participating, Performance Contracting is now being implemented in a majority of Ministries, Departments and Agencies (MDAs). The decision to extend its coverage to all MDAs was as a result of the benefits that were beginning to be manifest in participating institutions through improved administrative and financial performance as well as improved service delivery. Ministries were for the first time being required to work towards set targets, draw out service charters with their clients and compare their performance with the best in the world. The results of these efforts were so significant that they won international recognition with various African countries wishing to learn from Kenya's experience.

Over the last three periods of performance contracting, the public has raised dissatisfaction on the results as they do not relate to performance (service delivery) on the ground as perceived and received by the public. The dissatisfaction with the performance results was not only limited to members of the public. Ministries, Departments and Agencies have also challenged the announced results. Indeed, the public outcry over the results became so strong that the results for 2007 were never released. The Government recognizes the usefulness of Performance Contracting as a tool for improved service delivery. However, in view of the apparent mismatch between the results generated by the Performance Contracting tool and the reality on the ground, this study critically assesses the performance contract legislation as a tool for management, taking a case study of the state corporations sector.

The study recognizes performance contracting as a part of the wider performance management system. In undertaking the review of Performance Contracting in the Public Service, the study reaches the conclusion that the Performance Contract is now institutionalized and mainstreamed in Public Service Institutions, however the full benefits of Performance Contracting will be realized when all the state cooperation shall be obliged to mandatory embrace the system.

CHAPTER ONE

1.1 Introduction

Lane (1987) defines a contract as a binding agreement between two or more parties for performing, or refraining from performing some specified act(s) in exchange for lawful consideration. Relational contracting does not attempt to contract fully and completely but settles instead for an agreement that frames the relationship. Such contracts detail goals and objectives, general provisions that are broadly applicable, and who has what power to act within bounds limiting the range of actions that can be taken.

According to GoK (2007), a performance contract is a management tool for measuring negotiated performance targets. It is a freely negotiated performance agreement between the government, acting as the owner of public agency on one hand, and the management of the agency on the other hand. The performance contract specifies the mutual performance obligations, intentions and the responsibilities of the two parties. Similarly, it also addresses economic/social and other tasks to be discharged for economic or other gain. It organizes and defines tasks so that management could perform them systematically, purposefully and with reasonable probability of achievement. These also assist in developing points of view, concepts and approaches to determine what should be done and how to go about doing it. The expected outcome of the introduction of the performance contracts includes improved service delivery, improved efficiency in resource utilization, institutionalization of a performance-oriented culture in the public service, measurement and evaluation of performance, linking rewards and sanctions to measurable performance, retention or elimination of reliance of public agencies on exchequer funding, instilling accountability for results at all levels and enhancing performance.

The new Constitutional dispensation introduced redefinition of institutional structures and relationships across the three arms of Government. Additionally, given the platform against which the citizens adopted the constitution i.e. the push for improved governance,

accountability and service, it is imperative that the Government bring on board or strengthen the existing mechanisms in order to allow for realization of the citizen's aspirations, even under the Performance Contracting Model.

A contract may be therefore discharged in a number of ways; most commonly through performance, by the parties, of their contractual obligations¹. As a general rule, for a contract to be discharged by performance the contractual obligations must be performed completely and exactly; it is not sufficient to 'substantially' perform a contract. There are, however, some exceptions to the rule that exact performance is required. The parties may also modify this requirement - by expressly or implicitly providing that exact performance is not required. Determining the relevant level of performance will, therefore, depend on proper construction of the contract involved².

Breach of contract *may* give the non-breaching party a right to terminate a contract. The non-breaching party may terminate a contract for breach if (a) a provision of the contract permits discharge for breach in the circumstances (e.g., it might provide that in the event of failure to supply goods on a specific date the other party may terminate the contract), (b) if the other party repudiates the contract - that is, renounces their obligations under it (e.g., they say that they will not perform the contract); or (c) the breach is sufficiently serious (minor or technical breaches will generally not allow the non-breaching party to terminate)³

¹ **Van DM Slyke 2003** -The mythology of privatization in contracting for social services **Public Administration Review**, - Wiley Online Library

² **JP Stucker - 2001** -The performance contracting concept in education **DTIC Document**

³ **Christensen J -2002**- The determination of performance standards and participation **Journal of Accounting Research**, - JSTOR

In some cases a contract will be brought to an end because of a supervening event that is beyond the control of the parties; for example, a contract between A and B, whereby B agrees to hire A's theatre on a particular night may be frustrated if, as a result of a terrorist act the theatre is destroyed prior to the date for performance of the contract. The doctrine of frustration applies only in a limited range of circumstances - generally where the event renders performance of the contract something fundamentally different from that anticipated by the parties. The courts are likely to be unsympathetic if the event could have been anticipated and therefore provided for by the parties in their contract. Where frustration is established the contract is terminated automatically; there is no option to discharge or to perform and, at common law, the loss resulting from the termination lies where it falls (although there are limited exceptions to that rule- 'statutory modification'). Statutory modification means that in most cases the harshness that might result from that common law rule is avoided⁴

The Kenyan government acknowledges that over the years there has been poor performance in the public sector, especially in the management of public resources which has hindered the realization of sustainable economic growth. The government reiterates in the Economic Recovery Strategy (ERS) some of the factors that adversely affect the performance of the public sector. These include excessive regulations and controls, frequent political interference, poor management, outright mismanagement and bloated staff establishment. To improve performance, the government has continued to undertake a number of reform measures⁵

In the Economic Recovery Strategy for Wealth and Employment Creation (ERS) of 2003-07, the government of Kenya outlined its commitment towards the improvement of the general performance in ministries and state owned corporations through the introduction of performance contracts. It is within this context that the Kenyan

⁴ Mulgan R -1997- Contracting out and accountability Australian Journal of Public Administration, - Wiley Online Library

⁵ GOK, (2003), Economic Recovery Strategy for Wealth and Employment Creation. Nairobi: Government Printer.

government introduced performance contract as a management tool for measuring performance against negotiated performance targets⁶ the contract specifies the mutual performance obligations, intentions and responsibilities between two parties. The objectives of introducing the performance contracts were to improve service delivery to the public by ensuring that top-level managers were accountable for results; improve efficiency levels and ensure that public resources were focused on attainment of the key national policy priorities of the government; and institutionalize performance oriented culture in the public service; measure and evaluate performance among others⁷

During the initiation phase, the performance contracts were introduced on a pilot basis in sixteen State Corporations, thirteen of them from the late 2004 to mid 2005. The remaining three were implemented from January 2005 through December 2005. In the evaluation stage the sixteen Corporations recorded an increase of 282 percent in pre-tax profits over the previous period (2003/04) and an increase of 14 percent over the set targets. The lessons learnt from the pilot phase were incorporated in the introduction of performance contracts in all ministries/departments and State owned Corporations the following financial year. In order to prepare ministries/departments and State Corporations for implementation of the performance contracts strategy, a series of sensitization workshops targeting key stakeholders including Permanent Secretaries, Chair Persons of State Corporations, Chief Executive Officers, Chair persons⁸

1.2 Background of the Study

Though the aforementioned performance improvements have been recognized in the National Customer Satisfaction Survey where the overall customer satisfaction index was 63.5 (comparable to international benchmarks); through the 2007 United Nations Public Service Award in Category, Kenyan government acknowledges that over the years there

⁶ GOK, (2005). *Ministry Human Resources Development Strategy*. Government Printers: Nairobi.

⁷ GOK, (2006). Results for Kenyans: Capacity Building Programme for Transforming the Public Service, Public Service Reform and Development Secretariat, December, 2006.

⁸ Ibid 7

has been poor performance in the public sector, especially in the management of public resources which has hindered the realization of sustainable economic growth (GoK,2005).

The government reiterates in the Economic Recovery Strategy (ERS) some of the factors that adversely affect the performance of the public sector. These include excessive regulations and controls, frequent political interference, poor management, outright mismanagement and bloated staff establishment. To improve performance, the government has continued to undertake a number of reform measures. However, these measures have not provided a framework for guiding behavior towards attainment of results or ensured accountability in the use of public resources and efficiency in service delivery. The initiatives for instance lack the performance information system, comprehensive performance evaluation system and performance incentive system (GoK, 2005).

Performance Contracting therefore is part of the broader Public Sector Reforms aimed at improving efficiency and effectiveness in the management of the public service. A Performance Contract is a freely negotiated performance agreement between the Government, acting as the owner of a Government Agency, and the management of the Agency. It clearly specifies the intentions, obligations and responsibilities of the two contracting parties⁹.

A performance contract constitutes a range of management instruments used to define responsibilities and expectations between parties to achieve mutually agreed results. It is a useful tool for articulating clearer definitions of objectives and supporting innovative management, monitoring and control methods and at the same time imparting managerial and operational autonomy to public service managers. It is therefore a management tool

⁹ **Kobia M 2006 The Kenyan experience with performance contracting - 28th annual roundtable conference of the African**

for ensuring accountability for results by public officials, because it measures the extent to which they achieve targeted results¹⁰.

Signing a Performance Contract commits a public official to perform to, or beyond, the specified levels. This holds public officials accountable for results and therefore helps in converting tax Shillings into goods and services effectively and efficiently. It also creates transparency in the management of public resources. Therefore every good person holding public office or managing public resources would be placed on a Performance Contract.

Currently all chief officers in all government ministries and accounting departments, State Corporation, Local authorities and tertiary Institutions have signed performance contracts. There has been tremendous and measurable performance arising out of these ongoing government reform initiatives and resulting in international recognition and wide acclaim. For instance, recently the United Nations Public Service Award 2007 was awarded to Kenya in the category of improved Transparency, Accountability and Responsiveness in the Public Sector. This is a clear testimony of the great strides the Kenya Public Service is making in the area of reforms¹¹.

1. 3 Statement of the Research Problem

It is a public perception that the performance Contracting Policy has failed to effectively compound accountability and transparency in management of State Corporations within its service delivery mandate in Kenya. This is due to the perceived failure of public expectations, perceptions on performance rankings and results, customer satisfaction and ranking. In quest of this same goal, Kenya introduced performance contracting not only

¹⁰ Ibid 5

¹¹ **SO Obong'o - 2009** Implementation of performance contracting in Kenya **International Public Management Review 2009b, - imp.unisg.ch**

to improve service delivery but also to refocus the mind set of public service away from a 'hands-off' culture towards a renewed culture focused on the customer and results.¹²

Thus, that the impetus for introduction of performance contracting in Kenya underlies the assumption that institution of performance measurements, clarification of corporate objectives, customer orientation and an increased focus towards incremental productivity and cost reduction cannot lead to improvements in service delivery if the framework for engagement is not well established.¹³

Consequently a major common reform area that many developing countries Kenya have been pursuing in the implementation of reforms involves the adoption of a multiplicity of measures intended to improve service delivery. The emphasis over the period therefore, had been shifting towards fixing management and performance aspects as a means of providing an immediate remedy rather than focusing on its core objective as stipulated in the 'contractor' docket. These measures originate from the need to show demonstrable gains from reform following the pains imposed by the structural adjustment reform period; responding to public demands for accountability and transparency; influence of reform ideas as well as shift to market economies and private sector led economic development, among others.

Over the three-year performance contracting period, 2010-2012, the public has raised dissatisfaction on the results as they do not relate to performance (service delivery) on the ground as perceived and received by the public. The dissatisfaction with the performance results was not only limited to members of the public. Ministries, Departments and

¹² Balogun, M. J. (2003) Performance Management and Agency Governance for Africa Development: The search for common cause on Excellence in the Public Service. UNCEA, Addis Ababa.

¹³ Government of Kenya (2003) Economic Recovery Strategy for Wealth and Employment

Creation Government Press

Agencies have also challenged the announced results. Indeed, the public outcry over the results became so strong that the results for 2007 were never released.

The Government recognizes the usefulness of Performance Contracting as a tool for improved service delivery. However, in view of the apparent mismatch between the results generated by the Performance Contracting tool and the reality, a Panel of Experts was appointed and commissioned on 6th May 2010 to review Performance Contracting and Evaluation in the Public Service with a view to making appropriate recommendations to Government for improving the system.

In essence, performance contracting laws and regulations in Kenya clearly spell out the desired end results expected of the contractor or officers who have signed the contracts. The manner in which the work is to be done is left to the officer who is given as much freedom as possible in figuring out how best to meet the organization's performance objective (Akaranga, 2008). However, as Sean (2009) points out, performance contracting should be much more than a process for documenting and delivering feedback, coaching and ratings. He believes that when expanded beyond these basics, performance contract becomes a powerful tool for helping employees develop and achieve their full potential. Armstrong and Baron (2004) further argue that the manager and the staff member should regularly (periodically) evaluate the staff member's performance and the achievement of the objectives in the work plan as well as the agreed training and development plan.

It is therefore upon the submission that the performance contract legislative framework grants public officers in service deliver the means through which performance is realized, that this study is based, with a view to explore the legislative framework and its efficacy as a tool for management of public resources in the state corporations sector. This is done in realization of the fact that performance contracting is a part of the wider performance management system. In undertaking the review of Performance Contracting in the Public Service though, the study reaches the conclusion that the performance contract law is

now institutionalized and mainstreamed in Public Service Institutions, however the full benefits of Performance Contracting will be realized when all the state corporation shall be obliged to mandatory embrace the system.

1.4 Conceptual Framework

From the preceding sections, it is notable that performance contracting through its legislative framework is meant to be used as a management tool to help public sector executives and policy makers to define responsibilities and expectations between the contracting parties so as to achieve common mutually agreed goals. Performance contracting law has however failed to effectively compound accountability and transparency in management of State Corporations within the public service. Introduction of the use of Performance Benchmarks in the formula for calculation of raw scores to address the accuracy and objectivity of the evaluation system should not only be factual but 'legislatively responsive'.

1.5 Research Objectives

The main objective of the study is to determine whether the introduction of performance contracts and its legislation has achieved accountability and efficiency in management of public resources.

1.5.1 Specific Objectives

The specific objectives of this study are:

- i. To investigate the effectiveness of the legal process in performance contracting as well as of legal Notice No. 93 in regulating Performance Contracting for State Corporations in Kenya.
- ii. To assess the effectiveness and appropriateness of the performance contract tool in its administration to State Corporations.

- iii. To determine the effectiveness and appropriateness of the performance contract tool in its administration to State Corporations?

1.6 Research Questions

This study strives to answer the following research questions

- i. What external factors, outside the legal framework affect the PC in State Corporations?
- ii. What is the effectiveness of the legal process in performance contracting as well as of legal Notice No. 93 in regulating Performance Contracting for State Corporations in Kenya?
- iii. What is the effectiveness and appropriateness of the performance contract tool in its administration to State Corporations?

1.7 Hypotheses

The Kenyan government acknowledges that over the years there has been poor performance in the public sector, especially in the management of public resources which has hindered the realization of sustainable economic growth¹⁴. The government reiterates in the Economic Recovery Strategy (ERS) some of the factors that adversely affect the performance of the public sector. These include excessive regulations and controls, frequent political interference, poor management, outright mismanagement and bloated staff establishment. To improve performance, the government has continued to undertake a number of reform measures. However, these measures have not provided a framework for guiding behavior towards attainment of results or ensured accountability in the use of public resources and efficiency in service delivery. The initiatives for instance lack the

¹⁴ GOK, (2005). Ministry Human Resources Development Strategy. Government Printers: Nairobi.

performance information system, comprehensive performance evaluation system and performance incentive system¹⁵.

The study therefore proceeded with the null hypothesis (H_0): Performance contract has failed as a service delivery tool in the state corporations sector in Kenya. The alternative hypothesis (H_1) is that Performance contract has been a successful service delivery tool in the state corporations sector in Kenya.

1. 8 Justification

This study derives from the current Kenyan situation. Whereas institutional reforms and restructuring are essential, effective accountability and transparency in management of State Corporations should therefore be simultaneous for there to be an effective and efficient redress system for instance. Performance contracting remains a viable and important tool not only for improving public sector performance but also for strengthening governance as a key element of the Kenya Vision 2030 goals. Whether governance is seen from the perspective of improving public sector management and performance, or as strengthening government capacity to perform essential functions and deliver goods and services to the citizenry, the use of performance contracting as a management tool to achieve these can provide significant benefits to Kenya. A critical review of its governing policy framework is therefore warranted, to assure its effectiveness as a service delivery tool. The legal provisions on performance contract as developed by the state corporations sector has emphasized contractual relationships using a range of contractual instruments to improve efficiency and effectiveness in their institutions. The aims of these performance-contracting arrangements are to improve performance by: setting clear objectives; delegating authority for day-to-day input decision making; specifying agent performance in terms of results they can control (outputs and financial performance - not outcomes); assigning accountability for those results; increasing the transparency of the accountability relationship; promoting

¹⁵ Ibid 10

communication between the parties; establishing clear reporting and monitoring processes; providing a basis for assessment of performance and providing a basis for renegotiation, should conditions change.

1. 9 Theoretical framework

The study reviews the contract and agency theories and conceptualizes the same in studying performance contract as a tool for management with reference to the state corporations sector.

1.9.1 Consent Theory

According to Barnett (1986) in interrogating the consent theory of a contract, he stated that the mere fact that one man promises something to another creates no legal duty and makes no legal remedy available in case of non-performance. To be enforceable, the promise must be accompanied by some other factor such as legal documents to verify the consent. A consent theory of contractual obligation views certain agreements as legally binding because the parties bring to the transaction certain rights and they manifest their assent to the transfer of these rights. This approach accurately captures what is at stake when individuals seek to exchange or bestow entitlements that they have acquired or will acquire. It provides a coherent account of both the traditional common law preference for an objective interpretation of contracts and its exceptions.

It dictates that a showing of consent is sufficient (*prima facie*) to obtain enforcement and shows that circumstances which undermine the moral significance of objective consent are warranted. A consent theory also provides a focus for contemporary dissatisfaction with the doctrine of consideration, while putting into better perspective the recognized need to enforce some gratuitous commitments and to protect some acts of reliance that were not bargained for. It also specifies the proper relationship among these core concerns of contract law. In this way, it helps determine which principle or concern should be given priority in different situations.

According Wertheimer and Franklin (2010) consent theory of a contract is a voluntary

choice at the essence of contract law. Contract law, both in principle and in practice, is about allowing parties to enter arrangements on terms they choose each party imposing obligation on itself in return for obligations another party has placed upon itself.

1.9.2 Contract theory

In economics, contract theory studies how economic actors can and do construct contractual arrangements, generally in the presence of asymmetric information. Because of its connections with both agency and incentives, contract theory is often categorized within a field known as Law and economics. One prominent application of it is the design of optimal schemes of managerial compensation. In the field of economics, the first formal treatment of this topic was given by Kenneth Arrow in the 1960s.¹⁶

A standard practice in the microeconomics of contract theory is to represent the behavior of a decision maker under certain numerical utility structures, and then apply an optimization algorithm to identify optimal decisions. Such a procedure has been used in the contract theory framework to several typical situations, labeled *moral hazard*, *adverse selection* and *signaling* (David, 2008). The spirit of these models lies in finding theoretical ways to motivate agents to take appropriate actions, even under an insurance contract. The main results achieved through this family of models involve: mathematical properties of the utility structure of the principal and the agent, relaxation of assumptions, and variations of the *time structure* of the contract relationship, among others.¹⁷

Putting the theory in context, state corporations and the instituting authorities' can be viewed as the economic actors engaging in a binding performance contract in the presence of a performance contract legislative framework.

¹⁶ Jean-Jacques, L. & Martimort, D. (2002). *The Theory of Incentives: The Principal-Agent Model*. Description, "Introduction," & down for chapter links. (Princeton University Press, 2002)

¹⁷ Patrick, B. & Dewatripont, M. (2005). *Contract Theory*. MIT Press

1.9.3 Agency theory

Agency theory analyzes the relationships between an organization's owners and its managers who, under law, are agents for the owners. The key issues in agency theory center upon whether adequate market mechanisms exist that compel managers to act in ways that maximize the utility of a firm's owners where ownership and control are separated. Under the terms of agency theory, a principal (P) passes on authority to an agent (A) to conduct transactions and make decisions on behalf of the principal in an effort to maximize P's utility preferences.¹⁸

Three ways in which agents may differ from their principals. First, the agents may have different preferences from their principal, such as willingness to work. Second, agents may have different incentives from the principal. Agents may have a different stake in the outcome or may receive different rewards than the principal. Third, agents may have information that is unavailable to the principal, or vice versa. These types of divergences may give rise to problems relating to monitoring, incentives, coordination, and strategy¹⁹.

