UNIVERSITY OF NAIROBI

SCHOOL OF LAW

THE EFFECTIVENESS OF THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD IN ADJUDICATING PUBLIC PROCUREMENT DISPUTES IN KENYA

BY:

BEATRICE WAMBUI MATHENGE

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DECLARATION

This project paper is my original work and has not been presented to meet the requirements for an award of a degree at this or any other university.

Signature: .....**Date**: .....

Beatrice Wambui Mathenge

G62/72466/2008

I confirm that the work reported in this project paper was carried out by the candidate under my supervision and has been submitted for examination with my approval as University supervisor.

Signature: …….**.....Date**: .....…….

Professor Albert Mumma

School of Law

DEDICATION

To my late mother, Shiphirah Mathenge, and my father, Mathenge Minja, who toiled tirelessly and sacrificed so much to ensure that my siblings and I were able to attend school. They have and will remain my inspiration in all that I have achieved and what I will attain in the future.

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ABBREVIATIONS AND ACRONYMS

DPP	Directorate of Public Procurement
EACC	Ethics and Anti-Corruption Commission
EU	European Union
GATT	General Agreement on Tariffs and Trade
GPA	Agreement on Government Procurement
IPAR	Institute of Policy and Research
NAFTA	North American Free Trade Agreement
OECD	Organization for Economic Co-operation and Development
PPARB	Public Procurement Administrative Review Board
PPCRAB	Public Procurement Complaints, Review and Appeals Board
PPD	Public Procurement Directorate
PPOA	Public Procurement Oversight Authority
PPOAB	Public Procurement Oversight Advisory Board
SWAPs	Sector Wide Approaches
UK	United Kingdom
UNCITRAL	United Nations Commission on International Trade Law
WTO	World Trade Organization

ABSTRACT

The existence of a review body in public procurement provides an important platform for bidders to have recourse against wrongful decisions of procuring entities. It generally gives the bidders an opportunity to enforce compliance with the law and also promotes the function of correcting legal violations in procurement. However, the efficacy of the review process is dependent on whether the body is independent, impartial, cost-effective, accessible and anchored in a firm legal framework. Since its establishment under the Public Procurement and Disposal Act, 2005, PPARB has contributed positively in the development of case law on public procurement and exposed the misdeeds of public officers to public scrutiny. Nonetheless, in carrying out its mandate, PPARB has faced several challenges that have marred its effectiveness in carrying out its mandate provided under section 93 of the Act. These challenges include lack of institutional and financial independence, lack of impartiality, and inadequacies in the legal and regulatory framework. For instance, the Act has not been aligned with the Constitution of Kenya, 2010 to reflect on the public procurement principles provided under Article 227. In addition, the process of appointment and removal of members of PPARB is premised under the Public Procurement and Disposal Regulations, 2006, and not the Act. The Minister has powers to make the Regulations and may amend or repeal them at will to tamper with the composition of the Board. In light of this, this study appraises the effectiveness of PPARB in adjudicating public procurement disputes in Kenya. It seeks to unpack the extent to which PPARB exercises its mandate in ensuring that procuring entities comply with the Act and the Regulations made thereunder.

Key Terms: public procurement; independence; impartiality; accessibility; cost-effective.

CHAPTER ONE: INTRODUCTION

1.0 Background to the Study

A proper-functioning procurement system requires a well-designed regulatory framework supported by adequate enforcement environment. The main reason for this is to ensure value for money, prevention of corruption and promotion of industrial or social policies.[1] Prior to 2001, Kenya did not have a codified public procurement legal framework and the system was largely centralized.[2] Procurement was regulated by the Ministry of Finance which issued regulations and guidelines in the form of circulars to the ministries and other public agencies from time to time. The circulars set out the details of public procurement procedures and policies which included the procurement thresholds and review of adjudication procedures.[3]

There was no provision for review or appeal by dissatisfied bidders or the general public against the procurement decisions of the various tender boards in instances where there were irregularities in the process by an independent tribunal. The appeals allowed were to the Central Tender Board from the District Tender Boards, to the relevant permanent secretaries from the Ministerial Tender Boards and those against the Central Tender Board and the Department of Defence Tender Board to the Permanent Secretary, Ministry of Finance.[4] This tender protest mechanism was within government circles and therefore gave government officials several opportunities to manipulate the system for their own personal gain. There was no provision for

[1] Arrowsmith, S., Linarelli, J. and Wallace, D.J. (2000). *Regulating Public Procurement: National and International Perspectives,* The Hague, Netherlands: Kluwer International, p. 1.
[2]Migai, Akech J.M, (2006). Development Partners and Governance of Public Procurement in Kenya: Enhancing Democracy in the Administration of Aid. *International Law and Justice Working Papers 2006/3, Global Administrative Law Series* at p. 10.
[3] Ministry of Finance and Planning, *Report on the Diagnostic Survey, Findings and Recommendations on the Kenya Public Procurement Systems* 43 (1999) [*Hereinafter Report on Kenya Public Procurement Systems*].
[4] Migai, Akech J. M. (2005). Development Partners and Governance of Public Procurement in Kenya: Enhancing Democracy in the Administration of Aid. *Journal of International Law and Politics,* 37, 4, p. 843.

independent judicial review since the decisions by the said bodies were deemed final.[5] Thus, there was lack of transparency and accountability in the system.