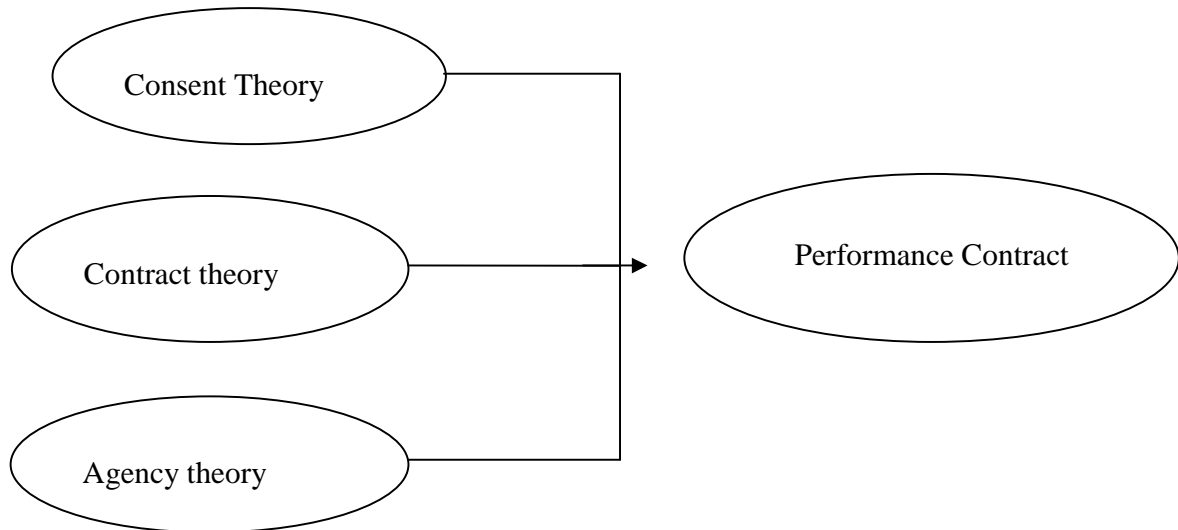
Again in contextualizing the theory, state corporations can be viewed as agents whereas the instituting authorities as principals. The state corporations (agents) are expected to be custodians of both the government and public interest as per the performance contract and are bound by the terms.

¹⁸ Williamson, O.E. (1981). The Economics of Organization: The Transaction Cost Approach. *The American Journal of Sociology* 87 (3): 548–577

¹⁹ Moffitt, M. & Bordone, R. (2005). Handbook of Dispute Resolution [Program on Negotiation/Jossey-Bass], 190

Theoretical Framework

Figure 2.1: Theoretical Framework



Source: Author, 2013

1. 10 Literature Review

The term performance contracting can be traced from France in the late 1960's and other countries including India, Pakistan and Korea (OECD, 1997). Prior to this period the business environment was rather stable and therefore strategic planning was entrusted in the hands of the top management of the organization. This practice was counterproductive as managers who were implementers of the strategic plans were not involved at the formulation stage. Aosa (2000) supports this view when he argues in his study that due to increased environmental turbulence in the early 1970's, especially 1973, top executives were forced to recast the way they looked at their business for survival. They redefined performance management as a proactive management tool for achieving business goals and objectives, through a structured and continual process of motivating, measuring and rewarding individual and team performance. Earlier, management tools for example the Carrot-and-Stick policies and behavior which were common in the 19th Century Industrial Age had become increasingly irrelevant to modern management

practices and therefore, this called for more flexibility and adaptability in strategic planning, forcing managers responsible for implementing strategies to be involved in all stages of strategy formulation (Barclays Africa, 1997).

However, Steiner (1983) speculates that many of the strategic planning systems failed to link planning and resource allocation and did not place emphasis on strategy implementation. He further observes that the existing systems failed to reward managers and employees for strategic thinking, creativity and innovation. This led to disenchantment with strategic planning and thus forcing managers to believe that it was of little or no value to the organization. Despite these problems practitioners and academics like Porter (1983) came in support of strategic planning by placing emphasis on strategy implementation.

In Canada the government's approach to performance contracting and management were rooted in early 1990's expenditure management systems designed to cut costs during a period of budget deficits (Kernaghan & Siegel, 1999) and in France they were first introduced in the Directorate General for Taxes (DGI) specifically designed to respond to two main concerns (Grapinet, 1999). First, as tools meant to ensure consistency in a decentralized context and second, as tools to enhance pressure on the entire services network in order to improve performance.

1.10.1 Purpose of Performance Contracting

An organization's purpose defines the ways in which it relates to its environment. If this purpose is fulfilled, the organization will survive and prosper (Luo & Peng, 1999). The main purpose of the performance contracting according to Armstrong and Baron (2004) is to ensure delivery of quality service to the public in a transparent manner for the survival of the organization. Hope (2001) points out that performance contracts specify the mutual performance obligations, intentions and the responsibilities which a government requires public officials or management of public agencies or ministries to meet over a stated period of time. As part of the performance orientation in government,

the common purposes of performance contracting are to clarify the objectives of service organizations and their relationship with government, and facilitate performance evaluation based on results instead of conformity with bureaucratic rules and regulations which have killed thinking, innovation and creativity in the public sector (Hitt *et al.* 1999).

Grapinet (1999) posits that the performance contracting involves a highly structured phase of evaluating results which he considers to be an extremely rigorous technical exercise on one hand and on the other hand a morale-boosting exercise for managers and staff. The performance contract does not actually go into resource appropriations which, although needed for practically all resources, are automatic. He further argues that members of staff are not sufficiently involved in drawing up contracts, a task which in spite of exhortations from central government is still largely the preserve of managers. In management terms, this means that performance goals are all too often perceived as being imposed from above rather than from a collective thought process.

Gore (1996) recognizes the importance of performance contracting when he admits that in the United States federal government, performance contracts are in one way or the other changing the way many bosses do their jobs. Gore believes that many managers have changed their attitude towards workers which in turn has encouraged innovation and good customer service. On the other hand, Hill and Gillespie (1996) argue that performance contracting is expected to increase accountability because clear and explicit managerial targets, combined with managerial autonomy and incentives to perform, make it easier to establish the basis for managerial accountability and to achieve outputs. Further, Therkildsen (2001) speculates that performance contracts if well executed increase political accountability by making it easier for managers to match targets with political priorities. Politicians can, in turn, hold managers accountable for their performance as being witnessed in many developing nations. Performance contracts clearly spell out the desired end results expected of the contractor or officers who have signed the contracts. The manner in which the work is to be done is left up to the officer

who is given as much freedom as possible in figuring out how best to meet the organization's performance objective. In this section the author looks at the performance contracting management process, its implementation, evaluation and monitoring and finally its impact evaluation on service delivery.

1.10.2 Performance Contracting Management Processes

Sean (2009) points out that performance contracting should be much more than a process for documenting and delivering feedback, coaching and ratings. He believes that when expanded beyond these basics, performance contract becomes a powerful tool for helping employees develop and achieve their full potential. Processes should be fairly standard and be able to address agency objectives. The amount of detail provided depends on the level of guidance required to support the needs of business units. Performance management process typically involves four main stages namely work plan management, skills development, performance monitoring and evaluation, and rewarding of outstanding performance. In terms of work plan management, it is based upon business plans and other corporate documents, key deliverables and areas of responsibility to which staff members will contribute are determined. A staff member and manager agree on the work and responsibilities of the staff member's position. The plan will also set out how the staff members' performance will be measured or evaluated against set objectives (Akaranga, 2008).

On the other hand, in terms of skills development, the staff member and the manager identify and agree the learning, development and information needs of the staff member to meet their performance and the business needs of the business unit. This would include selecting options and the development of an action plan to access the opportunities identified (Armstrong, 2006). Similarly, under performance monitoring, the staff member provides regular feedback to the manager on their progress towards the achievements of the agreed performance objectives. The manager provides regular formal and informal feedback on their assessment of the staff member's achievements.

Within the context of performance evaluation, Armstrong and Baron (2004), argue that the manager and the staff member should regularly (periodically) evaluate the staff member's performance and the achievement of the objectives in the work plan as well as the agreed training and development plan. This phase should then feed into the next cycle of the performance management process. Lastly, with regard to rewarding outstanding performance, there is need to reward outstanding work which is recognized from the evaluation reports. The top performers need to be rewarded in various ways ranging from recognition to award of medals and other material endowments (Armstrong, 2006).

However, according to Moy (2005) the performance based contract process in federal government in Washington D.C. relates heavily to the federal guidelines established by the Office of Federal Procurement Policy. Despite differences in the federal and state perspectives, Moy comes up with Seven Steps to Performance Based Service Acquisition which he speculates that provide an overview of the contracting process. Firstly, there is an integrated solutions team whose main task is to ensure that senior management involvement and support is in place. The team defines roles and responsibilities, empowers team members and identifies stakeholders, nurture consensus, develop and maintain the knowledge base over the project life, and establish a link between program mission and team members' performance. Secondly, the problem that needs to be solved is described.

The fifth step deals with how to measure and manage performance. This involves a review of the success determinants (i.e. Where do you want to go and how will you know when you get there), relying on commercial quality standards, if applicable. Ensure that the contractor proposes the metrics and the quality assurance plan, select only a few meaningful measures on which to judge success, including contractual language for negotiated changes to the metrics and measures, consider "award term" (i.e. ties the length of contract to the performance), consider other incentive tools, recognize the power of profit as motivator, and most importantly, consider the relationship. The sixth step is selection of the right contractor who should be advised of the best practices and

trends in performance based contracting. Lastly, it deals with managing performance by keeping the team together, adjusting roles and responsibilities, assigning accountability for managing contract performance, adding the contractor to the team at a formal kick-off meeting, regularly reviewing performance in a contract performance improvement working group, and reporting on the contractor's past performance.

On the other hand, Schwella (1988) speculates that performance contracting processes tend to be fairly standard. Processes should address agency objectives. The amount of detail provided depends on the level of guidance required to support the needs of business units. Performance contracting process typically involves four main stages namely work plan management, skills development, performance monitoring and evaluation, and rewarding of outstanding performance. In terms of work plan management, he argues that this is to be based upon business strategic plans and other related corporate documents. A staff member and manager agree on the key responsibilities and targets to be achieved during the period under review. The plan also sets out how the staff members' performance will be measured or evaluated against the set objectives. The performance aspect of the plan obtains agreement on what has to be done to achieve objectives, raise standards and improve performance. In terms of skills development, the staff member and the manager identify and agree on the training requirement, development and information needs of the staff member to meet their performance which on a large extend will meet the business needs. This includes selecting options and the development of an action plan to access the opportunities identified (Armstrong, 2006). Similarly, under performance monitoring, the staff member provides regular feedback to the manager on their progress towards the achievements of the agreed performance objectives. The manager provides regular formal and informal feedback on their assessment of the staff member's achievements.

Within the context of performance evaluation, Armstrong and Baron (2004) speculate that the staff member's performance and the achievement of the objectives in the work plan needs to be evaluated periodically. Lastly, with regard to rewarding outstanding

performance, there is need to reward outstanding work which is recognized from the evaluation reports. The top performers are to be rewarded in various ways ranging from recognition to award of medals and other material endowments (Armstrong & Baron, 2004; Armstrong, 2006).

1.10.3 Implementation of Performance Contracting

To understand the successes and challenges of implementing performance contracting in Kenya, Kobia and Mohammed (2006) carried out a survey among the civil servants. They developed a questionnaire from performance contracting literature and administered it to a sample of 280 senior public service course participants at the Kenya Institute of Administration. Data were collected from the course participants who were central in the implementation of performance contract in the government ministries and agencies. To investigate if the participants knew the goal of performance contracting, they asked them to state the goal of performance contracting in their ministries. A majority of the respondents (205 or 72.2 percent) summed the goal as the improvement of performance/enhance efficiency and effectiveness in service delivery through a transparent and accountable system. Further (206 or 73.6) percent acknowledged that their ministries had signed the second (2006/7) performance contract with the Government. The responses indicate that majority of the participants were conversant with performance contracting.

Regarding training in performance contracting, Kobia and Mohammed were fascinated to observe that only 57 respondents had received training in performance contracting while a majority 212 or 75.5 percent had not received any. It is interesting to note that 208 or 74.3% indicated that they would require further training on all aspect of performance contracting. The study shows that over 60 percent of the respondents acknowledged that with the implementation of performance contracting, public servants are more involved in decision making, felt evaluation of the performance is done fairly, they knew where to seek assistance concerning meeting the targets and had assisted in understanding government policy documents. However over 174 or 62.1 percent respondents indicated

that they did not have adequate resources needed to meet their targets which could easily adversely affect the individual and ministry performance.

To investigate participant's experience with the implementation of performance contract, the researchers asked several questions regarding whether the participants had signed performance contracts with their supervisor and whether they had experienced any problems with implementation of the performance contracting. The result was interesting as only 25 out of the 280 participants had signed the performance contract. They indicated some of the problems experienced during the implementation of the performance contract as, lack of adequate resources, resources not being released on time, and unplanned transfer of staff (Kobia & Mohammed, 2006). In general, the study shows that performance contracting has induced the public service to become more oriented towards customers, markets and performance, without putting the provision of essential public services into jeopardy. The introduction of performance contracting and management by results is used to improve the performance of an organization as it emphasizes better the human resource management.

1.10.4 Monitoring and Evaluation of Performance Contracting

The process of monitoring and evaluation is defined by management theory, as well as political science theory, as the collection and analysis of relevant data about organizations' achievements and the implementation of actions to improve future performance (McKelvey & Palfrey, 1996). Control and monitoring is frequently identical with accountability when public needs and interests are involved. As was viewed by Stewart and Ranson (1994), organizations in the public domain exercise substantial power for which they are accountable. Public accountability must involve a political process which responds to the many voices of citizens and other stakeholders.

A response is defined by Hirschman (1980) as a pure political action compared with an exit which represents more of an economical action. Since citizens generally do not have the alternative of exit in a public market, the option of voice becomes more relevant and

imminent. Moreover, it seems that western democracies are facing pressures for greater rather than less accountability on behalf of their citizens (Anthony & Young, 1984).

Pollitt (1988) acknowledges that while it is not obvious that the accumulated wisdom of the private sector is transferable to the public sector, inevitable interactions between the two spheres are productive for both. In Kenya, for instance the government is encouraging the Public-Private sector partnership in order to improve on service delivery. Smith (1993), on the other hand, identifies two different indicators for measuring public sector performance which are internal and external to the organization. Measures of internal performance, such as managerial processes, routines and formal procedures, are of limited interest to ordinary citizens yet there are also those which attract more attention in management literature. Their main objective is to enable the central government secure closer control of devolved management teams. However, Palfrey *et al.* (1992) argue that the external indicators are intended to enhance the accountability of public organizations to external interested parties, for example service users, the electorate, taxpayers and central government. The role of such outcome indicators is to furnish external users with information about the consequences of public sector activity so that citizens can make better judgments about the organization's performance. They compare this process of public accountability to stakeholders, with the role adopted by financial reporting in the private sector. As in the private sector, increasing external related outcomes, such as the responsiveness of public authorities to citizens' demands, will have a profound impact on internal control mechanisms, as managers and public servants become more sensitive to their duties and highly committed to serve the people.

Muralidharan (1997) argues that citizens are the clients and main beneficiaries of public sector operation and thereby should be involved in every process of performance evaluation. In their study, responsiveness of the public sector to citizens' demands is mentioned as an important part of performance control. This is because it refers to the speed and accuracy with which a service provider replies to a request for action or for information. According to this definition, speed can refer to the waiting time between

citizens' requests for action and the reply by the public agency. Accuracy means the extent to which the provider's response is appropriate to the needs or wishes of the service user (Miller & Friesen, 1983). Nonetheless, while speed is a relatively simple factor to measure, accuracy is a more complicated factor to measure. In Kenya, many public institutions have developed citizen service charters which spell out their service commitments in terms of timeliness, service requirements; value for the service provided and redresses mechanisms. These service charters are, however not well monitored as there is no measuring mechanism put in place to ensure that services are being provided as stipulated in the service charters. In private sector like Barclays bank of Kenya ltd, service monitoring gargets have been fixed closer to the cashiers where customer gives feedback on the service provided.

Contrary to the private sector, public service accuracy must take into consideration social welfare, equity, equal opportunities, and fair distribution of public goods and services to all citizens. To test for accuracy of governmental endeavors one must examine how citizens feel when consuming public services. A well-accepted method is to use satisfaction measures indicating the outcomes of certain activities and the acceptance of public administration actions as fruitful, contributive, equally shared among a vast population, and responding well to public needs (Rhodes, 1987).

Performance evaluation is, therefore, a critical stage in the performance contracting process. It is based on the premise that what gets measured gets done. Performance evaluation assesses the extent to which public agencies have achieved the agreed performance targets. Thomas and Palfrey (1996) conceive that citizens are the clients and main beneficiaries of public sector operation and thereby should be involved in every process of performance evaluation. In their study, responsiveness of the public sector to citizens' demands is mentioned as an important part of performance control since it refers to the speed and accuracy with which a service provider replies to a request for action or for information. According to this definition, speed can refer to the waiting time between citizens' requests for action and the reply of the public agency. Accuracy means the

extent to which the provider's response is appropriate to the needs or wishes of the service user. Nonetheless, while speed is a relatively simple factor to measure, accuracy is a more complicated one.

1.10.5 Impact Evaluation

Impact evaluation is an assessment of the impact of an intervention on final outputs. It assesses the changes in the well-being of individuals that can be attributed to a particular intervention, such as a project, program or policy. The results agenda which is an ongoing debate has forced agencies to demonstrate that the money they spend is improving the lives of poor people, thereby increasing demand for impact evaluation. In the current environment, calls for increased aid spending are only credible if it can be shown that current spending is indeed contributing toward the attainment of the Millennium Development Goals and that evaluation tools in place are effective enough to track the flow of resources through various strata of government to determine how much of the originally allocated resources reach each level (Dehn, et al., 2003).

Debates over impact evaluation reflect the more general debate over the relative roles of positivism and phenomenological methods in social research. Whilst positivism is a strong form of empiricism, phenomenological perspective, on the other hand, captures experiential content with a good degree of reliability. Participatory impact evaluation grew rapidly in the 1980s, and is still growing strong especially amongst non-governmental organizations. The proponents of the participatory approach are skeptical of the econometricians' attempts to reduce the impact of complex social interventions to a single number. But the econometricians reject analyses which fail to build on a well designed sample of project and comparison groups which allow statements to be made with a degree of scientific confidence about the behavior of indicators with versus without the intervention (Gupta, 2002). Montgomery (1994) defines econometrics as a discipline which makes use of economic theory, mathematical tools and statistical theory in order to analyze the economic relationships.

Dessler (2003) observed that good evaluations are almost invariably mixed method evaluations. Qualitative information informs both the design and interpretation of quantitative data. He noted that many evaluations under-exploit qualitative methods, both in the techniques they use and the way in which analysis is undertaken. Field experience by members of the core evaluation team is an invaluable source of qualitative data which cannot be overlooked for good quality evaluations.

Performance of a public enterprise can therefore be evaluated ex-post where the evaluation is based on selected criteria determined at the end of the performance period, or ex-ante where the firm's performance is evaluated against a set of predetermined indicators. In managing the performance of public sector institutions, it is important to consider the enterprise performance and the managerial performance at the same time. Enterprise performance is based on the observed overall performance of the public institution while managerial performance is the total enterprise performance adjusted for exogenous factors which are beyond the control of managers (Alford, 2000).

The measurement of service delivery can represent a powerful mechanism for obtaining feedback from client to providers. A better understanding of service delivery will enable policy makers to increase the efficiency and effectiveness with which resources are translated into welfare outcomes. Measures of service delivery represent a vehicle for holding service providers to account for the quality and quantity of services they provide. Impact evaluation, therefore, tackles one of the fundamental problems of evaluation as it aims to measure the key outcomes that may be attributed to an intervention (Amin, *et al.*, 2008).

In a study carried out by Akaranga (2008), it was revealed that all government ministries and state corporations in Kenya had formally implemented performance contracts. According to the study, there was clear evidence of improvement in income over expenditure as well as service delivery in the state corporations and government

ministries. This is evidenced by results for financial year 2005/6 where majority of state corporations posted excesses of revenue over expenditure (GOK, 2006). Akaranga argues that for it to have impact on the populace, the evaluation of this improved performance should be done not only by the government but also by the service users. The government needs therefore, to come up with evaluating tools which will bring to board other stakeholders. In some developing countries, like Uganda the government uses Public Expenditure Tracking System (PETS) to track the funding from central government up to service delivery points. For example, a public expenditure tracking survey was carried out in 2002 to assess the effects of improved access to public information in Uganda. This was a replication of the 1996 survey, measuring the difference between the capitation grants disbursed by the central government and the resources actually received by the schools. The 1996 sample consisted of 250 schools, randomly drawn from 18 districts while a total of 218 schools were considered in 2002. Not all schools in the original sample could be resurveyed in 2002 due to security concerns. Summary statistics indicate that schools which had received only 24 percent on average of the total yearly grant from the central government in 1995 received more than 80 percent in 2001 due to increased sensitization via a campaign in both print and electronic media. It is interesting to note that while median school received nothing in the mid-1990s; it received 82 percent of its entitlement in 2001. However, diversion is still a problem for many schools. On average, 20 percent of school entitlements do not reach the schools, and about 30 percent of schools receive less than two-thirds of their entitlements (Bjorkman, 2006). It is clear from this survey that the increased prudence in the disbursement of funds to schools was occasioned by the sensitization campaign. It therefore calls for improvement in the instrument being used to track funds from the central and local government. After all the Public Expenditure Tracking System is just a tool for follow up on public expenditure.

The framework of accountability described in the World Bank Development Report (2007) indicates that there is no direct accountability of service provider to consumer in situations in which the government takes responsibility for services in sectors such as

health, education, water, electricity and sanitation (World Bank, 2003). Instead, accountability travels by a long route and thus citizens influence policy makers who then exert pressure on providers. Tracking surveys if well utilized can, therefore, be a powerful tool for public expenditure in not only in the developing countries but also developed countries.

The principle of performance contracting provides an original combination of increased operational autonomy in the field of service delivery and a better strategic control by the organization. But what are the effects of such an increase of the operational autonomy on the internal management of the organization and its external relations? Performance contracting has a direct bearing on the productivity of the organization. This effect can be examined from four fronts: Human Resource Management, Financial Management and Cost Consciousness, Internal Organization and External Relations (Bouckaert, *et al.*, 1999).

1.11 Research Methodology

The research is library based, and will therefore rely on the use of secondary data from documented facts. Extensive use will also be made on Internet based resources. As the subject under consideration is of interest to events currently unfolding in Kenya, institutional and law reforms, this study is not only of academic interest. The study was particularly interested in accountability, efficiency and effectiveness attributes of performance contracting to which end the managerial targets, combined with managerial autonomy as well as service delivery were assessed. Particular indicators were used to measure each variable. To measure accountability, the study was interested in among others, the clarity of roles and responsibilities for all concerned; actions taken if responsibilities are not fulfilled and the clarity of boundaries indicating who is responsible to whom, and for what. For efficiency, the study was interested in the nature, scale and time-frame of performance contracting; its relative importance; the nature, size and resource-skill base of the state corporation involved; the time period involved; the

level of resources available for undertaking the analysis; as well as the purpose of undertaking performance contracting. To measure performance contracting effectiveness, the study was interested in identifying and quantifying the outputs; costing the resources that have gone into producing these outputs; identifying indicators that would tell whether the stated objectives have been achieved; as well as assessing to what extent it is performance contracting will have, or has had, the desired or observed effect on the indicators. The data collected was qualitative in nature hence content analysis.

1.12 Chapter outline

The study will consist of five chapters.

Chapter one

Will be the proposal for the dissertation; ascertaining the effectiveness of the legal process in performance contracting.

Chapter Two

The chapter will focus on the Nature of Contract in Law in Kenya. It will also critically examine its effectiveness.

Chapter Three

The chapter will seek to examine and evaluate the performance contracting regulations, visa vie its effectively compound accountability and transparency in management of State Corporations.

Chapter Four

This chapter presents the critical analysis of the findings on performance contracts in Kenya. The chapter also focuses on how performance contract regulations and management affects firms operations.

Chapter Five

This chapter presents summary conclusion and recommendations based on the comparative analysis of performance contracts and its legislation in Kenya and other countries.

CHAPTER TWO

CONTRACTING: A CONCEPTUAL ANALYSIS

2.1 Introduction

Contract law lies at the heart of the world's system of laws and serves as the foundation of the entire society; this is a simple observation - one that too often goes unobserved.²⁰ In a society where the exchange of goods and services is central to its economic order, as in a developing capitalist society based on free enterprise, a means of supporting the process of exchange of goods and services needs to be found. It is in this context that the foundations of modern contract law were established, and contract became the juristic mechanism for the distribution and utilization of the goods and services.²¹ The general principles of contract law are, for the most part, of a judge-made character, and many of them emanate from the time of the industrial revolution and the 'classical' period of contract law which accompanied it.²² Contract law serves to make these agreements "enforceable", which usually means that it allows one party to a contract to obtain monetary damages from the other party upon showing that the latter stands in breach.²³

2.2 Nature of Contract

A contract is a voluntary agreement, whether verbal or in writing, between two or more parties, that creates a legal relationship and is enforceable by law. It is an intention to create legal relations between parties, and must include certain elements in order to meet the criteria of a contract. Along with the intention of parties to create a legal relationship, a contract must include: offer (specific serious proposal that, if accepted, leads to a contract); acceptance (an expression of absolute and unconditional agreement to all the

²⁰ W. A. Markham, (2002). *An Overview of Contract Law: The Extraordinary Importance of Contract Law*. San Diego Attorney, 2002

²¹ L. Mulcahy, (2008). *Contract Law In Perspective*, 5th Ed. New York: Routledge-Cavendish,

²² P. Atiyah, (1989) *An Introduction to the Law of Contract*, 4th edn, 'Part 1: The development of the modern law of contract', Clarendon Press, Oxford.

²³ . A. Markham, (2002)

terms set out in the offer); and, consideration (the price paid for the other's promise). Acceptance must be communicated clearly or indicated by action, must occur in a fashion specified in the offer and must be unconditional, without changes. Consideration must include something of value given and received by each party.²⁴

In Case of **Wishart v National Association of Citizens' Advice Bureaux Ltd, [1990] IRLR 393**, it was held that employment contracts are formed in the same manner as ordinary contracts. Like other contracts, there must be an offer and an acceptance. The offer and acceptance may be subject to conditions. In this case, the claimant offered a job 'subject to receipt of satisfactory references.' References received were not satisfactory hence the offer was withdrawn. It was held that this was a conditional offer of employment and the defendants had an obligation to consider the references in good faith. The question of being 'satisfactory' was subjective.

The law of contracts differs from other branches of law. This owes to the fact that a contract does not lay down so many precise rights and duties which the law will protect and enforce; it contains rather a number of limiting principles, subject to which the parties may create rights and duties for themselves, and the law upholds those rights and duties. Thus, parties to a contract, in a sense make the law for themselves; so long as they do not transgress some legal prohibition, they can frame any rules they like in regard to the subject matter of their contract and the law will give effect to their contract.

It is also the case that English law recognizes contracts in which the exchange agreed upon is completed at the same time as the acceptance matches the offer (executed contracts). It also recognises exchanges of promises about future conduct (executory contracts).

Contracts can be stated in writing, in which event they are called written contracts; they can be made by oral agreement, whereupon they are called oral contracts; and, can arise by implication, in which case they are said to be implied contracts. These are the three

²⁴ D., Smithies, 2007. Contract - Elements of a Contract. *Tutor2U*, August

different kinds of contract - written, oral, and implied.²⁵ Generally the parties to a written contract comprehend that they have entered into a binding agreement, but they do not always grasp this point when making an oral or implied contract. It is always difficult to prove the terms of an oral or implied contract than those of a written one.²⁶ There are many important points that have to be kept in mind while forming a valid contract; after making the offer to the promisee, the contract will be formed when the promisee communicates his acceptance to the contract.

The person making the offer is free to withdraw the same before the acceptance of the offer. Once the agreement is made, the following clauses should be present in the same: there should be some consideration offered for the agreement; parties should be competent to contract; consent to the agreement should be free; and, object of the agreement should be lawful.

In the Case of **Barry v Davies (Trading as Heathcote Ball & Co) [2000]** best exemplifies the doctrine of offer and acceptance. A seller put up two engine analysers for sale by auction, with no reserve. The price of the machines would have been £14,521 each if they had been new. The claimant was a bidder at the auction. He bid £200 for each machine, and was the highest bidder. The auctioneer refused to sell the machines to the claimant for such a low price, despite the 'no reserve' sale. The claimant brought an action against the auctioneer for breach of contract. It was held by the Court of Appeal that there was a collateral contract between the auctioneer and the highest bidder. The offer was made by the auctioneer to sell to the highest bidder, and this was accepted when the bid was made.

Consideration: This is one of the important aspects which is necessary for a party to enter into a contract. This is the return which a person gets for performing the obligations of the contract. There must be consideration given by all the parties, meaning that every

²⁵ W. A. Markham, (2002).

²⁶ J. Z., Jones (2009). Contract Law - Why is it So Important? Your Rights As a Worker. Ezine Articles, September 14, 2009

party is conferring a benefit on the other party or himself sustaining a recognizable detriment, such as a reduction of the party's alternative courses of action where the party would otherwise be free to act with respect to the subject matter without any limitation. Consideration needs to be of some value but it is not necessary that it should be specified in the contract. An agreement made without consideration is void.

In **Williams's v Roffey Bros & Nicholls (Contractors) Ltd [1991]** case, the defendant building contractors entered into a contract with the plaintiff carpenter. The plaintiff was to carry out work in 27 flats. The price was £20,000. The plaintiff fell into financial difficulties, partly because the contract price was too low. The defendants were subject to a 'penalty clause' under the main contract on the flats. The defendants therefore agreed to pay the plaintiff an extra £575 per flat. The defendant failed to pay the extra money. The question for the Court of Appeal was whether the plaintiff's performance of its existing contractual duty to complete the work on the flats could amount to sufficient consideration for the promise of the additional payment. The Court of Appeal held that consideration was present in the form of 'practical benefits' which would be obtained by the defendants, in the form of their avoidance of the penalty clause.

Persons Competent to Contract or *Sui Juris* Parties: Both parties must have the capacity to understand the terms of the contract they are entering into, and the consequences of the promises they make. All persons are legally authorized to enter into a contract except for the following: minors, who are above 18 years of age and when a guardian is appointed for them the age is increased to 21 years in some countries; mentally incompetent persons; and, person who is ineligible from entering into the contract by law. Any contract with them is considered void or voidable.

Although corporations/companies are technically legal fictions, they are considered persons under the law, and thus fit to engage in contracts. As such, companies have a separate legal entity to enter into contracts through the acts of their agents, officers and workers. For adults, most jurisdictions have statutes declaring that the capacity of parties

to a contract is presumed, so that one resisting enforcement of a contract on grounds that a party lacked the capacity to be bound bears the burden of persuasion on the issue of capacity.

Consent to the Contract: There must be an express or implied agreement. The essential requirement is that there be evidence that the parties had each from an objective perspective engaged in conduct manifesting their assent, and a contract will be formed when the parties have met such a requirement. For a contract based on offer and acceptance to be enforced, the terms must be capable of determination in a way that it is clear that the parties assent was given to the same terms. The terms, like the manifestation of assent itself, are determined objectively. Unless the consent of the contract is obtained through, coercion, undue influence, fraud, misrepresentation or mistake, it is presumed that the consent is free.

Misrepresentation in contracts is best presented in the Case of **Spice Girls Ltd v Aprilia World Service BV [2002]**. The claimants, the Spice Girls, entered into a contract with the defendant motorcycle manufacturer under which the defendant agreed to sponsor the Spice Girls' tour in return for promotional work. The contract was signed on 6 May 1998. Geri Halliwell left the band on 27 May that year. The defendant discovered that Halliwell informed the other members of the group of her decision to leave prior to the signing of the contract. The defendants claimed they had been induced to enter the contract by a misrepresentation. The claimants denied misrepresentation. It was held by the Court of Appeal that the Spice Girls had made a misrepresentation by conduct in that all of the members participated in a commercial photo shoot, at considerable cost to the defendants, at a time when they knew that one member was to leave. They also engaged in other conduct, such as the supply of logos, images and designs, which included the five Spice Girls, which also amounted to misrepresentation.

In the case of **Ray versus William O. Eunice Brothers (1952)**: A developer signed a contract without reading it and later tried to get out of the special demands the property

owner had made. Court held that the standard for evaluating a contract is objective; “meeting of the minds”. The court further stated that contract is voidable when consent is influenced by fraud, duress or mutual mistake; otherwise signing a contract is binding.²⁷

Proper Subject Matter: The contract must have a lawful purpose. A contract to commit murder in exchange for money will not be enforced by the courts. It is void *ab initio*, meaning "from the beginning."

Mutual Right to Remedy and Obligation to Perform: Both parties must have an equal right to remedy upon breach of the terms by the other party. Besides, both Parties must have some obligation to fulfill to the other. This can be distinct from consideration, which may be an initial inducement into the contract.

Relief Given to the Aggrieved Party: Generally the party who has suffered due to the breach of contract of the other can claim money damages that will put the non-breaching party in the position it would be in, if the contract had been performed. In some cases the court may order the breaching party to perform its obligations.

The aim of the law of damages is to place the plaintiff in the same position that he would have been, had the breach not occurred. The parties to a contract may determine the damages beforehand which are called liquidated damages and can be recovered. In this case the sum of money should not exceed the amount already specified. But in the case when there are no predetermined damages then the person can claim the whole amount.

2.2.1 Essentials of a Contract Agreement

The contract should contain certain clauses without which the agreement will be incomplete. A detailed description of the duties and obligations of the parties should be stated to avoid ambiguity at a later stage; representations concerning warranties should be present in the contract; confidentiality clauses should be present to ensure that the parties

²⁷ Knapp, Crystal, and Prince (2005). Problems in Contract Law: Cases & Materials (5th ed., 2003). Duke Law School. Internet Legal Research Group ILRG

keep any information which comes into the possession, due to the contract, confidential; force *majeure* clause which generally provides that no party will be liable for non-performance arising out of an event of force majeure i.e. war, aggression, epidemic should also be present; term should also be specified in the agreement; the events on the occurrence of which the contract will be terminated should also be specified (the clause also describes the methods of giving notice, and whether the breaching party must be given a chance to cure the breach); the relief available to the other party on the breach by one party should also be stated (this would also include liquidated damages); and, an arbitration clause should also be inserted to settle the disputes through arbitration rather than court litigation. In international contracts, it is important to state the jurisdiction and the applicable law governing the contract. Once these conditions are incorporated in a contract it will be easier for the parties to enforce them and claim their rights.

2.3 Written Contracts

It is always harder to prove the terms of an oral or implied contract than those of a written one. The terms of an oral contract can only be recounted by the parties themselves or other witnesses to the transaction. Their testimony can often be contradicted or is sometimes self-contradictory or implausible on its face. A written contract can be a simple recitation of a straightforward exchange, or it can be longer and more complicated. However, every written contract, no matter how complicated or convoluted, is at bottom a statement of a private, voluntary agreement to exchange valuable benefits. Written contracts explain the exchange more fully and to allocate responsibility and risk for the possible complications might arise. Such contracts might include of the following:

- i. *Preamble* or *recitation of recitals* which serves to explain and clarify the contract whose proper meaning is later disputed. It is never obligatory, but is often useful, so that the nature and purpose of the transaction can be stated expressly;
- ii. *Covenant* which is, merely, a statement of an obligation or duty that the covenanter promises to observe or perform for the benefit of the covenantee;

- iii. *Provision* which is merely an express statement of rights or responsibilities that has special importance to one or more of the parties (e.g., an "opt-out provision");
- iv. A *condition precedent* is the statement of a prerequisite event or circumstance that must occur or arise before a stated obligation becomes binding.
- v. A *condition subsequent* is the statement of an event or circumstance whose occurrence extinguishes or modifies an obligation.
- vi. A *condition concurrent* is the statement of a condition that must be satisfied at the very time the obligation is owed, else the obligation is not owed at all. Most escrow transactions employ such conditions.
- vii. *Express representations* are statements of material fact, made by one party to induce the other to agree to the contract. Often these are oral statements made during negotiations. Sometimes a prudent party will insist that representation be recited in the contract itself and declared to be a "material inducement" to the agreement. If the representation later proves to have been misleading or inaccurate, the party who relied on it might have a claim for misrepresentation (intentional or negligent). Often the parties will specify that no party to the contract has relied on any representation, other than those expressly recited in the contract itself.
- viii. *Disclaimers* are express disavowals of responsibility, as in "the company disclaims (disavows) any responsibility for any harm that might be caused to another party, his business or his property.
- ix. *Exclusions*, which are often employed in insurance contracts, are used to remove certain kinds of obligations from the contract that otherwise might be deemed to be required by it.

- x. A *warranty* is a guarantee of a condition or circumstance that is material to the contract. Typically, the warrantor must pay for harm caused if the warranty is not met.
- xi. An *indemnity* is the grant of reimbursement upon the occurrence of a condition subsequent. Stated differently, a party might become entitled to reimbursement upon the occurrence of a condition precedent! The condition, whether it be deemed subsequent or precedent, is some sort of loss suffered by the party entitled to indemnification. Indemnities tend to include specific procedures that must be followed in order to obtain the indemnification on offer.
- xii. A *release* is a formal renunciation and binding forfeiture of a right or claim.
- xiii. *Litigation procedures* are special provisions by which the parties agree in advance on the resolution of any subsequent dispute arising from the performance of the contract. Parties typically specify which law governs interpretation and enforcement of the contract. The parties sometimes require that any dispute arising between them first be submitted to mediation and afterwards to private arbitration in lieu of courtroom litigation.

The above-listed devices are merely means of stating and refining the agreement that the parties mean to make with one another. The important point is that the parties themselves can insert in their contract whatever they choose, so long as their purpose or the mechanism chosen is not illegal or otherwise contrary to local public policy. The inartful or excessive use of such devices in written contracts can lead to unwelcome confusion.

Pleated Industries (K) Ltd & another versus Allied Industries Limited (2007) Court of Appeal at Nairobi, December 20, 2007 P. K. Tunoi, E. O. O’Kubasu & W.S. Deverell JJ A: The case put forward by Pleated Industries (K) Ltd was that by a verbal agreement made in 1986 with Allied Steel Industries Ltd, and evidenced in various correspondences, they agreed on transfer of a parcel on Baba Dogo Road in Ruaraka within Nairobi from Allied Steel Industries Ltd to the plaintiff. In pursuance of the

agreement, Pleated Industries (K) Ltd proceeded to pay the initial deposit of Sh120, 000, the amount being 10 per cent of the total purchase price to Allied Steal Industries Ltd who then later refused to transfer the property to the plaintiff. Allied Steal's attempt to pay back the Sh120, 000 to Pleated Industries (K) Ltd through their advocates was repelled as the cheque was returned. The parties had neither entered into a written agreement with regard to the transaction nor had the plaintiff ever enjoyed vacant possession or any type of possession of the premises.

The High Court found in favour of Allied Steal Industries Ltd that there had neither been written contract for the sale of the property nor had Pleated Industries (K) Ltd taken possession of the land. It further held that Pleated Industries had failed to prove an enforceable agreement for sale and proceeded to dismiss the suit. Being aggrieved, Pleated Industries (K) Ltd filed moved to the Court of Appeal. The Court of Appeal, however, upheld the decision of High Court that had dismissed a verbal contract for the sale of land between the appellant, Pleated Industries (K) Ltd, and the respondent, Allied Steal Industries Ltd. In dealing with the grounds raised by Pleated Industries (K) Ltd, the Court of Appeal noted that the firm had based its claim on an agreement made in 1986 and that they did not allege a written agreement between themselves and Allied Steal Industries Ltd. The appellate court further noted that the plaintiff had not relied on the doctrine of part performance.