In 1998, the government established a team to come up with recommendations to reform the public procurement sector.[6] As a result of this reform process, the Exchequer and Audit Act (Public Procurement) Regulations, 2001[7] were enacted.[8] These Regulations vested the overall administration of public procurement in the Public Procurement Directorate (PPD) which was at the time a small department in the Ministry of Finance.[9] The Public Procurement Complaints Review and Appeals Board (PPCRAB) was created under the Regulations[10] in order to adjudicate complaints by aggrieved bidders.[11]

The Regulations, however, suffered from serious flaws including lack of a firm legal basis. They were a subsidiary legislation and the Minister of Finance could repeal or even amend them at will. In order to deal with these challenges, the Public Procurement and Disposal Act ("the Act"), 2005[12] was enacted and came into operation in the year 2007. Although the Act was largely a restatement of the 2001 Regulations, it established a firm legal framework in the Kenyan procurement system,[13] including the establishment of PPOA, PPOAB and, in continuance of the PPCRAB, the PPARB.[14] The Act and the Public Procurement and Disposal Regulations, 2006

[5] Ibid.
[6] Nyaoga, M. *Manual on Public Procurement Laws in Kenya,* (unpublished) Nairobi, Kenya at p. 3.
[7] Legal Notice No. 51 of 30th March, 2001
[8] Thuo, Caroline Wambui & Njeru, Anes. "Effects of Public Procurement Reforms on Service Delivery at National Spinal Injury Referral Hospital, Nairobi." *International Journal of Business and Commerce* 3, no. 8 (April 2014): 70-81.
[9] Migai, *supra* note 4 at p. 846.
[10] See the Kenya Gazette Supplement No. 24 and Legislative Supplement No. 16 of 2001.
[11] Exchequer and Audit (Public Procurement) Regulations, 2001, Regulation 40 and 41 (1).
[12] Act No. 3 of 2005.
[13] For instance, while the PPCARB was created under a subsidiary legislation, the establishment of the PPARB under the Act was an important transformation in the adjudication of procurement disputes.
[14]Jerome, Ochieng and Mathias, Muehle, (2012). Development and Reform of the Kenyan Public Procurement System. *Paper presented at the 5th International Public Procurement Conference2012*, p. 1770.

(hereinafter "the Principal Regulations")[15] provide the current legislative framework for the PPARB. Although there have been several challenges encountered in its application and stakeholders in the procurement sector have given their views on the need to amend the Act, no amendments had been carried out at the time of the study. The Act is currently undergoing review in order to bring it into conformity with the provisions of the Constitution of Kenya, 2010[16]and the Public Procurement and Asset Disposal Bill, 2014 is pending for enactment before Parliament.

Since its establishment, PPARB has handled about 591 disputes.[17] It has undoubtedly contributed positively to the implementation of the objectives of the Act set out under section 2. PPARB has, however, faced several challenges in discharging its mandate as envisaged in the Act. This study involves an in-depth analysis of the performance of PPARB since its establishment and the extent to which it has contributed to the achievement of the objectives of public procurement regulation in Kenya as provided under the Act and the Constitution of Kenya, 2010.

1.1 Statement of the Problem

Public Procurement in Kenya has evolved from a system with no sound legal framework and institutional structure to a properly regulated system anchored in the new Constitution through Article 227 and the Act. The creation of PPARB under this Act marked a positive step towards ensuring a strong and effective procurement system, providing for the bidders' enforceable right of review in circumstances where procuring entities breach the rules. However, while PPARB's

[15] Legal Notice No. 174 published on 29/12/2006.
[16]<kenyalaw,org/kl/fileadmin/pdfdownloads> accessed on 25/7/2014; see also Article 227 (2) of the Constitution of Kenya.
[17]www.ppoa.go.ke/index.php?option=com_content&view=category&id=63&Itemid=166 Accessed on 4/7/2014, 7/7/2014 and 11/7/2014; figure also obtained from the case registers at the office of the PPARB.

establishment is a major step,[18] the current legal framework as laid out under the Act contains several deficiencies that affect its effectiveness. For instance, there are no legal provisions granting PPARB the power to enforce its own decisions. As a result, in circumstances where a party fails to comply with an order of PPARB, the affected party has to obtain orders of mandamus from the High Court for compliance. This is time consuming and costly and undermines the effectiveness of PPARB. In addition, PPARB is accountable to PPOA for its activities and programs and hence there is lack of clear regulatory and adjudicatory roles between the two institutions. PPARB does not have its own staff and depends on PPOA on all its requirements. Further, the provisions on the appointment, composition and membership of PPARB are contained in the Regulations and not the Act. Under section 140 of the Act, the Minister for Finance can repeal or amend these provisions at will without proper consultation and, hence, these provisions may be subject to abuse. Based on these challenges, the study examines the effectiveness of the PPARB in its mandate of resolving public procurement disputes in Kenya and in particular in meeting the objectives provided under section 2 of the Act. In doing this, the study identifies the successes achieved, the challenges faced since its establishment and the factors that affect its effectiveness.