The essence of this doctrine was captured under section 3(7) of the Law of Contract. This section set out the two exceptional circumstances under which a verbal contract could be enforced in court. These were; where the intending purchaser had in part performance of the contract taken possession of the property or any part thereof or; where the intending purchaser being already in possession, continued in possession in part performance of the contract and had done some other act in furtherance of the contract. Allied Steal Industries Ltd on their part denied an agreement of any kind between the two parties had ever been entered into in the first place. They conceded to the fact that there had been some discussions, as evidenced in various correspondence, with regard to the possible

sale of the suit property at the price of Sh1, 200,000 but maintained that such discussions were preliminary and they had never materialised into an agreement, verbal or otherwise. In their view, Pleated Industries (K) Ltd had never taken possession of the property at any time before, during or after the negotiations and as a result could not rely on the doctrine of part performance. They were only entitled to a refund from Allied Steel Industries Ltd.²⁸

2.4 Void, Voidable and Unenforceable Contracts

In general, there are three classifications of contracts that are not binding:

- i. **Void:** If a contract is held to be void, the contract has never come into existence. For example, a contract is void if it is based on an illegal purpose or contrary to public policy; the classic example is a contract with a hit man. Such a contract will not be recognized by a court, and cannot be enforced by either party. **Voidable:** A contract is voidable if one of the parties has the option to terminate the contract. Contracts with minors are examples of voidable contracts.
- ii. **Unenforceable:** If a contract is unenforceable, neither party may enforce the other's obligations. For example, in the United States, a contract is unenforceable if it violates the Statute of frauds.
- iii. **Uncertainty and incompleteness:** If the terms of the contract are uncertain or incomplete, the parties cannot have reached an agreement in the eyes of the law. An agreement to agree does not constitute a contract, and an inability to agree on key issues, which may include such things as price, may cause the entire contract to fail.

2.5 Concept of Performance Contract

Performance, in law, is an act of doing that which is required by a contract. The effect of successful performance is to discharge the person bound to do the act from any future contractual liability. Each party to the contract is bound to perform promises according to

²⁸ M. Achode (2008). Contract for sale of land must be in writing.). *Kenya Law Report*, March 17, 2008

the stipulated terms. In case of any controversy as to the meaning of a promise, the courts have usually decided that a person must perform it as the other party reasonably understood it to be. Thus, a preference for the rights of the one who is to receive the benefit of the promise is established. This is the basis of performance contracts.²⁹

A performance contract is a contract between a performer and a venue which sets out the terms of a performance. The contract includes the rights and obligations of all parties involved in the performance and discuss matters such as security, compensation, and scheduling. The goal of a performance contract is to make the expectations of all parties clear so that the performance will go smoothly and to eliminate any causes for legal challenges in the future. Performance contracts specifies the intentions, obligations, and responsibilities of the two parties are freely negotiated and then clearly set out.³⁰

The Government of Kenya defines performance contract as a freely negotiated agreement between Government, acting as the owner of a Public Enterprise, and the Public Enterprise (ministries and parastatals). It clearly specifies the intentions, obligations, responsibilities and powers of the parties, addresses economic/social/other tasks to discharge for economic or other desired gain, organizes and defines tasks so management can perform them systematically and purposefully with reasonable probability of achievement, and assists in developing points of view, concepts and approaches to determine what should be done and how to go about doing it.³¹

Essentially, a Performance Contract is an agreement between a government (as the owner of a government agency) and a public agency which establishes general goals for the agency, sets targets for measuring performance and provides incentives for achieving these targets.³² They include a variety of incentive-based mechanisms for controlling

²⁹ Arthur J. Mann (1995). Public Enterprise Reform and The Use of Performance Contracts. Serie de Ensayos y Monografías, 72, March 1995

³⁰ J.R. Nellis, (1989). Contract Plans and Public Enterprise Performance, World Bank Discussion Paper 48. Washington: The World Bank

³¹ GOK. (2003). *Economic Recovery Strategy for Wealth and Employment Creation*. Nairobi: Government Printer.

³² Boston Institute for Developing Economies (BIDE) (2007). Performance Contracts: An Approach To

public agencies-controlling the outcome rather than the process. It clearly specifies the intentions, obligations and responsibilities of the two contracting parties. It is part of the broader Public Sector Reforms aimed at improving management of the public service and constitutes a range of management instruments used to define responsibilities and expectations between parties to achieve mutually agreed results. And as earlier posited, it is a useful tool for articulating clearer definitions of objectives and supporting innovative management, monitoring and control methods and at the same time imparting managerial and operational autonomy to public service managers.

Gore recognizes the importance of performance contracting when he admits that in the United States federal government, performance contracts are in one way or the other changing the way many bosses do their jobs.³³ Gore believes that many managers have changed their attitude towards workers which in turn has encouraged innovation and good customer service. On the other hand, Hill and Gillespie argue that performance contracting is expected to increase accountability because clear and explicit managerial targets, combined with managerial autonomy and incentives to perform, make it easier to establish the basis for managerial accountability and to achieve outputs.³⁴ Further, Therkildsen speculates that performance contracts if well executed increase political accountability by making it easier for managers to match targets with political priorities. Politicians can, in turn, hold managers accountable for their performance as being witnessed in many developing nations.³⁵

Improving Public Sector Performance. in collaboration with Performance Contracts Steering Committee Secretariat Cabinet Office, Office of the President – Kenya, March 12 - March 23 , 2007

³³ Gore, A. (1996). *The Best-Kept Secrets in Government: A Report to President Bill Clinton*, Washington DC:

³⁴ Hill, M. & Gillespie, K. (1996) 'Social Control of Civil Service Systems', in Bekke, Perry and Toonen (eds), *Civil Service Systems in a Comparative Perspective*, Indiana University Press, Bloomington.

³⁵ Therkildsen, O. (2001) 'Efficiency, Accountability and Implementation, Public Sector Reform in East and Southern Africa', *Democracy, Governance and Human Rights Programme Paper, Number 3*, UNRISD. Geneva.

2.6 Origin of Performance Contracts

The contracts were first implemented in France in the late 1960s to improve performance of State-Owned Enterprises (SOEs) including the national electric power utility and the national railroad company. Performance contract was spread to eight of France's most important public corporations. It was named "contract plan", in which an agreement regarding the performance was established between the government and the State Owned Enterprises (SOEs) based on a five year work plan. In the early 1980s 13 additional contracts were signed between the pertinent ministries and industrial state enterprises. However, due to lack of indicators and measure the performance of SOEs, whenever the plan was not achieved, the contract was modified and reprogrammed.³⁶

Performance contract was later developed and adopted by many countries the World over.³⁷ In Asia, the Performance Contract concept has been used in Bangladesh, China, India, Korea, Pakistan and Sri Lanka. In Latin America, they have been used at different times in Argentina, Brazil, Bolivia, Chile, Colombia, Mexico, Uruguay and Venezuela. Others include Malaysia, United Kingdom, U.S.A, Canada, Denmark and Finland among others.³⁸ Performance contracting was utilized in some Latin American and Asian countries during the same decade (1980s).

In mid 1980s, Korea applied the contractual approach and developed the "signal systems", incorporating the collection of goals and incentives that would guide managers and administrators. In the system the national goals were translated into explicit and quantifiable targets in performance criteria. The inclusion of performance measurements and indicators enabled the system a useful instrument to scale the performance of SOEs.³⁹ Since then, PCs have evolved and been adopted by a number of countries in different

³⁶ R. Mallon, (1983). Performance Contracts with State-owned Enterprises. *Development Discussion Paper no. 143, Harvard Institute for International Development*

³⁷ OECD. (1997). *In search of Results: Performance Management Practices in Ten OECD Countries*. Paris: Public Management Committee, OECD

³⁸ GOK (2010). Evaluation of Performance Contracting. *LOG Associate Report* for the Office of the Prime Minister Performance Contracting Department, Kenya.

³⁹ R. Mallon, (1983).

forms and names. Currently, PCs are widespread in both developed and developing countries. The name “contract plan” is prominent in francophone African countries, while Pakistan uses the name “signal system” as in Korea. India calls it the ‘memoranda of understanding.’ There is diverseness in terms of duration, varying from one year to five years. The system varies as well. Some include investment while other focus only on current operating performance. Some set up the system of performance-related pay while others do not.⁴⁰

In Canada the government’s approach to performance contracting and management were rooted in early 1990’s expenditure management systems designed to cut costs during a period of budget deficits and in France they were first introduced in the Directorate General for Taxes (DGI) specifically designed to respond to two main concerns.⁴¹ First, as tools meant to ensure consistency in a decentralized context and second, as tools to enhance pressure on the entire services network in order to improve performance.

2.6.1 Performance Contracts in Africa

The performance contract system for public enterprises was introduced in Gambia in 1987. As a prelude to identifying those Performance Enterprises to come under the performance contract system, the Public Enterprise sector was divided in to three schedules: enterprises in which the government is a minority shareholder; enterprises in which the government is a majority shareholder or has 100% shareholding, and, strategic corporation/departments.⁴² In Africa, performance contracts began to be used in francophone Africa in the 1980s. In Africa, performance Contracts have been used in selected enterprises in Benin, Burundi, Cameroon, Cape Verde, Congo, Cote d’Ivoire, Gabon, the Gambia, Ghana, Guinea, Madagascar, Mali, Mauritania, Morocco, Niger, Senegal, Togo, Tunisia, Zaire and Kenya. The decade of the 1990s has witnessed an

⁴⁰ Boston Institute for Developing Economies (BIDE) (2007).

⁴¹ Kernaghan, K. & Siegel, D. (1999). *Public Administration in Canada*. ITP Nelson.

⁴² M., Kobia & N., Mohammed. (2006). The Kenyan Experience With Performance Contracting. *African Association For Public Administration And Management (AAPAM) 28th Annual Roundtable Conference*, Arusha, Tanzania, 4 – 8th December 2006

overriding preference for outright divestiture via sales to the private sector in lieu of the performance contract alternative.⁴³

In Kenya the concept of performance contracting was first introduced in the management of State Corporation in 1989 as a way of responding to the needs of the taxpayers. This was against the backdrop of the government's key priorities of implementing and institutionalizing public sector reforms that would lead to an efficient, effective and ethical delivery of services to the citizens. A Parastatal Reform Strategy Paper, which was approved by cabinet in 1991, was the first official recognition of the concept of performance contracting as it was part of the policies that were recommended to streamline and improve the performance of State Corporations. These policies were divestiture or liquidation of non-strategic parastatals, contracting out commercial activities to the private sector, permitting private sector competition for existing state monopolies and improvements in the enabling environment of all strategic parastatals including removal of potentially conflicting objectives. Performance Contracts, where applicable were to be used to make transparent the cost of social services and to compensate the parastatals for their net costs.⁴⁴

The first two parastatals to be on performance contracting were Kenya Railways in April 1989 and National Cereals and Produce Board signed in November 1990. The PC's of Kenya Railways Corporation and the National Cereals and Produce Board failed because of lack of political goodwill to drive this process (it was perceived as donor-driven), the PC's did not conform to the requirements of the three sub-systems of PC's as they lacked the performance incentive system and there was no provision for the impact of external factors such as changes in GoK policy, inflation, exchange rate fluctuations that would have made evaluation fair.⁴⁵

⁴³ Arthur J. Mann (1995).

⁴⁴ P.K. Korir, (2006). The Impact of Performance Contracting In State Corporations. The Case Of East African Portland Cement Company Limited. *A University of Nairobi Unpublished MBA Research Thesis*

⁴⁵ M. Kobia. & N., Mohammed, (2006). The Kenyan Experience With Performance Contracting, African Association For Public Administration And Management, *28th AAPAM Annual Roundtable Conference*,

Kenya decided to re-introduce performance contracting in 2003. The initiative to introduce PC's in Kenya came from H.E. the president and was clearly spelt out in the Economic Recovery Strategy for wealth and Employment Creation (ERSWEC). In August 2003, the government appointed a committee to spearhead the introduction and implementation of performance contracts namely the performance contracts steering committee. The government made a decision to introduce PC in state corporations on a pilot basis in 2004. Sixteen state corporations signed the PC's by December 2004. The criteria for selecting the pilot companies included representation of diverse sectors and corporations, the government extended the process to public service beginning with permanent secretaries and accounting officers. Further, in April 2005, Government decided to place the management of 175 local authorities on performance contracts. Accordingly, five major municipalities completed performance contracts on 30th September 2005 on pilot basis; City Council of Nairobi, Mombasa Municipal Council, Eldoret Municipal Council, Kisumu Municipal Council and Nakuru Municipal Council. Kenya won the 2007 UN Public Service Award for improving transparency, accountability and responsiveness in the Public Service through the practice of performance contracting.

2.7 Areas of failure of Performance Contracting on Public Service Management

The principle of performance contracting provides an original combination of increased operational autonomy in the field of service delivery and a better strategic control by the organization.

2.7.1 Human Resource Management

Lings emphasizes the importance of human resource management when he pointed out that many researchers and employers neglect one important focus, the demand of internal employees, especially those who directly get in touch with customers.⁴⁶ Because the

Arusha, Tanzania.

⁴⁶ Lings, I. N., (2004). Internal Market Orientation Construct and Consequences. *Journal of Business*

attitude and behavior of employees interacting with customers would influence the feeling and behaviour of the customers when they get the service, it is quite important for managers to efficiently define and manage the way their employees provide the service in order to make sure that their attitude and behaviour are good for providing the service. In this study, Lings argues that if properly executed performance contracting has a significant positive effect on staff commitment and satisfaction. The study through the evidence-based research results found that the company applying internal market orientation strategy viewpoint could benefit to promote the organization internal and external performance. Hence it could benefit the service industries to establish perfect human resources management strategy with marketing viewpoint, and maintain the value goals of continuous survival, high growth and high profit in practice.

On the other hand, Slater reiterated that performance contracting if well executed may increase real speed in decision making and builds self-confidence in employees.⁴⁷ He reckons that bureaucracy which is a common feature in organizations that still rely on the management apparatus that had worked in the 1970s is terrified by speed and simplicity which are some of the essentials of the performance contracting. Shirley and Lixin add that before the performance contracts were put in place most governments were trying to run their state enterprises without any form of performance evaluation which made life difficult when appraising employee at the end of the performance period.⁴⁸

Nahavandi points out that outstanding performance should be rewarded through promotion, pay-increase or recognition which should be negotiated on signing the performance contract. He further speculates that those who adhere and fit the organizational culture and structure, as well as meet individual goals and objectives are much more likely to be promoted to top leadership positions – as opposed to those who do not. This process could be true for almost any situation; those who naturally fit well

Research, 57(4), 405-413.

⁴⁷ Slater, R. (1999). Jack Welch and the GE Way; *Management insights and leadership secrets of the legendary CEO*; McGraw-Hill, New York.

⁴⁸ Shirley, M. & Lixin Colin Xu. (1997). "Empirical Effects of Performance Contracts: Evidence from China." World Bank, Development Research Group, Washington, D.C.

into an organization's mission and culture are more apt to be selected and rewarded in some fashion.⁴⁹

2.7.2 Financial Resource Management

The use of performance-based contracts has induced an increased cost consciousness. The organizations have to develop cost-accounting systems and provide yearly financial statements. The information provided improves the government's capacity to control the organizations' financial practices. Up to this moment, there is no direct link between the purchased amount of services and the level of the budget. An extended audit is needed to establish the link between objectives, outputs and inputs. However, the outlook on better budget estimates, based on an increased knowledge of real costs, is realistic. In some cases, transfers are corrected on the basis of achieved performance results such that a failure to meet performance targets results in a decrease of financial transfer to government. On the other hand, there is a positive financial return to the government in case performance results exceed set targets. These positive corrections are dependent, however, on developments of the overall budgetary position of the government and are therefore limited.⁵⁰

Martins in his empirical study on performance contracting in the human services affirm that several agencies that participated in the study had experienced improved performance. For, instance, the Oklahoma Community Rehabilitation Services Unit found that contractor's costs per placement declined by 51 percent between 1992 and 1997, that the average number of months that clients spent on waiting lists decreased by 53 percent. The North Carolina Division of Social Services increased the number of adaptations from 261 adoptions in Financial Year (FY) 1993-1996 to 364 and to 631 in FY 1997-1998. The Illinois Department of Children and Family Services increased the number of placements in its Relative Home Care caseload from 2,411 to 5,570 in its first

⁴⁹ Nahavandi, A. (2006). *The Art and Science of Leadership*. Upper Saddle River, NJ: Prentice Hall.

⁵⁰ Shirley, M. & Lixin Colin Xu. (1997).

year, and in the second year the placements reached 9,503. As a result the Relative Home Care caseload declined by 41%.⁵¹

2.7.3 Internal Organization Management

Moy in his final report to the Office of Financial Management which summarized the results of their literature search and state survey on the best practices and trends in performance contracting in a number of state and local agencies in Washington D.C. indicates that the use of performance contracts and the accompanying increase of operational autonomy had induced some developments in the internal structures of the agencies under study. A number of questions were sent to each of the seven selected agencies and the responses were quite interesting. Three of the four states changed to performance based contracting to achieve better results. The study reveals that the implementation of performance based contracting ranges from state-wide, agency wide, to only within specific agency divisions or programs and that its impacts in each state agency varied, but including increased accountability for service delivery and deliverables and increased partnership between the contractor community and the state agency. The study further indicates that states agencies had defined performance as deliverables, outputs, outcomes, and effectiveness and efficiency, among others.⁵²

2.7.4 Improved External Relations

With respect to changes in customer relations, new interfaces and instruments are installed, resulting in increased client-orientedness. Most state corporations and government ministries in Kenya now have functional customer care and public relations offices. These offices have acted as valuable instruments for introducing a client focus. However, the functioning of these offices is hampered, in some cases, by the

⁵¹ Martin, L. L.(2000). "Performance Contracting in the Human Services: An Analysis of Selected State Practices." *Administration in Social Work* 24.2 : 29-44.

⁵² Moy, P. (2005). *Best Practices and Trends in Performance Based Contracting*. A final report submitted to Office of Financial Management; 210, 11th Ave. S.W. Rm.311, Olympia, Washington D.C. 98504.

insufficiency of financial and human resources.⁵³ Performance contracting has been instrumental in helping state corporations and government ministries to introduce instruments to monitor client satisfaction. Examples of such instruments are the client help desks in all government ministries, accessible complaint channeling via the internet and other avenues, and annual reporting of performance and challenges to the public.⁵⁴

Performance based contracting has received mixed reactions as many people would like to know the performance implications of altering team composition, especially in the top management team. Changes in top management teams are becoming more and more frequent due to poor organizational performance, mergers and acquisitions, and strategic reorientations.⁵⁵ According to upper echelon theory, this might be a feasible strategy since research has demonstrated a link between attributes of top management team members and firm performance.⁵⁶ Specifically, upper echelon theory argues that individual attributes influence the preferences and attitudes of top team members, as well as the resulting team dynamics. In turn, these affect the strategic choices managers make, and therefore, organizational outcomes.⁵⁷ This argument supports the importance of performance contracting in the sense that whenever there are changes at the top level, the incoming chief executive continues to work on the set performance targets.

Akaranga suggested that performance standards are external to the individual and for evaluative purpose and that it is different from individual goals as a person's internal aim.⁵⁸ Similarly, Lane suggested that performance standards should be clear and specific in order for raters to evaluate performance accurately using such standards.

⁵³ Bjorkman, M. (2006). Public Funding in the Educational Sector and Its Effect on Test Scores in Essays on Empirical Development Economics: Education, Health and Gender, IIES Monograph Series No 56, Stockholm University.

⁵⁴ Bouckaert, G., Verhoest, K. & De Corte, J. (1999), *Public Sector Performance Contracting In Belgium and Flanders*, Paris, Public Management Committee: OECD.

⁵⁵ Leonard, B. 2001. Turnover at the top. HR Magazine, May: 46-52.

⁵⁶ Hambrick, D.C., Mason, P.A. (1984). Upper echelons: the organization as a reflection of its top managers. *Academy of Management Review*, 9:193-206.

⁵⁷ Finkelstein, S., Hambrick, D.C. (1996). *Strategic leadership: top executives and their effects on organizations*, New York: West.

⁵⁸ Akaranga, E. M. (2008). *The Process and Effects of Performance Contracting in Kenyan Public Sector*, MBA Project; United States International University (USIU), Nairobi.

He, however, observed that the major concern was the kind of rating scales increase rating accuracy to be used. He suggested various rating scales among them behavioral anchored rating scale (BARS), behavioral observation scales, and other similar scales were proposed to increase the rating accuracy.⁵⁹

⁵⁹ Lane, J.E. (1987). 'Public and private leadership', pp. 47-64, in J. Kooiman and K.A. Eliassen (eds.), *Managing public organizations*.

CHAPTER THREE

PERFORMANCE EVALUATION

3.1 Path to Public Service Reforms and Performance Contracting

The Civil Service in Kenya inherited at independence had not been designed to grapple with development needs of post-independence Kenya. This led to the launching of the on-going reform efforts necessitated by need to address the declining performance of the Public Service in spite of the many reforms which had been carried out. Under Sessional Paper No. 10 of 1965, the Government chose the path of mixed economy. This allowed the Government to participate in economic activities normally reserved for the private sector so as to decolonize the economy, promote development and regional balance, increase citizen participation in the economy, and ensure greater public control of the economy.⁶⁰

Over the years the Government has pursued reforms of the State Corporations Sector given its potential to contribute to our socio-economic development. During the 1980s to mid-1990s, the major reform thrusts were sector-based structural adjustment programmes which resulted in the removal of price controls, foreign exchange controls, import licensing, among others, but also in a major policy thrust on Public Enterprise Reform and Privatization. A lot was achieved under the structural adjustment programme. However, there was a slow down on public enterprise reform after a few successful privatizations mainly due to the absence of a privatization law which is now in place.⁶¹

Beginning year 2003, the tempo of reforms picked up following the publication of Government Paper on Economic Recovery Strategy for Wealth and Employment Creation (2003), and the Vision 2030 (2007). The overall reform strategy targets

⁶⁰ State Corporations Advisory Committee (SCAC) (2009). Report of Proceedings and Recommendations of the Induction Programme for Directors of State Corporations (16th January to 26th June, 2009). Presidency And Cabinet Affairs Office October 2009

⁶¹ Kobia. M, & Mohammed, N. (2006), The Kenyan Experience With Performance Contracting, African Association For Public Administration And Management, 28th AAPAM Annual Roundtable Conference, Arusha, Tanzania

improvements in public service delivery within all the branches of Public Service – the mainstream Civil Service, Local Authorities, Judiciary, Teaching Service as well as improved performance in the State Corporations Sector. The implementation of performance contracting in the Civil Service, Local Authorities and the State Corporations Sector is part of the wider Public Sector Reform.⁶² In pursuit of reforms the implementation, monitoring and evaluation programme for Kenya’s Economic Recovery Strategy for Wealth and Employment Generation (ERS) 2003 – 2007”, listed the finalization of plans to restructure the existing State Corporations and Statutory Boards, including privatization rationalization, restructuring, mergers and legislative reforms as a key objective. Privatization Act 2005 was enacted to provide legal framework for some of those reforms.

The public service reforms can be looked at in five stages. The first is the Sessional Paper No.10 of 1965 whose goals were: Africanization of public service, land reforms; improving service delivery and performance; and, performance improvement and remuneration for better service delivery. The second is Sessional Paper No. 1 of 1986 on Economic Management for Renewed Growth whose main goals were: implementation of Structural Adjustment Programme (SAP); and, private sector growth. The third is Civil Service Reform Programme-1993 whose activities and achievements were: enhancement of Public Service efficiency and productivity; facilitation of equitable wealth distribution necessary for poverty alleviation and creation of an enabling environment for investment and enhanced private sector growth; and, introduction of Results-Based Management (RBM) guided by the Economic Recovery Strategy (ERS) for Wealth and Employment Creation (2003-2007). The Sessional Paper No. 1 of 1986 implementation proceeded in three phases: Phase 1 – Cost containment; Phase 2 – Performance Improvement; and, Phase 3 – Consolidation and sustenance of gains made by reform initiatives.

⁶² Performance Contracts Steering Committee, Kenya, (2005): Sensitization/Training Manual on Performance Contracts in the Public Service.

The fourth reform was the Economic Recovery Strategy (ERS)-2003-2007 whose activities and achievements were the economic recovery and improving the performance of public service; enhanced efficiency and effectiveness; macro-economic stability; economic growth; strengthening the institutions of Governance; rehabilitation of physical infrastructure; investment in human capital; public Service Reforms in the Civil Service, Local Government and Public Enterprises (State Corporations); implementation of free primary education; tackling corruption; formulation of Vision 2030 Strategy. It also led to Performance Contracting. The goals of the fourth reform (Performance Contracting) were to: improve efficiency and effectiveness in service delivery; objectively identify and freely negotiate indicators of performance; performance evaluation and ranking of institutions; enhance accountability for evaluation results; and, bring about operational autonomy.

3.2 Laws and Regulations Supporting Performance Contracting in Kenya

Government of Kenya introduced performance contracts in the public service through Legal Notice No. 93, the State Corporations (Performance Contracting) Regulations, in 2004.⁶³ The need to improve performance in public service is further emphasized in the national strategic plans; Economic Recovery Strategy for Wealth and Employment Creation (2003-2007) and in the Vision 2030.

3.2.1 The Employment Act (CAP 226)

In Kenya, employment is governed by the general law of contract, as much as by the principles of common law. Other laws regulating employment are: constitutional rights, as mentioned above; statutory rights, as set out in statutes and regulations; rights set by collective agreements and extension orders of collective agreements; and individual labour contracts.

⁶³ Government of Kenya (2004) Legal Notice No 93. The State Corporations (Performance Contracting) Regulations, Nairobi, Kenya

This Act formulated in 2007, fundamental rights of employees, to provide basic conditions of employment of employees, to regulate employment of children, and to provide for matters connected with the foregoing. The Employment Act defines “contract of service” as an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership but does not include a foreign contract of service.⁶⁴

The Act, further, defines “employee” as a person employed for wages or a salary and includes an apprentice and indentured learner and “employer” as any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company. In subject of performance contract as implied by this study, the “employer” is the Kenyan Government.

According to the Employment Act, employment contracts may be for fixed or unlimited periods of time. If an employment contract specifies a fixed period of employment, the contractual relationship is automatically terminated at the end of this period, without being considered a resignation or a dismissal. Under section 15 of the Employment Act, such a contract may be prolonged for a period of service up to 1 month, if the employee is engaged in any journey. Until the very recent past most female civil servants and parastatals staff were employed on fixed term contract. In general, temporarily and fixed term employed workers enjoy all the rights of an employee working on permanent terms, except those that are excluded explicitly (such as entitlement to pensions) or by the nature of a short term assignment (such as annual leave).

An employment contract, which does not specify a fixed period of duration, is considered to be for an unlimited period of time, but can be terminated by notice of either party. However, in the organized sector collective agreements which give workers tenure limit

⁶⁴ Government of Kenya (2010) The Employment Act Chapter 226 (2007), Revised Edition 2010. *National Council for Law Reporting with the Authority of the Attorney General*

the employers' ability to discharge and end the employment contract. Other limitations on terminating an individual labour contract are the principle of good faith and the requirement of non-discriminatory reasons.

Under section 14 (1) of the Employment Act it is a legal requirement that certain contracts of service be made in writing. These are contracts: for a continuous period of 6 months; which are not continuous, but for which the periods still add up to six months; and in which the task to be performed may last for six months. Where a contract is in writing, it must carry a signature or a fingerprint of the employee showing that she or he has agreed to its terms. There must also be a witness who is not the employer. It is the duty of the employer to make sure that the contract is written when this is required by the law.⁶⁵

The Act is efficacious in its part VI, on Termination and Dismissal. The section provides that due to wrongs done in connection with employment:

- Dismissal can be effected after warning or summarily/instantly in case of gross misconduct
- In the case of dismissal after warning, warnings should be in writing and kept in the employer's records for the particular employee
- Summary dismissal is for serious misconduct. Grounds include absenteeism, crime, intoxication, disobedience, e.t.c.
- Dismissed employees are entitled to moneys, allowances and benefits earned while in employment, e.g. salary, accrued leave payments, retirement benefits, e.t.c.
- Dismissed employees are entitled also to certificates of service (testimonials)
- Upon dismissal, the employer should make a written report to the district labor office explaining the circumstances leading to, and reasons for, the dismissal as well as giving other specified details of the employee's terms of employment⁶⁴

⁶⁵ Wangui (2009). National Labour Law Profile : Kenya. Understanding the labour laws in Kenya, January 24, 2009

These are seen as punitive measures meant to curb breach of the performance contracting laws and underperformance in state corporations.

3.2.2 The State Corporation Act (CAP 466)

State Corporation Act, Cap 466, is an Act of Parliament to make provision for the establishment of state corporations; for control and regulation of state corporations; and for connected purposes. The Act was first established in 1986. According to the Act, “state corporation” means a state corporation established under section 3; a body corporate established before or after the commencement of the Act by or under an Act of Parliament or other written law; a bank or a financial institution licensed under the Banking Act Cap. 488 or other company incorporated under the Companies Act, the whole or the controlling majority of the shares or stock of which is owned by the Government or by another state corporation; and, a subsidiary of a state corporation.⁶⁶

However, the Permanent Secretary to the Treasury incorporated under the Permanent Secretary to the Treasury (Incorporation) Act Cap. 101; a local authority established under the Local Government Act Cap. 265; a co-operative society established under the Co-operative Societies Act Cap. 490; a building society established in accordance with the Building Societies Act Cap. 489; a company incorporated under the Companies Act Cap. 486 which is not wholly owned or controlled by the Government or by a state corporation; and, the Central Bank of Kenya established under the Central Bank of Kenya Act Cap. 491, are not classified as ‘State Corporation’.

3.2.3 The State Corporations (Performance Contracting) Regulations, 2004

In Kenya, the process of performance contracts started with the establishment of a Performance contract Steering Committee in 2003, and the issue of Legal Notice No. 93 and the State Corporations (Performance contract) Regulations, 2004. According to the State Corporation Act, regulations on state corporations’ performance may be cited as the

⁶⁶ Government of Kenya (2004)

State Corporations (Performance Contracting) Regulations, 2004. The Act defines “performance” as the means evaluated results of achievement of agreed performance targets; and “performance contract” means a contract entered into between the Government and a state corporation. The Act state that performance contracts in Kenya is, indiscriminately, applicable to all ‘state corporations’.

The performance contract specifies the mutual performance obligations, intentions and the responsibilities of the two parties. Similarly, it also addresses economic/social and other tasks to be discharged for economic or other gain. It organizes and defines tasks so that management could perform them systematically, purposefully and with reasonable probability of achievement. These also assist in developing points of view, concepts and approaches to determine what should be done and how to go about doing it. The expected outcome of the introduction of the performance contracts includes improved service delivery, improved efficiency in resource utilization, institutionalization of a performance-oriented culture in the public service, measurement and evaluation of performance, linking rewards and sanctions to measurable performance, retention or elimination of reliance of public agencies on exchequer funding, instilling accountability for results at all levels and enhancing performance.⁶⁷

State Corporations (Performance Contracting) Regulations of 2004 states that every state corporation shall have all the powers necessary or expedient for the performance of its functions; the Board of a state corporation shall implement budgets approved by the Treasury and the parent Ministry; recruit staff including the chief executive officer of the state corporation; develop and negotiate with the parent Ministry performance targets for the state corporation for a specified financial year; develop, maintain and review on a regular basis the strategic plan for the state corporation; manage the assets of the state corporation; enter into and implement performance contracts with the chief executive of the state corporation; submit quarterly reports on the performance of the state corporation

⁶⁷ GOK, (2006). Results for Kenyans: Capacity Building Programme for Transforming the Public Service, Public Service Reform and Development Secretariat, December, 2006.

to the parent Ministry, the Treasury and the Inspector-General (Corporations); and, perform any other duties that may be deemed necessary or expedient for the implementation of the performance contracts. The State Corporations (Performance Contracting) Regulations of 2004 also states that no state corporation shall begin a new financial year before signing a performance contract.⁶⁸

3.2.3.1 Signing of Performance Contracts

According to the State Corporation Act, performance contracts for each financial year should be signed between the Board of a state corporation and the parent Ministry and counter-signed by the Treasury every last month of the financial year in order to become effective on the first month of the financial year. The implementation phase for PC is normally one year; Government of Kenya's (GoK) financial year starts on 1 July and finishes on 30 June. If the respective organization's financial year is different from the GoK it may consult the parent Ministry and the Treasury and agree on submission of reports and reviews according to its financial year. Under the GoK financial year each the formal negotiations between a state corporation and the parent Ministry on the implementation of performance targets takes place between April and June.⁶⁹ The Act further states that the chairman and one other Board member of a state corporation shall sign the performance contract on behalf of the state corporation pursuant.

The parent ministry of the state corporation under section 5 has a lot of authority over the performance of a particular entity.

Responsibility of Parent Ministry and the Treasury: For the purposes of implementing the performance contracts, the Act states that the parent Ministry and the Treasury shall be responsible for negotiating and signing performance contracts with the state corporations; and, reviewing performance targets with the state corporations.

⁶⁸ Government of Kenya (2010). The State Corporations Act Chapter 446, Revised Edition 2010 (1987). *Published by the National Council for Law Reporting with the Authority of the Attorney-General*

⁶⁹ Government of Kenya (2004)

Responsibility of Inspector-General (Corporations): For the purposes of implementing the performance contracts, the Inspector-General (Corporations) shall evaluate actual results of operation and management on the basis of the agreed performance targets; determine methods for evaluating performance on the basis of specified and agreed targets; develop evaluation criteria; submit results of evaluation to the Treasury and the parent Ministry within three months after the end of the financial year; and, advise on the administration of the performance contracts.

Performance Contracting Secretariat: The Act further established Performance Contracting Secretariat whose responsibility is to develop performance targets to be pursued in the ensuing year before the beginning of each financial year (this is normally concluded by 30th of June). These targets are developed within guidelines provided by Performance Contracting Secretariat. The Secretariat and the Inspector-General (Corporations) work closely in the administration of performance contracts and evaluation.

3.2.4 Inspector of State Corporation

Corporations Corporation Act, CAP 466, Schedule 18(1), states that there shall be an Inspector-General (Corporations) whose office shall be an office in the public service and whose duties is to advise the Government on all matters affecting the effective running of state corporations; report periodically to the Minister on management practices within any state corporation; and, report to the Controller and Auditor-General any cases where moneys appropriated by Parliament are not being applied by state corporations for the purposes for which they were appropriated.

The Legal Notice No. 93 on State Corporations (Performance Contracting) Regulations, 2004 gave the Inspectorate additional responsibilities as follows: the evaluation of actual results of operations and management on the basis of agreed targets; determining methods for evaluating performance on the basis of specified agreed targets; developing evaluation criteria; submission of results to the Treasury and the parent ministry three

months after the financial year; and, advising on the administration of performance contracting in State Corporations. In carrying out its functions, therefore, the Act confers powers on the Inspector-General (Corporations) to call for and inspect all books, records, returns and documents which in his opinion relate to the accounts of, or to execution of the functions of, any state corporation; enter and inspect the premises, including any plant and installation thereon, of any state corporation; and, attend meetings of any state corporation or of a Board or committee thereof if in his opinion it is necessary to do so for the effective carrying out of his duties as stated in the Act.⁷⁰

Inspector-General (Corporations) is thus to ensure that top-level managers are accountable for results. They also ensure that resources are focused on the attainment of the key national policy priorities of the Government. Performance contracts enable the measuring and evaluating of performance, and relating rewards to measurable performance. Performance contracts should be linked to the organizations work plan. The cycle of implementing PC includes the following steps: Setting Key Results Areas based on agreed priorities in the organization; Signing or contracts between the Chief Executive and the Principal; Desegregation of performance targets and signing of subcontracts between the Chief Executive and heads of department; Quarterly and annual reporting of performance; and Quarterly and annual reviews of the contracts.⁷¹

The provision is efficacious as it has seen a number of State Corporations develop Strategic Plans that outline the Inspectorate's current situation and set out the goals that need to be achieved in order to accomplish the corporations' mandates as outlined under Sections 18 and 19 of the State Corporations Act and the State Corporations (Performance Contracting) Regulations, 2004.⁷²

⁷⁰ Government of Kenya (2010). p

⁷¹ Public Service Reform and Development Secretariat (2006) Results Based Management Components Training Manual, Nairobi, Kenya, p46

⁷² Kiboi, W., (2006), Management perception of performance contracting in state corporations. An unpublished MBA project, University of Nairobi.

3.3 Effective Implementation of Performance Contracting In Kenya

All governments would like to be more efficient, more cost effective, more accountable and more responsive. The difficulty is that although failure flaunts itself and is easily spotted, success is more modest. It is easier to identify what the public service must escape from than to point out exactly where it must go. In 1990 the Government approved the introduction of Performance Contracts in the management of public agencies. A few state corporations attempted to develop variants of performance contracts that were however, not implemented. In 2003, the Government made a commitment to introduce performance contracts strategy as a management tool to ensure accountability for results and transparency in the management of public resources. To that end a Performance Contracts Steering Committee (PCSC) was established in August 2003 and gazetted on 8th April, 2005 with a mandate to spearhead the introduction and implementation in the entire public sector.⁷³

The Performance Contracting Secretariat (PCS) was established within Cabinet Office in 2003, to spearhead the implementation of Performance Contracting in the Public Sector, as a key element in Kenya's performance Management Framework. A pilot programme involving 16 state corporations signed PCs on 1st October 2004. Performance Contracting has since been rolled out to all Ministries, State Corporations and Local Authorities. In April 2008, the Grand Coalition Government merged PCS with the former Public Service Reform and Development Secretariat (PSRDS) to form Performance Contracting Department (PCD), under the Office of the Prime Minister. Performance contracting is being funded by the GoK.⁷⁴

In the implementation of performance contracts, the steering committee is assisted by an Ad-hoc Negotiations and Evaluation Task Forces whose members are drawn from

⁷³ S.O. Obong'o (2009). Implementation Of Performance Contracting In Kenya. International Public Management Review, 10(2)

⁷⁴ State Corporations Advisory Committee (SCAC) (2009). Report of Proceedings and Recommendations of the Induction Programme for Directors of State Corporations (16th January to 26th June, 2009). Presidency And Cabinet Affairs Office October 2009.

outside the public service. The ad-hoc task forces are responsible for negotiating and evaluating performance contracts of ministries/departments, state corporations and local authorities on behalf of the Permanent Secretary, Secretary to the Cabinet and Head of the Public Service. The task-forces are independent and comprises of eminent private sector practitioners, retired public servants with a track record, business executives and academia. This ensures independence in the entire process of setting performance targets and in their evaluation.

The steering committee developed tools and instruments for introducing and implementing performance contracts and evaluating the same. These include subsidiary legislation for state corporations and local authorities; model performance contracts and matrices; training manual and information booklet; and guidelines for contracting and evaluation of ministries/departments, state corporations and local authorities. Of particular significance is the inclusion of citizens' service delivery charters and customer satisfaction surveys in the performance contract strategy. These are vital instruments for enhancing and measuring the quality of service delivery and by extension ultimately may lead to reduced incidences of corruption.