1.2 Research Objectives

The main purpose of the study is to inquire into the efficacy of the PPARB in resolving public procurement disputes in Kenya with a view to identifying its contribution to the public procurement system, the challenges thereto and recommend ways of enhancing its adjudicatory

[18] For the first time since the country attained independence in 1963, an independent body was created under a statute for the purpose of adjudicating over disputes by aggrieved bidders in circumstances where procuring parties violated the procurement rules. PPCRAB, which was the predecessor of PPARB, was a creature of subsidiary legislation: the Public Procurement Regulations, 2001, made under the Exchequer and Audit Act, Cap 489 Laws of Kenya. PPCRAB was not properly anchored in law as the Minister could amend or repeal the Regulations under which it was established at his own whims.

role in obtaining a strong and well-functioning public procurement system in Kenya. Specifically, the study establishes whether PPARB is independent; whether it renders its decisions in a timely manner; whether it is cost-effective; and whether it meets the universally accepted features of an effective public procurement administrative review tribunal.

1.3 Research Questions

The study mainly answers the question: How effective is the PPARB in adjudicating public procurement disputes in Kenya?

1.4 Hypotheses

This study is basically premised on the hypothesis that PPARB has not been effective in adjudicating public procurement disputes in Kenya. In particular, it is the assumption of the researcher that the extent of PPARB's efficacy is largely determined or affected by lack of independence and accessibility, political influence, and lack of financial and technical capacity, impartiality, and delay in rendering decisions. Thus, in order to ensure effective, expeditious and fair adjudication processes, there is need for legal and institutional reforms to address these challenges.

1.5 Justification

The growing emphasis on economic development in Kenya has translated into the procurement of major projects. With the devolved system of government, public procurement is likely to increase with a simultaneous increase in procurement disputes. This calls for an effective bid-protest mechanism where aggrieved bidders are able to challenge the decisions of procurement officials in circumstances where procurement regulations have been flouted. It is on this basis

that PPARB was established under the Act. The creation of PPARB is, in the researcher's view, a synergy towards enhancing accountability, fairness and integrity in the procurement process.[19]

However, as indicated in the above problem statement, PPARB is faced with a myriad of challenges justifying a study into its efficacy in carrying out its mandate. In addition, despite the existence of PPARB as a justice avenue for bidders, there have been established widespread abuses in public procurement where tendering rules are widely disregarded. Arising from this is the question whether the PPARB is strong enough to attend to these abuses in accordance with the enabling Act and Article 227 of the Constitution. Corruption has been a serious problem in the Kenyan public procurement history, costing the taxpayer colossal amounts of money. A good example is the Anglo Leasing scandal where senior government officials used their positions to corruptly defraud the government huge sums of money estimated at Kshs459 billion.[20] Though there are many procurement irregularities, very few of these are brought before the PPARB and this may be attributed to the fear by such bidders that they may be evaluated unfavourably thereby losing business.[21] A study into the effectiveness of the Board is important in explaining this situation.

The findings of this study are useful to the stakeholders in the public procurement sector especially PPOA and the Ministry of Finance, which are the key institutions involved in public procurement policy, legal formulation and review, and the private sector since it provides the market place for public procurement. The study also identifies certain gaps and inadequacies in

[19] See the Public Procurement and Disposal Act, 2005, section 2.
[20] Institute of Policy Analysis and Research (IPAR), (2006). *Public Procurement Reforms: Redressing the Governance Concerns*. An occasional publication of the Institute of Policy Analysis and Research (IPAR), Issue No. 2 of 2006, Nairobi, Kenya at p. 1.
[21] In *Application No. 71/2012 China Jiangxi International Kenya Ltd v Parliamentary Service Commission*, PPARB held that requests for review filed before it are part of the procurement process as set out in the Act and do not form part of litigation history as envisaged by section 31(1) (c) of the Act.

the legal framework which if addressed will enhance not only the effectiveness of the adjudicatory role of PPARB but also the entire public procurement system in Kenya. The results of this study will inform these institutions on key areas of review especially as regards the PPARB. The study will also contribute to knowledge and raise possible areas for further study.

1.6 Theoretical Framework

The main concepts requiring theoretical justification in this study are twofold: institutional independence; and judicial impartiality. Judicial (or institutional) independence implies that judges (or institutions) are the authors of their own decisions, and that they should be free from any "inappropriate" influence.[22] The nature of 'inappropriate' influence and the identity of actors who may influence the presiding judge or institution might differ depending on the normative theory of adjudication from which the definition of judicial or institutional independence emerges. In general, a theory of adjudication specifies the content of the obligation to decide which, in turn, determines what constitutes inappropriate influence from various individuals.[23] In this regard, this study adopts two theories of adjudication, namely the so-called Hart's Theory of Mechanical Adjudication, and Dworkin's Theory of Adjudication.

According to the Theory of Mechanical Adjudication, the judge or tribunal identifies the legal rule that governs the case by tracing its pedigree, and then applies the legal rule to the case at hand in a straightforward manner.[24] The parties only guide the judge or tribunal in highlighting the relevant statutes, case law, and other regulations, but no other influence by anyone is legitimate. Where there are no defined legal rules governing the case to be decided, the judge or

[22] See Burbank, SB (ed.). 2002. *Judicial Independence at the Crossroads*: *An Interdisciplinary Approach*, New York: Sage Publishers, p 46–49.
[23] Ibid at p 48.
[24] Ibid at p 49.

tribunal is obliged to exercise discretion. The discretion should however eschew any arbitrary actions. An even-handed decision that promotes the ends of the statute in question or makes good law should be rendered. The judge or tribunal cannot simply act capriciously.[25] Therefore, whether the law is clear or not, the resolution of the dispute does not depend on the identity of the presiding judge, but rather on the applicable law, the parties' submissions and the ends of justice.