In addition to the development of tools and instruments, preparations made for the introduction of performance contracts included a series of sensitization/training workshops conducted since 2004. These workshops targeted Permanent Secretaries, Chairpersons as well as Chief Executive Officers of State Corporations and Local Authorities, and Heads of Department. In 2005 a total of 1,054 people went through such training and in 2006 a total of 1,943 people drawn from the above category were trained in a two day workshops, which ran for about three months. The performance contracts for the central government ministries for the financial year 2005/6 were negotiated by the ad-hoc negotiating task force and subsequently signed on February 7th 2006 at a ceremony witnessed the President of the Republic of Kenya. This emphasizes the importance of performance contracting to the political leadership. Consequently, the expected outcomes of the introduction of performance contracts include: improved service delivery;

improved efficiency in resources utilization; institutionalization of a performance-oriented culture in the public service; measurement and evaluation of performance; reduction or elimination of reliance of public agencies on exchequer funding and enhancing overall performance. The underlying assumption driving the performance contracting concept is that 'once performance can be measured and performance shortfalls identified (including non-performers), actions can be taken to address the shortfall.'⁷⁵ Performance evaluation, and by extension contracting is therefore based on the premise that 'what gets measured gets one'.

3.4 Mode authenticity of PC in Kenya.

The ability to make and enforce contracts and meet effective service delivery is fundamental if PC are to function properly. Good enforcement procedures enhance predictability in commercial relationships and reduce uncertainty by assuring investors that their contractual rights will be upheld promptly by local courts. When procedures for enforcing PC are bureaucratic and cumbersome or when contractual disputes cannot be resolved in a timely and cost effective manner, economies rely on less efficient objectivity. Civil servants depend more heavily on directives from their exchequers to be able to deliver.

The process of identifying performance targets is carried out after the budget process has been completed and institutions informed about their resource allocation. This ensures that targets are realistic and achievable within the available resources. The targets emanate from the institutions and are freely negotiated and not imposed arbitrarily by the government. The process of negotiation is carried out in two phases. The first phase is the pre-negotiation consultations. At this stage the negotiating parties carry out a SWOT analysis in order to determine the institution's performance capacity. This helps to determine whether the targets being developed are realistic, achievable, measurable, growth oriented and benchmarked to performance of similar institutions. This stage in the

⁷⁵ Jones L and Thompson F. (2007): From Bureaucracy to Hyperarchy in Netcentric and Quick Learning Organizations: Exploring Future Management Practice. Information Age

process is a storming stage where parties hold lengthy meetings, often disagreeing but finally come to a consensus. The second phase in the negotiation process is where all issues agreed upon are factored into the performance contract. The draft contract is then submitted to the performance contracting secretariat for vetting. The vetting process ensures among other things that the contracts comply with the guidelines and that they are linked to the strategic objectives of the institutions, anchored on the strategic plans, growth oriented and relevant to the mandate of the institution.

The performance contracts are signed at two levels. In case of government ministries, the contract is signed between the Head of the Public Service and Secretary to the Cabinet, representing the Government on the one side and the permanent secretary of a ministry on the other side. To ensure that ministers, who represent the political body, are bound by the commitments of their permanent secretaries, they are required to counter sign the performance contracts. In the case of state corporations, the first level is between the government and the board of directors. The permanent secretary representing the parent ministry of the corporation signs with the board of directors on behalf of the government, while the board chair and one independent director sign on behalf of the board. The board subsequently signs a performance contract with the chief executive to transfer the responsibility of achieving the targets to the management. This guarantees operational autonomy given that board of directors are not executive and are not therefore involved in the day-to-day management of their corporations. Similar arrangements are replicated in the local authorities where the first level entails signing the contract between the chairperson/mayor of a council and the permanent secretary in charge of local government.

The evaluation exercise is done *ex ante*. Thus performance evaluation by the ad hoc evaluation committee is based on a comparison of achievements against the targets agreed at the signing of the contract. The negotiation of targets to be included in the contract is conducted by the ad hoc negotiation committee. The final contract is however between the government and the agency. The performance indicators are agency specific

and are developed by the respective agencies upon agreeing on the targets. The actual achievements of the agencies are rated against the set performance targets negotiated and agreed upon at the beginning of the period. The resultant difference is resolved into weighted scores and ultimate performance denominated to a composite score- the value of a weighted average of the raw scores in a performance agreement.⁷⁶ The critical requirement for each target is that they must be growth oriented and therefore must be improving with time.

3.5 Performance Contract Enforceability

If the terms of the contract are uncertain or incomplete, the parties cannot have reached an agreement in the eyes of the law.⁷⁷ An agreement to agree does not constitute a contract, and an inability to agree on key issues, which may include such things as price or safety, may cause the entire contract to fail. The performance contract seems to be uncertain or incomplete of major issues, such that obligations of performance contract are one sided, mostly on corporations. The performance contract in Kenya has no contract enforcement mechanisms that would for instance enable the state corporations to sue the government for breach.

A contract is said to be induced by undue influence where the relations subsisting between the two parties is such that one of them is in a position to determine the will of the other party and uses the position to obtain an unfair advantage over the other. It implies unfair and improper conduct or pressure on the mind of the other person as against physical fear created by coercion. Consequently the person whom undue influence is exercised is indirectly compelled to enter into the transaction. At common law, mutual assent is typically reached through offer and acceptance, that is, when an

⁷⁶ Trivedi, P. (2000) *How to Evaluate Performance of Government Agency: A manual for Practitioners*. World Bank.

⁷⁷ Jones, J. Z. (2009). Contract Law - Why is it So Important? Your Rights As a Worker. *Ezine Articles*, September 14, 2009

offer is met with an acceptance that is unqualified and that does not vary the offer's terms. The latter requirement is known as the "mirror image" rule. If a purported acceptance does vary the terms of an offer, it is not an acceptance but a counteroffer and, therefore, simultaneously a rejection of the original offer.

In an ordinary contract the contract partner voluntarily enter into a contract but in performance contract the government is dominating over its state corporation. The state corporation has no choice but to enter in to the contract. In most systems of law, parties have freedom to choose whether or not they wish to enter into a contract, absent superseding duties. In American law, one early case exemplifying this proposition is *Hurley v. Eddingfield* (1901), in which the Supreme Court of Indiana ruled in favor of a physician who voluntarily decided not to help a patient whom the physician had treated on past occasions, despite the lack of other available medical assistance and the patient's subsequent death⁷⁸ If there are uncertain or incomplete clauses in the contract and all options in resolving its true meaning have failed, it may be possible to sever and void just those affected clauses if the contract includes a severability clause. The test of whether a clause is severable is an objective test—whether a reasonable person would see the contract standing even without the clauses.

Entering into a contract must involve the elements of free will and proper understanding of what each of the parties is doing. In other words, the consent of each of the parties to a contract must be genuine. Only where the essential element of proper consent has been given is there a contract which is binding upon the parties. The ultimate consequences of establishing that no proper consent was given to enter the contract are matters dealt with when considering remedies for breach of contract. Proper consent may be affected by undue influence. Undue influence is exercised by taking unfair and improper advantage of the weakness of the other party, to the extent that it cannot be said that that party intended voluntarily to enter into the contract.

⁷⁸ Jones, J. Z. (2009). Contract Law - Why is it So Important? Your Rights As a Worker. *Ezine Articles*, September 14, 2009

Contract is entered into so as to enable its performance. In case of default of one party the aggrieved party has a right to move the court of law to enforce the contract. When a contract is broken, the party that suffers breach is entitled to receive from the other party compensation for any loss or damages. But as seen above, under performance contract the state corporation has no redress; they cannot sue the government.

CHAPTER FOUR

PERFORMANCE CONTRACTING AND IMPROVED SERVICE DELIVERY

4.1 Introduction

This chapter presents the critical analysis of the findings on performance contracts in Kenya. The chapter also focuses on how performance contract regulations and management has helped improve service delivery against public expectations.

Habermas stated that the relationship between performance contracts and performance management is that the former focuses on outcome and results while performance management is the integrating force that is concerned with what people do how they do it and what they achieve. It is therefore concerned with both inputs and the outputs.⁷⁹

4.2 Lack of enforcement mechanism a cause to ineffectiveness of PC in Kenya

An effective Contract law always includes the rules set and administered by the parties, determine when an agreement is enforceable, the grounds on which a breach of the agreement will be found and the consequences. Contract enforcement is one of the pillars of the rule of law.

4.2.1 Effective contract enforcement

When two parties strike a bargain, there must be some mechanism to ensure that each party will stick to the terms. This is evidently not seen in performance contracting. The main contract enforcement mechanisms are self-enforcement (e.g. posting bonds, ending a commercial relationship), reputation (e.g. risking a future commercial relationship), organizational (e.g. third party audits), technology (e.g. to monitor sales) and of course contract law. The PC user needs to examine these mechanisms. From an economy-wide

⁷⁹ Habermas. (2005). *Performance Contract and Management*. Published MSA, Makerere University. Uganda PP 50 – 56.

perspective, the issue is not whether a contract can be enforced but rather the cost of the various enforcement mechanisms and their efficacy in improving confidence between contracting parties. To be effective, the costs of enforcement must not outweigh the gains achieved from increased contractual commitment.

4.2.2 State cooperation Institutional requirements to support contract enforcement

Having a contract law on the PCs books is not sufficient. What matters equally are the role and practices of the legal institutions that support the effective implementation of PC contract law. The legal institutions relate to the organization of courts, an independent and competent judiciary, the legal profession, the enforcement services and the process of law making itself. Their design should be a crucial factor influencing equality of treatment between actors and also bears on the cost of enforcement and thus the reliance and confidence that public have in the system of PC.⁸⁰

4.2.3 Benefits of contract enforcement in state cooperation

Exclusive reliance on formal systems of contract enforcement (i.e. litigation through the judiciary system) can be costly and slow though its benefits are affordable..⁸¹For State House, performance contract is evaluated along five key areas: financial and stewardship (compliance with set budget level, cost reduction/savings, appropriation in aid (a-in-a), utilization of allocated funds, development index and debt equity ratio); service delivery (implementation of a service delivery charter, customer satisfaction, service delivery innovation); Non – Financial Indicators (Compliance with Strategic Plan, Disposal of Idle Assets, ISO Certification: 9001:2000 Quality Management System, Corruption Eradication, Prevention of HIV Infections, Statutory Obligations); Operations Outputs (Reduction of time in communicating to media Houses, Renovation/maintenance of State Houses and State Lodges, Sending invitations, Improvement of Hospitality Service,

⁸⁰ T.E. Eklund, (2008).p 28 - 30

⁸¹ Government of Kenya (2004b) Non-Commercial Corporations Performance Evaluation Criteria Form, Nairobi, Kenya

Maintenance of security, Coordination of Presidential and State Functions, Project implementations) Dynamic/Qualitative or Organizational capacity (Skills development, Automation (IT), work environment (baseline survey/implementation), employee satisfaction, safety measures, submission of pension documents to Pension Department and research and development).⁸²

Performance Contracting Department developed a framework below as the core basis for performance evaluation:⁸³

Criteria Range <u>upper</u> <u>lower</u>	Range Span	Performance Grade
1.00 – 1.49	0.49	Excellent
1.50 – 2.49	0.99	Very Good
2.50 – 3.49	0.99	Good
3.50 - 3.59	0.09	Fair
3.60 – 5.00	1.40	Poor

Excellent = achievement >30% above the agreed performance target. However, the following are exceptions to this general rule:-

- i. Indicators whose achievement cannot exceed 100% e.g. capacity utilization and ISO certification, except in instances where “current status” is <77%.
- ii. Indicators where achievement in excess of 100% for example in procurement of plant and equipment would be wasteful.

⁸² State House. (2011). *Performance Contract Between Government Of Kenya Represented by the Permanent Secretary, Secretary to the Cabinet and Head Of Public Service and State House*. Nairobi: Government Printer

⁸³ Office of the Prime Minister (2011). Report on Evaluation of the Performance of Public Agencies for the Financial Year 2008/2009. Performance Contracting Department, June 2011

Indicators of this kind, and where achievement is 100% or lower, attract raw scores as indicated below

Achievement	100%	<100%
Performance Indicator	Raw Score	
Compliance with Strategic Plan	2.49	Compute
Development of Service Charter	2.49	5.00
Corruption Eradication: Establishment of Corruption Eradication Structures	2.49	Compute
Disposal of Idle Assets	2.49	Compute
Customer Satisfaction Survey (baseline)	2.49	5.00
Employee Satisfaction Survey (baseline)	2.49	5.00
Compliance with set Budget Levels	2.49	Compute
HIV/AIDS Behavioural Change	2.49	Compute
Fulfillment of Statutory Obligations	2.49	Compute
Safety Measures	2.49	Compute
Repair	2.49	Compute
Maintenance	2.49	Compute
Utilization of Allocated Funds	2.49	Compute
Project Implementation	2.49	Compute

There is room for furthering performance on any indicator whose achievement is assigned a criteria value of 2.49. In this regard, achievement above 100% may be assigned higher criteria value in proportion to the “additional” performance.

- i. **Very Good** = achievement of the agreed target in the performance contract between 100% to 129.9%
- ii. **Good** = performance below agreed target but >2.57% over previous year’s achievement

iii. **Fair** = performance between 100% and 102.57% of previous year's achievement.

iv. **Poor** = performance below previous year's achievement

4.3 Performance Evaluation Results

For the Financial Year 2008/2009, the Ad-Hoc Evaluation Task Force concluded that the Performance Contracting practice has not only occasioned greater accountability in the management of public resources, but also created more awareness and higher expectation of better service delivery to Kenyans.

In the Financial Year 2008/2009, none of the Ministries/Departments, State Corporations, Local Authorities and Tertiary Institutions achieved the "Excellent" grade. For the Ministries/Departments, 15, representing 33%, attained the "Very Good" grade while 28, representing 62%, achieved the "Good" grade. None of the Ministries/Departments attained "Fair" grades. Two (2) Ministries/Departments, representing 5 per cent, did not sign Performance Contracts and were, therefore, awarded the "Poor" grade.

Out of 139 State Corporations that were evaluated, 63, representing 45 per cent, achieved the "Very Good" grade and 71, representing 51%, achieved the "Good" grade. One (1) State Corporation, representing one (1%) per cent, achieved "Fair" grade and four (4) representing 3 per cent, attained "Poor" grade. One (1) State Corporation in the "Poor" grade did not submit a Performance Report for evaluation. Out of the 175 Local Authorities that were evaluated, eleven (11), representing 6%, achieved the "Very Good" grade. A total of 147 Local Authorities, representing 84%, achieved the "Good" grade. Seven (7) Local Authorities, representing 4 per cent, and 10 Local Authorities, representing 6%, achieved the "Fair" and "Poor" grades respectively.

Out of the 68 Tertiary Institutions that made a debut in Performance Contracting, 24, representing 36 per cent, achieved "Very Good" grade, Thirty nine (39), representing 59 per cent, achieved "Good" grade. One (1) Tertiary Institution, representing 2 per cent, and four (4) Tertiary Institutions, representing 6 per cent, achieved "Fair" and "Poor"

grades respectively. It is important to note that two of the Tertiary Institutions in the “Poor” grade did not submit Performance Reports for evaluation.

4.4 Performance Contracting and Management in Kenya

The system in place should be such that it is able to measure the core business of the two institutions: for the Judiciary the dispensation of justice while for parliament enactment of legislation. Although there currently is no institutional framework in the judiciary and Parliament on Performance Contracting yet opportunity exists with the Judicial Service Commission and the Parliamentary Service Commission. The Government of Kenya established performance contracts owing to the need to be responsive to the demands and requirements of the public, while ensuring effectiveness in product and service delivery. Key objectives are expressed in terms of performance expectations linked to budget, service, outcomes and management ability. The objectives influence the kinds and numbers of performance targets that are set and the performance measures that are to be used to measure performance.

Under performance contracts, targets are set and although the areas of concern are the outcomes rather than the processes, the processes do determine the outcomes. One of the first things corporations in Kenya do before entering into performance contract is to develop Strategic Plans. This enables the corporation to be better focused on its core ‘businesses’. It also helps the corporation to clearly set out its objectives and action plans that will enable it achieve the targets.

GOK (2003) identifies education as a key determinant in provision of services. Employees within corporations In Kenya act as the driving force which triggers development by implementing policies. Thus, employees’ understanding about performance contract, employees’ participation in setting targets enhances utilization of resources and increase revenue maximization or cost minimization.

A study by Omboi and Kariuki showed that 75% of employees were able to deliver service targeted. This could be due to the fact that performance contract document is designed to cascade the intended purpose of performance contract initiatives using relevant communication methods that were easily understood. This implied that managers did understand performance contract.⁸⁴

Omboi and Kariuki further found that employees within state corporations, embraced performance contract modules of management despite the minimal level of understanding on how to operationalise the new methods. The study revealed that 59% of employees were not involved in setting performance contract targets. The findings confirm that low levels of academic qualifications resulted to less number of employees being involved in setting targets. The available option open to state corporations is to enhance training programmes on performance contracts, structured to accommodate those who have low academic levels.

4.5 Critique of Effectiveness of Performance Contracts in Kenya

Even though the performance tool shows that service delivery has improved due to utilization of performance contract, but from an external observation view this does not apply. Majority of state corporations has been performing poorly year after year despite the implementation of performance contracts.

A firm financial performance is a measure of how well a firm uses its assets from its core operations and generates revenues over a given period of time. This measure is thus compared to some given industrial average standard of similar firms in the same industry. Brealey, and Marcus⁸⁵ measure financial performance in terms of profitability, liquidity,

⁸⁴ Omboi B.M., & F.K. Kariuki. (2011). Factors Affecting Implementation of Performance Contract Initiative at Municipal Council of Maua-Kenya. *Research Journal of Finance and Accounting*, 2(2). 9-10

⁸⁵ Brealey D and Marcus J (2009) Meta analytical review of Financial Performance, *Strategic Management journal*

solvency, financial efficiency and repayment capacity. Wamalwa⁸⁶, on development and employment in Kenya decried the continued deterioration of the performance of State Corporations. He observed that while the creation of State Corporations through which government participation in economic activities was promoted was perhaps appropriate soon after independence, the objectives for and the circumstances under which most of the state enterprises were created have since changed. He underlines the need to implement privatization and divestiture of State Corporations urgently in view of the managerial problems afflicting the parastatals leading to poor return on government investments, the existence of a larger pool of qualified work force, availability of more indigenous entrepreneurship to permit a private sector-led economy and the need for non-tax revenue for the government. However, steps will need to be taken in order to accelerate the progress in this area and thereby improve on the low investment efficiency that limits economic growth

In effort to achieve the objectives and targets of ERS and to manage performance challenges in public service, the Government adopted Performance Contracting (PC) in public service as a strategy for improving service delivery to Kenyans. The Performance Contract is one element of the broader public sector reforms aimed at improving efficiency and effectiveness, while reducing total costs. Effective service delivery is touted as one of the key strategies for the reduction of poverty and associated problems. In Kenya, the delivery of public services has not been entirely successful or effective. This is manifested by the poor road network, incessant water unavailability, inadequate health facilities and personnel as well as falling education standards. The deliveries of government services in majority of corporation are not better as result of implementation of performance contract. Neither the citizens thinks that the service delivery has improved in government corporations a result of implementing performance contracts.

⁸⁶ Wamalwa, E., (2011). *Factors Influencing Investment Decisions in state coporation in Kenya*, Unpublished Thesis, Kenyatta University, Kenya.

The introduction of the rapid results initiative (RRI) in the Kenya public service in 2004 was expected to contribute to improved performance in service delivery. The vehicle and strategies for meeting the objectives of the RRI included but not limited to performance contracting.

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

5.1 Introduction

This chapter presents the conclusions and recommendations on the study which aimed at outlining the effectiveness of Performance Contract Act in public sector management. Conclusions and recommendations are made based on the findings from the previous chapters.

5.2 Conclusions

Performance contracting is a binding agreement (contract) between two or more parties for performing, or refrains from performing some specified act (s) over a specified period of time. As a branch of management control systems, it provides information that is intended for managers in performing their jobs and to assist organizations in developing and maintaining viable patterns of behavior.⁸⁷ Government of Kenya perceives performance contract is a management tool for measuring negotiated performance targets.⁸⁸ As part of performance management, performance contracting is a central element of new public management, which is a global movement reflecting liberation management and market-driven management.