In contrast, Dworkin's Theory of Adjudication holds that, before rendering a decision, a tribunal or judge is required to interpret the political history of the jurisdiction in which s/he or it sits to make the law of that jurisdiction "the best it can be."[26] In essence, the theory imposes an obligation on the tribunal or judge to interpret the law in a way that makes it "the best it can be." Accordingly, the decision of the case has to fit the past political history of the jurisdiction, and cast that political history in a favourable light.[27] Transplanted into the instant study, this theory can be interpreted to mean that PPARB is required to adjudicate procurement disputes in a manner that rhymes with its statutory mandate as well as the history behind its establishment. The decision-maker should therefore consider the history of the Act and endeavour to meet the objectives set thereunder.

On the other hand, institutional or judicial impartiality plays a vital role in the protection of individual rights and, therefore, should not be divorced from any discussion on independence. However, the two concepts do subscribe to the same meaning. In *Prosecutor v Kanyabashi (Appeal)*, the International Criminal Tribunal for Rwanda (ICTR) distinguished between the two concepts as follows:

[25] Burbank, *supra* note 15 at p. 49.
[26] Dworkin, R. 1978. *Taking Rights Seriously*. Oxford: Oxford University Press, p 31–39.
[27] Ibid.

> Judicial independence connotes freedom from external pressures and interference. Impartiality is characterized by objectivity in balancing the legitimate interests at play.[28]

Impartiality generally means that the tribunal or judge is not biased in favour of the other party. In light of this, Trechsel notes that "a judge must be free to float hither and thither between the positions of the parties and finally reach a decision at the place which, in correct application of the law and rules of jurisprudence, marks the just solution."[29] Thus, in an adjudication process, what matters most is the impartiality of the body or tribunal, and not necessarily its independence. Put differently, if a tribunal is partial, it is not fit to execute its roles; and it becomes immaterial whether it is independent or not.[30] In this context, impartiality is viewed as wider than independence, in that a tribunal can be independent and yet be biased against one of the parties to the dispute. In a nutshell, the issues at play in this study revolve around the concepts of independence and impartiality in decision making. The forgoing adjudication theories form the corpus of the study.

1.7 Literature Review

PPARB is the successor of the PPCRAB[31] that had been established under the Exchequer and Audit Act (Public Procurement Regulations), 2001.[32] According to Migai,[33] the bid protest mechanism established under Regulations was hailed for contributing immensely to the restoration of credibility to the public procurement system in Kenya. The PPCRAB was also

[28] *Prosecutor v Kanyabashi* ICTR-96-15-A, Appeal Chamber, 3 June 1999, Decision on the Defence Motion for the interlocutory appeal on the Jurisdiction of Trial Chamber I, Joint and Separate Opinions by Judge MacDonald and Judge Vohrah, para. 35.
[29] Trechsel, Stefan. 2005. *Human rights in criminal proceedings*, Vol. XII/3. Oxford: Oxford University Press, p 50.
[30] Ibid.
[31] Public Procurement and Disposal Act, 2005, section 25.
[32] *supra* note 7
[33] Migai, *supra* note 4 at p. 848.

credited for stopping several corrupt and irregular procurements and in the process exposed the misdeeds of public officials to public scrutiny. The PPCRAB also ensured that procuring entities complied with the regulations and contributed to the development of case law on public procurement. However, according to Migai, PPCRAB faced several challenges in carrying out its mandate. These include: that PPCRAB was precluded from entertaining complaints once a procuring entity concluded a contract with the successful bidder and this in effect frustrated it from stopping irregular and corrupt tenders;[34] that PPCRAB was established under a subsidiary legislation and did not have a firm legal basis and the Minister of Finance could bring its life to an end by simply repealing the Regulations; and that the Regulations being a subsidiary legislation had to be in conformity with the provisions of the enabling statute, the Exchequer and Audit Act, and that there was a likelihood of a judicial review action based on the legitimacy or consistency of the Regulations on which the decisions of PPCRAB were founded. The Regulations could be declared null and void by the High Court in such circumstances. In addition, the composition of PPCRAB was questionable in that the permanent secretaries in the Ministry of Finance, the Office of the President and the Solicitor-General were members of PPCRAB. These officials also sat on a number of government agencies and corporations and hence there was potential for conflicts of interest and likelihood that the officials could influence the award of tenders in favour certain bidders and where a review was sought before the PPCRAB they would sit in judgment of their own decisions. In addition, there was also lack of a clear separation of regulatory and adjudicatory roles between PPCRAB and the Directorate of Public Procurement (DPP). The PPCRAB, therefore, lacked independence and its impartiality was in question. Although Migai's work is in regard to PPCRAB, it provides useful information for the assessment of the effectiveness of PPARB being the successor of PPCRAB.

[34] Ibid at p. 850-851.

While examining the policy objectives underlying Kenya's public procurement system, Thiankolu provides an assessment of the dispute resolution processes under the Act vis-a-vis the GPA.[35] The GPA generally requires that parties establish timely, effective, transparent, and non-discriminatory domestic procedures for resolution of procurement disputes.[36] Thiankolu argues that, although the dispute resolution system established under the Act might pass the GPA test of non-discrimination, it fails on transparency, timeliness and effectiveness.[37] Concerning transparency, the Act is published and made generally available as anticipated under Article XX (3) of the GPA. However, procuring entities can invoke section 36, which allows them to terminate procurement proceedings at any time without entering into a contract, to shield unlawful decisions from judicial scrutiny. On timeliness, Thiankolu notes that the Kenyan judiciary cannot expeditiously dispose procurement disputes as required by the GPA or the Act because of legal and administrative restrictions.[38] Further, on the question of effectiveness, the author argues that the legal technicalities that plague the granting of interim orders suspending procurement proceedings under the Act do not meet the standards of the GPA.[39] For instance, there is no provision for stay orders once a dispute goes to the High Court, which falls short of the requirements of Article XX (7) of the GPA.[40] Although the author's focus is on the *Selex Case*,[41] his work adds value to the arguments raised in this study.

[35]Thiankolu, M. (2011). Reconciling Incongruous Policy Objectives and Benchmarking Kenya's Public Procurement Law: A Review of the Selex Case. *Journal of Public Procurement, 11* (3), 451.
[36] Ibid at p. 71.
[37] Ibid.
[38] Ibid.
[39] Ibid at p. 472.
[40] Article XX (7) of the GPA provides for rapid interim measures to correct breaches and to preserve commercial opportunities.
[41]High Court Misc. Civil Application No. 1260/2007 *Selex Systemi Integrati v The Public Procurement Administrative Review Board & The Kenya Civil Aviation Authority*.

Nyaoga argues that the Act and the Regulations should be amended to include provisions prescribing the right of unsuccessful bidders to access or inspect the evaluation report as a matter of law within a specified time.[42] The procurement laws should also establish bid-challenge procedures that are non-discriminatory, timely, transparent and effective.[43] Further, that the PPARB should be granted powers to grant interim orders of stay of the tender award pending final determination since in certain circumstances if the tender award is not challenged immediately and then it takes long to arrive at a decision, the outcome may be rendered nugatory as the successful bidder may proceed and fulfil its obligations. According to Nyaoga, section 100 (4) of the Act, which provides that if judicial review by the High Court is not declared within 30 days from the date of filing of the review application the decision of the Review Board shall take effect, is not conceptually clear and is an attempt to usurp the jurisdiction of the High Court.[44] In Nyaoga's view, this provision, when read together with the Civil Procedure Rules, 2010, seems confusing.[45] It, therefore, ought to be harmonized with the Civil Procedure Rules, 2010. Finally, section 112 of the Act that provides that a party to the review may appeal against the decision of the PPARB to the High Court within 14 days after the decision is made ought to be repealed. According to Nyaoga, this section serves no functional purpose since the PPARB is a quasi-judicial body whose decisions can only be amenable to judicial review.

The DPP established under the Exchequer and Audit Act (Public Procurement Regulations), 2001, prepared a report in January 2003 detailing the reforms that had been undertaken in public

[42] Nyaoga, *supra* note 6.
[43] Ibid., p. 15.
[44] Ibid.
[45] Under section 100 (1) the aggrieved party is granted 14 days to apply for judicial review to the High Court which means that there is automatic stay of the procurement proceedings. In addition, the High Court under the provisions of Order 53 of the Civil Procedure Rules, 2010 has the discretion in granting leave to file an application for judicial review, to grant leave to operate as stay or to grant leave and decline to order stay. If stay is granted pending the hearing and determination of the judicial review application, then all proceedings must stop but if no stay is granted the decision sought to be reviewed can be implemented.

procurement, the successes achieved and the challenges that the public procurement system was facing and made recommendations on how the system could be improved.[46] The DPP listed its functions and amongst these was to organize and participate in administrative review by providing secretarial services to PPCRAB. These services included: receiving and registering complaints lodged before PPCRAB; analyzing the cases for the members of PPCRAB to facilitate quick decision taking; taking minutes during Board meetings and writing them up properly; communicating the Board's decisions to procuring entities and other interested parties; monitoring the implementation of PPCARB's decisions; preparation of quarterly reports of cases heard and determined by PPCRAB to the Minister for Finance and Planning; reviewing and making comments on Contract Agreement documents for contracts valued over Kshs.2,000,000 submitted by Ministries and Departments for countersigning by the Permanent Secretary to the Ministry of Finance and Planning; handling any other correspondence from procuring entities, tenderers and contractors on matters pertaining to public procurement; and maintaining the registry serving PPCRAB. This denoted the lack of independence on the functions of PPCRAB on the one hand and the DPP on the other hand.[47]

In addition, the Report noted as an achievement that PPCRAB had heard and determined forty three cases between January, 2002 and January, 2003 when the report was made. The report also contained a breakdown of the outcome of these cases. The report did not list any challenges faced by PPCRAB in carrying out its functions but listed the challenges encountered by the Directorate as including understaffing, inadequate vehicles, office equipment and inadequate funds for human resources training and development. It also did not provide any

[46] Public Procurement Oversight Authority (PPOA), (2003). *Public Procurement Reforms Strategy: The Kenyan Experience*. Nairobi, p. 2.
[47] Ibid at p. 2-3.

recommendations specific to the improvement of delivery of the mandate of PPCRAB.[48] This defines the gap that this study is meant to fill.