The law on performance contract is contained in the State Corporations Performance Contracting Regulations, 2004, which is made pursuant to the State Corporations Act. Subject to the State Corporations Act and any other written law, the Regulations apply to all state corporations and every state corporation has all the powers necessary or expedient for the performance of its functions.⁸⁹ Every state corporation must sign a performance contract, signed on its behalf by the chairman of its board and one other

⁸⁷ CAPAM (2005). In Pursuit of Excellence: Developing and Maintaining A High-Quality Public Service. A Report on a CAPAM High-Level Seminar on Commonwealth Training and Development Institutes, October, 2005

⁸⁸ GOK, (2005). *Ministry Human Resources Development Strategy*. Government Printers: Nairobi.

⁸⁹ Section 3, State Corporations (Performance Contracting) Regulations, 2004.

board member, before they begin operations at the beginning of their financial year. Where the financial year of a state corporation is different from that of the Government, the corporation may, in consultation with the parent Ministry and the Treasury, make arrangements for submission of performance targets in line with their financial year.

Unlike any other accountability system in job performance in public service, performance contracting is often taken to be crucial to the delivery of improved services as part of the broader public sector reform aimed at improving efficiency and effectiveness, while reducing total costs. Emphasis on performance management for delivery of results is undoubtedly influenced by the basic assumption of performance management which lies in its professed ability to unite the attention of institution members on a common objective and galvanize them towards the attainment of this objective.⁹⁰ With the increased emphasis on quantitative measurement of outcomes, performance contracting has become a higher priority. Measuring and reporting on organizational performance focuses the attention of public managers and oversight agents, as well as the general public, on what, where and how much value state corporation programs and services provide to the public, an aspect peculiar to performance contracting.⁹¹

Governments are increasingly faced with the challenge to do things differently but with fewer resources. Above all, performance contracts have been found to encompass a range of management instruments used to define responsibilities and expectations between parties to achieve mutually agreed results.⁹² Performance contracting provides a framework for generating desired behavior in the context of devolved management structures. Employers view performance contracting as a useful and a new vehicle for articulating clearer definitions of objectives and supporting new management monitoring

⁹⁰ Armstrong, M. & Baron, A. (2004). *Managing performance: performance management in action*. London: Chartered Institute of Personnel and Development.

⁹¹ Armstrong, M. (2006). *Performance Management: Key Strategies and Practical guidelines*, 3rd Ed. Bodmin, Cornwall: MPG Books Ltd..

⁹² Elmore, R. F (2007) "When Good Policies Go Bad: Political Accountability and Quality of Service in Education". Paper was prepared for the IPPMN Workshop on Rating and Ranking Public Services, Worcester College, Oxford, UK August

and control methods, while at the same time leaving day-to-day management to the managers themselves. This is not as adequately factored in, in any other legislative framework aimed at achieving results in public service.⁹³

The parent ministry of the state corporation under Section 5 has a lot of authority over the performance of a particular entity. On receiving the performance targets from the Board of State Corporation they are empowered to constitute a team of experts to, examine and determine the adequacy of the performance targets and negotiate with the state corporation on the implementation of the performance targets. Under Section 6, Formal negotiations between the state corporation and the parent Ministry on the implementation of performance targets formulated pursuant to these Regulations under normal circumstances carried out between the months of April and June, unless under special circumstances where the state corporations have a different financial calendar from the government's and have been granted a special concession in that respect. The performance contracts for each financial year are signed between the Board of a state corporation and the parent Ministry and counter-signed by the Treasury every last month of the financial year in order to become effective on the first month of the financial year.⁹⁴

To put into operation the performance contracts, the parent Ministry and the Treasury are responsible for negotiating and signing performance contracts with the state corporations and reviewing performance targets with the state corporations.⁹⁵ For the purposes of implementing the performance contracts, the Inspector-General (Corporations) has the duty of evaluating the actual results of operation and management on the basis of the agreed performance targets, determining the methods of for evaluating performance on the basis of specified and agreed targets, developing evaluation criteria, submitting the results of evaluation to the Treasury and the parent Ministry within three months after the

⁹³ GoK (2010b)-Review of performance contracting in the public sector, Nairobi, Government Printer. (Excerpts) September 2010.

⁹⁴ Under section 7. (1), State Corporations (Performance Contracting) Regulations, 2004.

⁹⁵ Section 8 . State Corporations (Performance Contracting) Regulations, 2004.

end of the financial year; and advise on the administration of the performance contracts.⁹⁶

The introduction of Performance Contracting has contributed towards the improvement of public service delivery. The initiatives have positively transformed service delivery in most government sectors. However, certain challenges still exist. For example, while the implementation of reforms and performance contracting has been going on since 2004, it has been carried out in the context of largely discordant strategic plans with scant linkages to a common and integrated vision. Lack of clear sector standards has resulted in sectors concentrating on inputs, process and output indicators which do not link performance to outcomes. There have been concerns from stakeholders including the general public about the Government services delivery, and the inconsistency between perceived performance of various government agencies and their performance ratings.⁹⁷

The study concludes that the performance contract tools are inadequate this is due to the conflicting results. By use of performance contracting tools it has showed that the performance and service delivery of State Corporation has improved, but the findings have been disapproved by Wamalwa⁹⁸, and Nagar⁹⁹, who have indicated performance and service delivery has not really improved in state corporations. The study further concludes that it is hard to enforce performance contract when one party (government or state corporations) breach the contract. The study found that the state corporation can't sue that government when it breaches the contract despite the Government being part and parcel of the performance contracting process.

⁹⁶ Section 9, State Corporations (Performance Contracting) Regulations, 2004.

⁹⁷ Government of Kenya. (2010). *Sector Performance Standards (SPS) 2009-2030*. Nairobi: The Government Printer

⁹⁸ Wamalwa, E., (2011). *Factors Influencing Investment Decisions in state coporation in Kenya*, Unpublished Thesis, Kenyatta University, Kenya.

⁹⁹ Nagar, V (2010). *Governance Problem in Close Corporations*.

The study further concludes that effectiveness of performance contracts in Kenya is low due to inefficiency in legislating on performance contracting in Kenya. The study established that the performance contract seems to be uncertain or incomplete of major issues, such that obligations of performance contract are one sided, mostly on the part of corporations. The performance contract in Kenya has non contract enforcement mechanism into the contract; the state corporations cannot sue the government. This gives the government a platform to influence the state corporation on performance contracting, further undermining the principal of free consent. A Contract is entered into so as to enable its performance. In case of default of one party the aggrieved party has a right to move the court of law for enforcing the contract. When a contract is broken, the party that suffers breach is entitled to receive from the other party who has broken their terms of the contract warranting compensation for any loss or damages. But under performance contract the state corporation cannot sue the government, a clear justification that performance contract is not a contract in ordinary sense even though deemed so by the government.

Currently in Kenya, performance contracting, monitoring and evaluation is based more on input, process, and output indicators rather than outcome. In addition, there is no evidence that the performance indicators and targets are informed by international best practices. Sean for instance points out that performance contracting should be much more than a process for documenting and delivering feedback, coaching and ratings. He believes that when expanded beyond these basics, performance contract becomes a powerful tool for helping employees develop and achieve their full potential. Processes should be fairly standard and be able to address agency objectives.¹⁰⁰ This explains the difficulty of the public in relating to the results of performance contract evaluation.

¹⁰⁰ Sean, C. (2009). Important Performance Management Tasks That Often Are Forgotten; <http://wwwhrmguide.com/performance/5-tasks.ht>.

Owing to this, Kenya was ranked in 2009 as being in the first stage of development and as number 93 in the Global Competitive Index with a score of 3.84, compared with countries such as Singapore which was ranked number 5 with a score of 5.53 according to the World Economic Forum (2008-2009).

5.3 Recommendations

The study recommends that performance contracting legislation in Kenya should be reviewed to so as to assimilate with other ordinary legal contracts. This is due to the ambiguities and gaps created by the existing regulations has which has made it difficult to measure the performance and service delivery of public corporations against an effective legal framework.

Effectiveness of performance Contracts in Kenya may also be qualified as minimal due to inefficiency in the law and poor legislation. Indeed as indicated above, the study established that the performance contract seems to be uncertain or incomplete of major issues, such that obligations of performance contract are one sided. Further the study found that enforceability of performance contract where one partner breaches the contract offers no remedies as under ordinary contract law.

One of the biggest challenges facing performance contracts is how to involve the citizens in formulation and implementation of public service functions and delivery at all levels. The government needs to take deliberate steps to ensure that organized civil society groups, CBOs and other community forums are engaged in the formulation and implementation of public sector reform strategies. More regular consultations should take place between PSRPC and stakeholders to secure understanding, ownership and adoption of performance contracts and public sector reforms by all government ministries, departments and agencies. Government should embrace a new culture of participation, accountability and transparency. To achieve this, public officers need to be sensitized on the benefits of involving the general public in policy formulation. The Government should also establish mechanisms for enhanced participation of the private sector in

public policy formulation and decision-making in order to improve democracy accountability, efficiency, equity, effectiveness and sustainability in the provision of public services both at the local level and countrywide.

An important aspect of quality public service delivery is the existence of easily accessible and transparent complaints handling mechanisms to which the public can have recourse in case they are dissatisfied with the services received. It is with this background the Government created the office of the Ombudsman in 2003, Kenya Anticorruption Commission (KACC) and the Kenya National Commission on Human Rights (KNCHR). It is pertinent that a linkage in addressing poor service delivery within the performance contracting benchmarks be established within these institutions to provide the public with a platform to address dissatisfaction. The current customer complaints handling systems do not accommodate performance contract as a whole. It is therefore important that the Government institutionalizes complaints handling mechanisms consistent with the promises contained in Service Charters.

Government agencies and ministries should organize forums for the sharing of responsibility towards the delivery of targets before negotiating their individual performance contracts. Ministries and other government agencies should be encouraged to have good data gathering mechanisms. Lack of data should not be taken as an excuse to reject performance indicators. In addition, PSRPC should consider joint facilitation of key surveys to provide data across sectors. As much as possible, these surveys should be benchmarked to global surveys and measurement to facilitate comparability of Kenya to other countries. All mechanisms should be aligned within an exhaustive legal framework that governs all players equally.

Treasury and the Office Prime Minister are to agree on country priorities, align performance contracting cycle to that of budgeting, and ensure availability of financial resources. The priorities they agree upon should be made transparent to assist ministries and other government agencies to negotiate their performance contracts.

The study recommends that all public sector institutions at all levels of government be subjected to performance contracts; and that the signing of performance contracts in all three arms of Government be streamlined such that the Chief Executive signs the contract with the Political/Policy representative countersigning e.g. in the County Executive, the administration of Performance Contracting should be domiciled in the Office of the Governor while for the County Assembly the administration of Performance Contracting should be domiciled in the Office of the Speaker.

5.3.1 Human Resource Management

The new personnel statutes have improved the performance of human resources management and increased the flexibility of allocating the right person to the right job. The renewal of the mandate of members of the supervisory board and the management board being dependent on performance evaluation is a major change and may act as an important incentive. It is also expected that outstanding performance is rewarded through promotion, pay-increase or recognition. Although various performance contracts do not clearly spell out the pejorative measures taken against mediocre performance, it is assumed that the punishments are clear. With the creation of affiliated companies with widespread contractual employment, there are increasing concerns about the legal position of the personnel and about the growing fragmentation of employment regimes. This may affect mobility between the different business units (GoK, 2005).

Lings (2004) emphasizes the importance of human resource management when he pointed out that many researchers and employers neglect one important focus, the demand of internal employees, especially those who directly get in touch with customers. Because the attitude and behaviour of employees interacting with customers would influence the feeling and behaviour of the customers when they get the service, it is quite important for managers to efficiently define and manage the way their employees provide the service in order to make sure that their attitude and behaviour are good for providing the service. In this study, Lings argues that if properly executed performance contracting

has a significant positive effect on staff commitment and satisfaction. The study through the evidence-based research results found that the company applying internal market orientation strategy viewpoint could benefit to promote the organization internal and external performance. Hence it could benefit the service industries to establish perfect human resources management strategy with marketing viewpoint, and maintain the value goals of continuous survival, high growth and high profit in practice.

On the other hand, Slater (1999) reiterated that performance contracting if well executed may increase real speed in decision making and build self-confidence in employees. He reckons that bureaucracy which is a common feature in organizations that still rely on the management apparatus that had worked in the 1970s is terrified by speed and simplicity which are some of the essentials of the performance contracting. Shirley and Lixin (1997) add that before the performance contracts were put in place most governments were trying to run their state enterprises without any form of performance evaluation which made life difficult when appraising employee at the end of the performance period.

Nahavandi (2006) points out that outstanding performance should be rewarded through promotion, pay-increase or recognition which should be negotiated on signing the performance contract. He further speculates that those who adhere and fit the organizational culture and structure, as well as meet individual goals and objectives are much more likely to be promoted to top leadership positions – as opposed to those who do not. This process could be true for almost any situation; those who naturally fit well into an organization's mission and culture are more apt to be selected and rewarded in some fashion.

Review of existing performance contracting legislation to align with employer –employee relationships as governed by the Employment laws will be a step towards this realization.

5.3.2 Financial Resource Management

The use of performance-based contracts has induced an increased cost consciousness. The organisations have to develop cost-accounting systems and provide yearly financial

statements. The information provided improves the government's capacity to control the organisations' financial practices. Up to this moment, there is no direct link between the purchased amount of services and the level of the budget. An extended audit is needed to establish the link between objectives, outputs and inputs. However, the outlook on better budget estimates, based on an increased knowledge of real costs, is realistic. In some cases, transfers are corrected on the basis of achieved performance results such that a failure to meet performance targets results in a decrease of financial transfer to government. On the other hand, there is a positive financial return to the government in case performance results exceed set targets. These positive corrections are dependent, however, on developments of the overall budgetary position of the government and are therefore limited.

These remarks attenuate the real impact of the budget as an incentive. There is also a need to enhance the performance orientedness of the different financial management instruments (budgets, accounts and audits) and the coherency and consistency of these instruments including financial management rules and regulations. More coherence and consistency would mean that budget; accounts and audits are based on the same output and cost categories. Most organisations with contracts develop accrual and cost accounting but fail to use the resulting cost information in their budget estimates. Compliance audits remain more important than performance audits.

The theory of contracting suggests that to improve performance, performance contracts must not only reduce the information advantage that managers enjoy over owners but also must be motivated through rewards or penalties to achieve the contract's targets. Shirley (1998) argues that the logic of performance contracts is persuasive, but the reality has been disappointing. She carried out two empirical studies - one analyzing the effect of such contracts on profitability and productivity in twelve companies in six countries and the other examining statistically the correlation between performance contracts and productivity in hundreds of state enterprises in China. The results showed that there was no evidence that performance contracts had improved efficiency. The first study analyzed

the effects in monopoly enterprises (in water, electricity, telecommunications, oil and gas) in Ghana, India, the Republic of Korea, Mexico, the Philippines, and Senegal. It found no pattern of improvement associated with the performance contracts in productivity or profitability trends.

The second study used a much larger sample in manufacturing but in only one country, China. The results showed that the increasing use of performance contracts in China could not stem the fall in productivity amongst state enterprises. More important, the study found no robust, positive association between performance contracts and productivity. Moreover, a comparison of a sample of state enterprises that had signed performance contracts with a sample of firms that had not signed found that there was no significant difference between the two groups. On the other hand, Martins (2000) in his empirical study on performance contracting in the human services affirms that several agencies that participated in the study had experienced improved performance. For, instance, the Oklahoma Community Rehabilitation Services Unit found that contractor's costs per placement declined by 51 percent between 1992 and 1997, that the average number of months that clients spent on waiting lists decreased by 53 percent. The North Carolina Division of Social Services increased the number of adaptations from 261 adoptions in Financial Year (FY) 1993-1996 to 364 and to 631 in FY 1997-1998. The Illinois Department of Children and Family Services increased the number of placements in its Relative Home Care caseload from 2,411 to 5,570 in its first year, and in the second year the placements reached 9,503. As a result the Relative Home Care caseload declined by 41 percent%.

5.3.3 Internal Organization management

Moy (2005) in his final report to the Office of Financial Management which summarized the results of their literature search and state survey on the best practices and trends in performance contracting in a number of state and local agencies in Washington D.C. indicates that the use of performance contracts and the accompanying increase of operational autonomy had induced some developments in the internal structures of the

agencies under study. A number of questions were sent to each of the seven selected agencies and the responses were quite interesting. Three of the four states changed to performance based contracting to achieve better results. The study reveals that the implementation of performance based contracting ranges from state-wide, agency wide, to only within specific agency divisions or programs and that its impacts in each state agency varied, but including increased accountability for service delivery and deliverables and increased partnership between the contractor community and the state agency. The study further indicates that states agencies had defined performance as deliverables, outputs, outcomes, and effectiveness and efficiency, among others.

5.3.4 Improved External Relations

With respect to changes in customer relations, new interfaces and instruments are installed, resulting in increased client-orientedness. Most state corporations and government ministries in Kenya now have functional customer care and public relations offices. These offices have acted as valuable instruments for introducing a client focus. However, the functioning of these offices is hampered, in some cases, by the insufficiency of financial and human resources (Brynaert, 1994).

Performance contracting has been instrumental in helping state corporations and government ministries to introduce instruments to monitor client satisfaction. Examples of such instruments are the client help desks in all government ministries, accessible complaint channeling via the internet and other avenues, and annual reporting of performance and challenges to the public (Bouckaert, Verhoest and De Corte, 1999).

Performance based contracting has received mixed reactions as many people would like to know the performance implications of altering team composition, especially in the top management team. Changes in top management teams are becoming more and more frequent due to poor organizational performance, mergers and acquisitions, and strategic reorientations (Leonard, 2001). This trend, in a way, reflects a desire to influence the performance of the firm by means of altering the composition of the top management

team. According to upper echelon theory, this might be a feasible strategy since research has demonstrated a link between attributes of top management team members and firm performance (Hambrick & Mason, 1984). Specifically, upper echelon theory argues that individual attributes influence the preferences and attitudes of top team members, as well as the resulting team dynamics. In turn, these affect the strategic choices managers make, and therefore, organizational outcomes (Finkelstein & Hambrick, 1996). This argument supports the importance of performance contracting in the sense that whenever there are changes at the top level, the incoming chief executive continues to work on the set performance targets.

In order to increase the reliability and validity of performance measurements, various approaches are recommended such as multiple raters, combination of objective and subjective criteria, and so on. For instance, Bobko and Collela (1999) suggest that performance standards are external to the individual and for evaluative purpose and that it is different from individual goals as a person's internal aim. They proposed the importance of the employee reaction and acceptance of performance standards. Similarly, Huber et al. (1999) suggested that performance standards should be clear and specific in order for raters to evaluate performance accurately using such standards. They, however observed that the major concern was the kind of rating scales increase rating accuracy to be used. They suggested various rating scales among them behavioral anchored rating scale (BARS), behavioral observation scales, and other similar scales were proposed to increase the rating accuracy.

In conclusion performance contracting as an implementing tool in strategic planning is of great importance under the new public administration. There is, however, need for a good definition of outputs and solid performance measures which will be able to promote organization internal performance through a well customer-oriented ability of employees to further promote the organization external performance. This requires a well-defined training program for the public servants to support implementation of performance contracting. On the other hand, there is need to study both the public servants'

perceptions on the role of performance contracting in improving service delivery to the end users and also the impact of the performance contracting on service delivery to the populace. This will confirm whether the objectives of implementing performance contracting are being achieved in the public sector. The following issues also need to be addressed; stability and availability of resources is vital for the success of performance contracting and therefore the top leadership must ensure that necessary resources are available at all time; the political top leadership must respect the operational autonomy of the contracted organizations/ministries; knowledge of strategic planning, its development and monitoring capacities among the staff is central to success of performance contracting and the management support and their technical knowledge is vital; contract management should be accompanied by performance-oriented change in the public service structure and management culture. Culture that empowers staff to embrace and manage change is necessary. Management instruments, focusing on performance and cost in the field of human resources and financial management should be developed in an integrated manner.

Review of the he Law on Performance Contracting can provide this necessary 'backbone'!