Ramboll Management discussed public procurement under four pillars identifying the strengths and weaknesses of the system.[49] These pillars include: legislative and regulatory framework; institutional framework and management capacity; procurement operations and market practices; and integrity and transparency of the procurement system.[50] According to Ramboll, the fourth pillar relies on a number of control mechanisms, namely: an effective control and audit system; an efficient appeals mechanism; a comprehensive information sharing system enabling civil society and interested stakeholders to conduct social audit; and effective ethics and anti-corruption measures.[51] Without these control measures, flaws in the procurement system may not be detected and addressed.[52] Ramboll further argued that the establishment of a well functioning and independent complaint, review, and appeals mechanism under the Act and the Regulations is a key achievement in ensuring a credible procurement system. While there was provision in the law for precise conditions and timeframes for lodging complaints before PPARB and clear enforcement mechanisms, access to its decisions was limited.[53] The Report noted that the decisions of PPARB could only be accessed at the PPOA premises but were not published in any official gazette, the PPOA website or any other government websites.[54] This made it difficult for interested parties or even the public to access the decisions of PPARB and this undermined its

[48] Ibid at p. 6 & 10.
[49]Ramboll Management. "Assessment of the Procurement System in Kenya." 2007, available at http://www.goggle.co.ke/?gferd=ctrl&ei=YoZmUqljjqHy-fqgZAB&gwsrd=cr#q=procurement (accessed 30 June, 2013).
[50] Ibid.
[51] Ibid at p. 18.
[52] Ibid.
[53] Ibid at p. 19.
[54]Currently, however, the number of decisions made by PPARB as well as those by PPCRAB since its establishment can be accessed at the PPOA website.

transparency. The Report recommended that the PPOA website should be fully developed and the decisions of PPARB uploaded on the website.[55]

In its Report, the Institute of Policy Analysis and Research (IPAR) lauded PPARB in its professionalism, speed and integrity in handling procurement disputes referred to it.[56] However, according to IPAR, section 100 (4) of the Act, which limits the period within which decisions on judicial review are made by the High Court, was unconstitutional and was an attempt to usurp the powers of the High Court. IPAR also noted that the provision in Act referring to frivolous complaints without specifying their nature left room for misuse of the term and ought to be clearly defined. It also criticized the powers of the Minister under the draft Regulations to appoint members of PPARB without providing the basis of the appointments and found that this was subject to abuse. In addition, the power granted under the Act to the Minister to make rules and regulations governing public procurement issues, was subject to abuse as he could amend or repeal them at will. IPAR emphasized on the need for independence of PPARB from political and other kinds of influence.[57] Other recommendations included: that the avoidance or termination of contracts under sections 40-43 of the Act by procuring entities due to corrupt practices, fraud and conflict of interest of their employees should be a function of PPARB as the procuring entities may be unwilling to terminate or avoid these contracts since the senior management of these entities could be party to these wrongs or be compromised; that section 100 (1) of the Act that provides that the decision of PPARB is final and binding on the parties unless judicial review at the High Court commences within fourteen days of the decision of PPARB; and section 100 (4) to the effect that if the High Court decision on judicial review is not declared

[55] Ramboll Management, *supra* note 49 at p. 18, 19, 21 & 22.
[56] IPAR, *supra* note 20 at p. 2.
[57] Ibid at p. 2 & 3.

within thirty days the decision of the PPARB would take effect, were unconstitutional and unenforceable and should be repealed or revised.[58]

Nyaoga and Odhiambo examine the legal and institutional framework of the public procurement system in Kenya.[59] With regard to adjudication of procurement disputes, the authors raised concern over the criteria that PPARB was to employ in determining frivolous and vexatious complaints that are to be summarily dismissed, the award of costs in review proceedings and the independence of the PPARB in view of the fact that it is administered by the PPOA that provides its secretariat. They also discuss section 100(4) of the Act, which was found by the High Court to be unconstitutional and inconsistent with the objectives of the Act and hence ineffective.[60] Further, the authors also noted that, under section 93 of the Act, it is only a candidate who claims to have suffered or risks suffering loss or damage due to a breach of a duty imposed on the procuring entity that can seek administrative review of such action or omission. This provision was interpreted in *Mohammed Muigai Advocates v Nairobi Water Services*[61] and *Uni Impex (Import and Export) Ltd v The Ministry of Health (KEMSA),*[62] in which PPARB held that it would only entertain complaints where there is a breach of duty imposed on the procuring entities by the Act or the Regulations. In addition, the complaints must be made by candidates who participated in the procurement process by submitting bids.

The assessment of the effectiveness of PPARB and its predecessor contained in the literature above was not comprehensive since it involved the assessment of the entire public procurement

[58] Ibid at p. 5.
[59] Prie B H. *et al*, (2008). *Getting the Deal Through: Public Procurement 2008: An Overview of Regulation in 40 Jurisdictions World Wide*. Law Business Research Ltd, London, UK pp.134-138.
[60] Ibid., p. 137. This decision was made in *Selex Sistemi Integrati v The Public Procurement Administrative Review Board and the Kenya Civil Aviation Authority*, High Court Miscellaneous Civil Application No. 1260 of 2007.
[61] Public Procurement Administrative Review Board Application No. 15/2005.
[62] Public Procurement Complaints, Review and Appeals Board Application No. 5/2004.

system in Kenya at different periods of time. PPARB and PPCRAB were assessed as one of the components of the public procurement system. However, the assessment in this study is comprehensive since it has only focused on PPARB.

1.9 Scope and Limitations

The study focused on the efficacy of the PPARB in executing its adjudicatory role. This entailed an assessment of its effectiveness in carrying out its mandate as well adequacy of its legal framework. In deriving at the findings, the researcher interviewed key informants purposively selected from the Ministry of Finance, PPARB, PPOA, and some advocates practicing before the PPARB. In terms of the geographical scope, the study was carried out in Nairobi County because of the fact that this is where the PPARB largely operates and conducts most of its proceedings.

The main limitation of this study is that the efficacy of PPARB in adjudicating public procurement disputes in Kenya is generally under-researched. Consequently, information remains scarce. This explains why the researcher had to largely use interviews with most of the data being collected from the PPARB, PPOA and the Ministry of Finance. In addition, obtaining information from government offices in Kenya is usually difficult and most officials were not co-operative in providing information since issues relating to public procurement are highly sensitive in government circles. Nevertheless, the researcher purposively sampled key informants with whom she has previously interacted to inform the findings of the study.

1.10 Methodology

1.10.1 Research Design

The study was purely qualitative in methodology and premised on descriptive research design. This design was aimed at finding out by way of interviews the effectiveness of PPARB in adjudicating public procurement disputes in Kenya. It included an in-depth study of how PPARB which is the subject of the study has been carrying out its functions since its establishment. Some of the very pertinent aspects of an ideal administrative tribunal such as its independence, efficiency and accessibility to its services were discussed. Using an interpretive approach, this study examined the extent to which PPARB has contributed to the attainment of the objectives of public procurement under section 2 of the Act as well as ensuring compliance of the Act by both the procuring entities and contractors. This approach involved analysing interviews and cases, and interpreting texts and laws in order to assess the PPARB's performance.

1.10.2 Research Instruments

The research instrument for this study was by way of interview schedules. The interviews were semi-structured to enable comprehensive and in-depth collection of data.

1.10.3 Data Sources

Data sources were both primary and secondary. Primary data sources included statutes, government and public institutions' reports, manuals, registers and decisions made by PPARB and PPCRAB. Interviews were conducted with the members and former members of PPARB former members of PPCRAB, officials from PPOA, public procurement law practitioners and procurement officers from the Ministry of Finance.

Secondary data sources included text books, journals, magazines, newspapers, articles, law reports, reports from research organizations and the internet. The websites of PPOA and the National Council for Law Reporting, and other internet search engines such as Google Scholar were also consulted on various issues.

1.10.4 Data Collection Methods

In collecting data, the interview method was used. The respondents were approached in person and different questions were posed to them and the answers given written down. A combination of open and closed–ended interviews was conducted in order to get more information.

1.10.5 Data Analysis

The data collected was analyzed by thematic analysis technique. The major topics or subjects were organized and the major concepts or themes identified. The data collected was perused and information that was relevant to the research questions and objectives identified. A coding system was developed based on samples of collected data and major topics or issues were covered. All the coded materials were then placed under the major themes or topics identified and all materials relevant to a certain topic were placed together.

1.11 Chapter Breakdown

Chapter one marks the introduction of the research topic and which includes an overview of the research problem, the background and justification of the study. It also contains the theoretical framework, literature review and outlines the manner in which the research was conducted.

Chapter two examines the indicators or the criteria of an ideal administrative review tribunal and this is for purposes of testing whether the PPARB has been effective in carrying out its mandate of resolving public procurement disputes in Kenya. The Chapter is informed by the principles and recommendations emanating from the report of the Frank's Committee of the UK of 1957,[63]the UNCITRAL Model Law, the GPA, the EU procurement regime and the NAFTA.

Chapter three interrogates the manner in which the PPARB has been carrying out its adjudicatory role since it was established. It delves into issues such as the PPARB's independence, impartiality, cost-effectiveness, and accessibility to its services. The chapter further identifies the challenges faced by the Board in discharging its mandate and the successes achieved.

Chapter four gives conclusions on the findings of the study and makes recommendations on the measures that can be applied in addressing the challenges affecting the effectiveness of PPRAB.

[63]Jones B.L. (1989). *Garner's Administrative Law.* 7th Edition, London: Butterworths, p. .275

CHAPTER TWO

THE INDICATORS OF AN IDEAL PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW TRIBUNAL

2.0 Introduction

While the main focus of this study is on the PPARB's effectiveness in carrying out its adjudicatory role, it is pertinent to delve into the indicators of an ideal administrative review tribunal as a derivative framework for a proper assessment. These indicators are found in the Constitution of Kenya 2010, the so called Frank's Principles that came about as a result of a report made by the Frank's Committee on Administrative Tribunals and Enquiries of 1957 in the UK,[64] the UNCITRAL Model Law on Procurement,[65] the GPA,[66]and the procurement regimes under the EU[67] and NAFTA.[68]

2.1 PPARB as a Tribunal

According to Craig, a tribunal is characterized by certain attributes, which include: the ability to make final, legally enforceable decisions that are subject to appeal or review; independence from any department of government; the holding of a public hearing judicial in nature; the possession