REFERENCES

- Achode, M. (2008). Contract for sale of land must be in writing.. *Kenya Law Report*, March 17, 2008
- Akaranga, E. M. (2008). The Process and Effects of Performance Contracting in Kenyan Public Sector, *MBA Project*; United States International University (USIU), Nairobi.
- Armstrong, M. & Baron, A. (2004). *Managing performance: performance management in action*. London: Chartered Institute of Personnel and Development.
- Armstrong, M. (2006). *Performance Management: Key Strategies and Practical guidelines*, 3rd Ed. Bodmin, Cornwall: MPG Books Ltd.
- Atiyah, P. (1989). *An Introduction to the Law of Contract , 4th edn, 'Part 1: The development of the modern law of contract*. Clarendon Press, Oxford.
- Bjorkman, M. (2006). Public Funding in the Educational Sector and Its Effect on Test Scores in Essays on Empirical Development Economics: Education, Health and Gender, *IIES Monograph Series No 56*, Stockholm University.
- Boston Institute for Developing Economies (BIDE) (2007). *Performance Contracts: An Approach To Improving Public Sector Performance*. *Performance Contracts Steering Committee Secretariat Cabinet Office*, Office of the President – Kenya, March 12 - March 23 , 2007
- Bouckaert, G., Verhoest, K. & De Corte, J. (1999), *Public Sector Performance Contracting In Belgium and Flanders, Paris*. Public Management Committee: OECD.
- Brealey D and Marcus J (2009) Meta analytical review of Financial Performance, *Strategic Management journal*
- CAPAM (2005). *In Pursuit of Excellence: Developing and Maintaining A High-Quality Public Service. A Report on a CAPAM High-Level Seminar on Commonwealth Training and Development Institutes*, October, 2005
- Eklund, T.E. (2008). *Mainstreaming Disability Issues in Kenyan Public Service*. February 2008
- Elmore, R. F (2007) “When Good Policies Go Bad: Political Accountability and Quality of Service in Education”. Paper was prepared for the IPPMN Workshop on Rating and Ranking Public Services, Worcester College, Oxford, UK August

- Finkelstein, S., & Hambrick, D.C. (1996). *Strategic leadership: top executives and their effects on organizations*. New York: West.
- GOK, (2005). *Ministry Human Resources Development Strategy*. Government Printers: Nairobi.
- GOK, (2006). Results for Kenyans: Capacity Building Programme for Transforming the Public Service. *Public Service Reform and Development Secretariat*, December, 2006.
- GOK, (2010). Evaluation of Performance Contracting. *LOG Associate Report for the Office of the Prime Minister Performance Contracting Department, Kenya*.
- GoK (2010b)-Review of performance contracting in the public sector, Nairobi, Government Printer. (Excerpts) September 2010.
- GOK. (2003). *Economic Recovery Strategy for Wealth and Employment Creation*. Nairobi: Government Printer.
- Gore, A. (1996). *The Best-Kept Secrets in Government: A Report to President Bill Clinton*, Washington DC:
- Government of Kenya (2004) *Legal Notice No 93. The State Corporations (Performance Contracting) Regulations*. Nairobi, Kenya
- Government of Kenya (2004b) *Non-Commercial Corporations Performance Evaluation Criteria Form*. Nairobi, Kenya
- Government of Kenya (2010). The Employment Act Chapter 226 (2007), Revised Edition 2010. *National Council for Law Reporting with the Authority of the Attorney General*
- Government of Kenya (2010). The State Corporations Act Chapter 446, Revised Edition 2010 (1987). *Published by the National Council for Law Reporting with the Authority of the Attorney-General*
- Government of Kenya. (2010). *Sector Performance Standards (SPS) 2009-2030*. Nairobi: The Government Printer
- Habermas. (2005). Performance Contract and Management. *Published MSA*, Makerere University. Uganda PP 50 – 56.
- Hambrick, D.C., Mason, P.A. (1984). Upper echelons: the organization as a reflection of its top managers. *Academy of Management Review*, 9:193-206.

- Hill, M. & Gillespie, K. (1996). Social Control of Civil Service Systems', in Bekke, Perry and Toonen (eds), *Civil Service Systems in a Comparative Perspective*, Indiana University Press, Bloomington.
- Jones, J. Z. (2009). Contract Law - Why is it So Important? Your Rights As a Worker. *Ezine Articles*, September 14, 2009
- Jones, L., & Thompson, F. (2007). *From Bureaucracy to Hyperarchy in Netcentric and Quick Learning Organizations: Exploring Future Management Practice*. Information Age
- Kernaghan, K. & Siegel, D. (1999). *Public Administration in Canada*. ITP Nelson.
- Knapp, Crystal, and Prince (2005). Problems in Contract Law: Cases & Materials (5th ed., 2003). *Duke Law School. Internet Legal Research Group ILRG*
- Kobia, M., & Mohammed, N. (2006). The Kenyan Experience With Performance Contracting, African Association For Public Administration And Management, *28th AAPAM Annual Roundtable Conference*, Arusha, Tanzania.
- Kobia. M, & Mohammed, N. (2006), The Kenyan Experience With Performance Contracting, African Association For Public Administration And Management, *28th AAPAM Annual Roundtable Conference*, Arusha, Tanzania
- Korir, P.K. (2006). The Impact of Performance Contracting In State Corporations. The Case Of East African Portland Cement Company Limited. *A University of Nairobi Unpublished MBA Research Thesis*
- Lane, J.E. (1987). 'Public and private leadership', pp. 47-64, in J. Kooiman and K.A. Eliassen (eds.), *Managing public organizations*.
- Leonard, B. (2001). Turnover at the top. *HR Magazine*, May: 46-52.
- Lings, I. N., (2004). Internal Market Orientation Construct and Consequences. *Journal of Business Research*, 57(4), 405-413.
- Mallon, R. (1983). Performance Contracts with State-owned Enterprises. *Development Discussion Paper no. 143*, Harvard Institute for International Development
- Mann, A.J. (1995). Public Enterprise Reform and The Use of Performance Contracts. *Serie de Ensayos y Monografías*, 72, March 1995
- Markham, W.A. (2002). An Overview of Contract Law: The Extraordinary Importance of Contract Law. San Diego Attorney, 2002

- Martin, L. L.(2000). Performance Contracting in the Human Services: An Analysis of Selected State Practices. *Administration in Social Work* 24.2 : 29-44.
- Moy, P. (2005). *Best Practices and Trends in Performance Based Contracting. A final report submitted to Office of Financial Management*; 210, 11th Ave. S.W. Rm.311, Olympia, Washington D.C. 98504.
- Mulcahy, K. (2008). *Contract Law In Perspective, 5th Ed.* New York: Routledge-Cavendish,
- Nagar, V (2010). *Governance Problem in Close Corporations.*
- Nahavandi, A. (2006). *The Art and Science of Leadership.* Upper Saddle River, NJ: Prentice Hall.
- Nellis, J.R. (1989). Contract Plans and Public Enterprise Performance, *World Bank Discussion Paper 48.* Washington: The World Bank
- Obong'o, S.O. (2009). Implementation Of Performance Contracting In Kenya. *International Public Management Review*, 10(2)
- OECD. (1997). *In search of Results: Performance Management Practices in Ten OECD Countries.* Paris: Public Management Committee, OECD
- Office of the Prime Minister (2010). *Report on Evaluation of the Performance of Public Agencies for the Financial Year 2008/2009.* Performance Contracting Department, March, 2010
- Office of the Prime Minister (2011). *Report on Evaluation of the Performance of Public Agencies for the Financial Year 2008/2009.* Performance Contracting Department, June 2011
- Omboi B.M., & F.K. Kariuki. (2011). Factors Affecting Implementation of Performance Contract Initiative at Municipal Council of Maua-Kenya. *Research Journal of Finance and Accounting*, 2(2). 9-10
- Performance Contracts Steering Committee, Kenya, (2005): *Sensitization/Training Manual on Performance Contracts in the Public Service.*
- Public Service Reform and Development Secretariat (2006) *Results Based Management Components Training Manual.* Nairobi, Kenya, p46
- Sean, C. (2009). Important Performance Management Tasks That Often Are Forgotten; <http://www.hrsguide.com/performance/5-tasks.ht>.

- Shirley, M. & Lixin Colin Xu. (1997). "Empirical Effects of Performance Contracts: Evidence from China." World Bank, Development Research Group, Washington, D.C.
- Slater, R. (1999). *Jack Welch and the GE Way; Management insights and leadership secrets of the legendary CEO*; McGraw-Hill, New York.
- Smithies, D. (2007). *Contract - Elements of a Contract. Tutor2U*, August
- State Corporations Advisory Committee (SCAC) (2009). *Report of Proceedings and Recommendations of the Induction Programme for Directors of State Corporations (16th January to 26th June, 2009)*. Presidency And Cabinet Affairs Office October 2009
- State House. (2011). *Performance Contract Between Government Of Kenya Represented by the Permanent Secretary, Secretary to the Cabinet and Head Of Public Service and State House*. Nairobi: Government Printer
- Therkildsen, O. (2001) 'Efficiency, Accountability and Implementation, Public Sector Reform in East and Southern Africa', *Democracy, Governance and Human Rights Programme Paper, Number 3*, UNRISD. Geneva.
- Trivedi, P. (2000) *How to Evaluate Performance of Government Agency: A manual for Practitioners*. World Bank.
- Wamalwa, E., (2011). *Factors Influencing Investment Decisions in state coporation in Kenya*, Unpublished Thesis, Kenyatta University, Kenya.
- Wangui (2009). *National Labour Law Profile : Kenya*. Understanding the labour laws in Kenya, January 24, 2009
- Wertheimer A., Franklin G. (2010), *The Ethics of Consent: Theory and Practice*. eds., Oxford University Press, 2010. Minnesota Legal Studies Research Paper No. 08-36.

APPENDICES

APPENDIX I: LIST OF STATE CORPORATIONS IN KENYA

1. Agricultural Development Corporation
2. Agricultural Finance Corporation
3. Agro-Chemical & Food Company Ltd
4. Athi Water Services Board
5. Bomas of Kenya Ltd
6. Capital Markets Authority
7. Catchment Area Advisory Committee
8. Catering Tourism and Training Development Levy Trustees
9. Central Water Services Board
10. Chemilil Sugar Company Limited
11. Coast Development Authority
12. Coast Water Services Board
13. Coffee Board Of Kenya
14. Coffee Research Foundation
15. Commission for Higher Education
16. Communication Commission of Kenya
17. Consolidated Bank of Kenya
18. Cooperative College of Kenya
19. Council for Legal Education
20. Deposit Protection Fund Board
21. East African Portland Cement Co.
22. Egerton University
23. Ewaso Ng'iro South Development Authority
24. Export Processing Zone Authority
25. Export Promotion Council
26. Gilgil Telecommunications industries
27. Higher Education Loans Board
28. Horticultural Crops Development Authority
29. Horticulture Crops Development Authority
30. Industrial and Commercial Development Corporation
31. Industrial Development Bank
32. Investment Promotion Centre
33. Jomo Kenyatta University of Agriculture and Technology
34. KASNEB- Kenya Accountants and Secretaries National Examinations Board
35. Kenya Agricultural Research Institute
36. Kenya Airports Authority
37. Kenya Anti-Corruption Commission
38. Kenya Broadcasting Corporation
39. Kenya Bureau of Standards
40. Kenya Bureau of Standards (KEBS)
41. Kenya Civil Aviation Authority
42. Kenya College of Communication & Technology
43. Kenya College of Communications Technology
44. Kenya Dairy Board
45. Kenya Electricity Generating Company
46. Kenya Ferry Services Limited
47. Kenya Forestry Research Institute
48. Kenya Industrial Estates
49. Kenya Industrial Property Institute
50. Kenya Industrial Research & Development Institute
51. Kenya Institute Of Administration
52. Kenya Institute of Public Policy Research and Analysis
53. Kenya Literature Bureau
54. Kenya Marine & Fisheries Research Institute
55. Kenya Maritime Authority
56. Kenya Meat Commission
57. Kenya National Assurance Company
58. Kenya National Examination Council
59. Kenya National Library Service
60. Kenya National Shipping Line
61. Kenya National Trading Corporation Limited
62. Kenya Ordinance Factories Corporation
63. Kenya Pipeline Company Ltd

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| 64. | Kenya Plant Health Inspectorate Services | 102. | National Water Conservation and Pipeline Corporation |
| 65. | Kenya Ports Authority | 103. | National Co-coordinating Agency for Population and Development |
| 66. | Kenya Post Office Savings Bank | 104. | New K.C.C -New Kenya Co-operative Creameries |
| 67. | Kenya Railways Corporation | 105. | NGO's Co-ordination Bureau |
| 68. | Kenya Re-insurance Corporation | 106. | Numerical Machining Complex |
| 69. | Kenya Revenue Authority | 107. | Numerical Machining Complex |
| 70. | Kenya Roads Board | 108. | Nyayo Tea Zones Development Corporation |
| 71. | Kenya Safari Lodges & Hotels | 109. | Nzoia Sugar Company |
| 72. | Kenya Seed Company Ltd | 110. | Pest Control Products Board |
| 73. | Kenya Sisal Board | 111. | Postal Corporation of Kenya |
| 74. | Kenya Sugar Board | 112. | Pyrethrum Board of Kenya |
| 75. | Kenya Sugar Research Foundation | 113. | Retirement Benefits Authority |
| 76. | Kenya Tourist Board | 114. | Rift Valley Water Services Board |
| 77. | Kenya Tourist Development Corporation | 115. | School Equipment Production Unit |
| 78. | Kenya Utalii College | 116. | South Nyanza Sugar Company |
| 79. | Kenya Water Institute | 117. | Sports Stadia Management Board |
| 80. | Kenya Wildlife Service | 118. | Tana and Athi Rivers Development Authority |
| 81. | Kenya Wine Agencies Limited | 119. | Tea Board Of Kenya |
| 82. | Kenyatta International Conference Centre | 120. | Tea Research Foundation Of Kenya |
| 83. | Kenyatta University | 121. | Teachers Service Commission |
| 84. | Kerio Valley Development Authority | 122. | Telkom (k) Ltd |
| 85. | Lake Basin Development Authority | 123. | University of Nairobi |
| 86. | Lake Victoria South Water Service Board | 124. | University of Nairobi Enterprises & Services Ltd |
| 87. | Lake Victoria South Water Service Board | 125. | Water Resources Management Authority |
| 88. | Local Authority Provident Fund | 126. | Water Services Regulatory Board |
| 89. | Maseno university | 127. | Western University College of Science and Technology |
| 90. | Moi University | | |
| 91. | National Aids Control Council | | |
| 92. | National Bank of Kenya | | |
| 93. | National Cereals and Produce Board | | |
| 94. | National Council for Law Reporting | | |
| 95. | National Environmental Management Authority | | |
| 96. | National Hospital Insurance Fund | | |
| 97. | National Housing Corporation | | |
| 98. | National Irrigation Board | | |
| 99. | National Museums of Kenya | | |
| 100. | National Oil Corporation of Kenya Ltd | | |
| 101. | National Social Security Fund(NSSF) | | |

**APPENDIX II: THE STATE CORPORATIONS (PERFORMANCE
CONTRACTING)
REGULATIONS, 2004
LEGAL NOTICE NO. 93**

**THE STATE CORPORATIONS ACT
(Cap. 446)**

IN EXERCISE of the powers conferred by section 30 of the State Corporation Act, I, Mwai Kibaki, President and Commander-in-Chief of the Armed Forces of the Republic of Kenya, make the following Regulations:-

THE STATE CORPORATIONS (PERFORMANCE CONTRACTING)
REGULATIONS, 2004

1. Citation.

These Regulations may be cited as the State Corporation (Performance Contracting) Regulations, 2004.

2. Definition.

In these Regulations, except where the context otherwise requires -

“Act” means the State Corporations Act;

“budget” means estimates of revenue and expenditure including sources thereof covering one financial year;

“Committee” means the State Corporations advisory committee established under section 26 of the Act;

“chief executive” means the chief executive officer of a state corporation;

“Director” means a person appointed as such to the Board of a State Corporations;

“evaluation criteria” means the standard of judgement to be applied for evaluation;

“financial year” means a period of twelve months during which the business of a state corporation is accounted for;

“incentives” means the graduated or monetary reward for a good performance based on performance evaluation;

“Inspector” means the inspector-general (corporation) appointed under section 18 of [the Act](#);

“Minister” means the minister for the time being assigned ministerial responsibility over a state corporation and - parent Ministry - shall be constructed accordingly;

“performance” means evaluated results of achievement if agreed performance targets;

“performance contract” means a contract entered into between the Government and a state corporation;

“performance evaluation” means assessment of extent of achievement of agreed targets;

“sanction” means punitive action taken for failure to achieve agreed targets; and

“target” means a specified and agreed goal to be achieved by the Board of a state corporation.

3. Application.

Subject to the Act and any other written law, these Regulations shall apply to all State Corporations.

4. Autonomy and responsibilities of Board of Directors.

(1) Subject to the Act and any other written law, every state corporation shall have all the powers necessary or expedient for the performance of its functions

(2) Subject to paragraph (1), the Board of a state corporation shall -

(a) implement budget approved by the Treasury and the parent Ministry;

(b) recruit staff including the chief executive of the state corporation;

(c) develop and negotiate with the parent Ministry performance targets for the state corporation for a specified financial year;

(d) develop, maintain and review on a regular basis the strategic plan for the State Corporations;

(e) manage the assets of the state corporation;

(f) enter into and implement performance contracts with the chief executive of the state corporation;

(g) submit quarterly reports of the performance of the state corporation to the parent

Ministry, the Treasury and the Inspector-General (Corporations); and

(h) perform any other duties that may be deemed necessary or expedient for the implementation of the performance contracts.

(3) Every state corporation shall submit its annual budget to the parent Ministry and the Treasury for approval not later than the end of February in every year and the parent Ministry and the Treasury shall grant such approval not later than 30th April in every year.

(4) Where the financial year of a state corporation is different from that of the Government, the corporation may, in consultation with the parent Ministry and the Treasury, make arrangements for submission of performance targets in line with the financial year of the corporation, provided that no state corporation shall begin a new financial year before signing a performance contract.

5. Responsibility parent Ministry.

The parent Ministry shall, upon receipt of the performance targets from the Board of State Corporations, constitute a team of experts to -

(a) examine and determine the adequacy of the performance targets; and

(b) negotiate with each state corporation on the implementation of the performance targets.

6. Negotiations.

Formal negotiations between the state corporation and the parent Ministry of on the implementation of performance targets formulated pursuant to these Regulations shall be undertaken between the months of April and June in each year, except that where a

financial year of a state corporation does not coincide with the Government's financial year, the state corporation shall proceed in a manner provided for in Regulation 4 (4) of these Regulations.

7. Signing of performance contracts.

(1) The performance contracts for each financial year shall be signed between the Board of a state corporation and the parent Ministry and shall be counter-signed by the Treasury every last month of the financial year in order to become effective on the first month of the financial year.

(2) The chairman and one other Board member of a state corporation shall sign the performance contract on behalf of the state corporation pursuant to paragraph (1).

8. Responsibility of parent Ministry to the Treasury.

For the purposes of implementing the performance contracts, the parent Ministry and the Treasury shall be responsible for -

(a) negotiating and signing performance contracts with the State Corporations; and

(b) Reviewing performance targets with the State Corporations.

9. Responsibility to Inspector-General(Corporations)

For the purpose of implementing the performance contracts, the inspector-general (corporations) shall -

(a) evaluate actual results of operation and management on the basis of agreed performance targets;

(b) determining methods for evaluating performance on the basis of specified and agreed targets;

(c) develop evaluation criteria;

(d) submit results of evaluation to the Treasury and the parent Ministry within three months after the end of the financial year; and

(e) advise on the administrator of the performance contracts.

10. Minister to submit report.

The minister shall submit the results of evaluation of State Corporations to the controller and auditor-general, the National Assembly and the President.

11. Removal of Director.

Subject to the provisions of any other Act, the Minister may, in consultation with the committee, and based on results of evaluation, remove a Director of a state corporation whose performance is unsatisfactory.

12. Incentives and Bonuses.

(1) The Minister for the time being responsible for matters relating to finance may, in consultation with the committee, approve incentives for Board members and employees of State Corporations whose performance achieves the agreed targets.

(2) The Minister for the time being responsible for matters relating to finance, shall in consultation with the Committee, develop guidelines on sanctions against Board members and employees of State Corporations whose performance is below the agreed targets.

Dated the 4th August, 2004