[64]Jones B.L. (1989). *Garner's Administrative Law.* 7th Edition,London: Butterworths at p. 278.
[65] UNCITRAL stands for the United Nations Commission on International Trade Law and the UNCITRAL Model Law on Procurement of Goods, Construction and Services, A/49/17 (Feb, 1995) is one of the international instruments negotiated by the international community for purposes of establishing certain international standards in public procurement. Its main objective is to provide a model for states to reform or promulgate regulatory systems for procurement.
[66] This is an agreement on government procurement that was concluded at the end of the Uruguay Round of General Agreement on Tariffs and Trade (GATT) of 1994 and is administered by the World Trade Organization (WTO). The agreement applies only to member countries that have acceded to it.
[67] The European Union (EU) is comprised of 15 member states in Europe and deals mainly with economic matters, foreign and defence policy and co-operation in criminal justice issues. At the regional level, the procurement regime of the EU is the most developed and comprehensive.
[68] This Agreement was concluded in 1992 for purposes of creating a free trade area for the United States, Canada and Mexico and contains detailed provisions for opening up public procurement.

of expertise; a requirement to give reasons; and the provision of appeal to the High Court on points of law.[69]

Jones[70] attributes a tribunal to the following characteristics: it is independent of the administration and decides cases impartially as between the parties before it; it reaches a binding decision in relation to the cases heard which distinguishes tribunals from inquiries which hear evidence but merely make recommendations to the ultimate decision-maker; its decisions are reached by a "panel" or "bench" of tribunal members rather than a lone adjudicator; it adopts a procedure akin to, though rather simpler and flexible than, a court of law; and it has a permanent existence and is normally established under an Act of Parliament to specifically deal with a particular type of case or a number of closely related cases. Tribunals are required to be more advantageous in terms of informality, economy, speed, and expert understanding of tribunal hearings over the ordinary court procedures.

Although PPARB is not statutorily referred to as a "tribunal," it is a tribunal since it contains nearly all the aforementioned attributes by virtue of its structure, operations and the particular types of cases it deals with. Further, Article 169 (1) (d) provides for local tribunals established under an Act of Parliament as part of the subordinate courts of Kenya. Thus, PPARB, having been established under the Act, falls within this category and exercises judicial authority just like the ordinary courts. This is a new shift from the old Constitution, which did not recognise the role of tribunals in the administration of justice and did not confer judicial authority on them.

[69] Craig P. P. (1999). *Administrative Law*, 4th Edition, London: Sweet & Maxwell Limited, p. 250.
[70] Jones, *supra* note 64 at p. 275.

2.2 The Indicators of an Effective Public Procurement Review Tribunal

Some of the universally accepted and immutable features of an ideal public procurement administrative review tribunal are discussed below.

2.2.1 Independence

Independence is one of the most important attribute of an ideal and effective public procurement review tribunal. Under Article 160 of the Constitution, the Judiciary is granted independence in exercising judicial authority. Further, Article 160 (5) of the Constitution grants the members of PPARB immunity while discharging their functions while Article 50 (1) requires PPARB to be independent in discharging its mandate. PPARB is therefore required to be independent and is only subject to the Constitution and the law and should not be controlled or directed by any person or authority.

For an ideal tribunal to be deemed as independent, it should have the following characteristics: it should not be housed by the department in which the disputes that the tribunal is required to resolve emanate andalso should not operate as a unit of such department as this would raise suspicion as regards the complete independence of the tribunal; it should have its own staff and not get staff seconded from such departments; and must be financially independent by having its own budget whose expenditure it should account for independently but not through these departments.[71] Further, the powers of appointment and removal of members of the tribunal should not be vested in the government department over whose decisions the tribunal is established to sit in judgment.[72] Such a tribunal would be perceived to be influenced in its

[71] Jones, *supra* note 64 at p. 281 (The Franks Report).
[72] Ibid.

decisions by the said department and therefore not independent. Such powers should be vested in the office of the Chief Justice since this office is responsible for the appointment of judges and magistrates.[73] However, in some situations the chairperson can be appointed by the Chief Justice but the members are appointed by the relevant central department. In circumstances where the minister of such a department is conferred with powers of appointment of members, the minister should be provided with a list of nominees from various professional backgrounds depending on the mandate of the particular tribunal and the minister should only appoint members from the approved list. Therefore, the minister is not free to appoint cronies who can be easily influenced.[74] The minister should also not be granted powers to select the panel of members to hear particular cases and this role should be performed by the chairperson of powers.

The GPA provides that bid challenges or protests must be heard by a "court" or by an independent review body with no interest in the outcome of the procurement and whose members are secure from external influence during the term of appointment.[75] It assumes that a court or such a review body provides adequate procedures for independence. This is important in order to ensure both fairness and the appearance of fairness and to fulfil the important legal maxim that justice must be done and seen to be done.

[73] Ibid at p.275.
[74] Ibid at p. 282.
[75] *See* Agreement on Government Procurement, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO GPA], Annex 4(b) (setting out objectives in the introduction), *available at* <http://www.wto.org/English/docs-e/legal-e/gpr-94_e.pdf> last visited 24 August, 2014., art. XX, para. 6; Arrowsmith *et al*, *supra* note 1 at p. 767.

2.2.2 Impartiality

According to the Franks Committee, impartiality requires the freedom of tribunals from the influence, real or apparent, of departments concerned with the subject-matter of their decisions.[76] Such a tribunal should exercise its mandate free from bias or conflict of interest. Article 50 (1) of the Constitution provides that PPARB while resolving disputes should be impartial. According to the GPA, an effective public procurement review tribunal must be impartial with no interest in the outcome of the procurement.[77]

2.2.3 Fairness

Fairness requires the adoption of a clear procedure which enables parties to know their rights, to present their case fully and to know the case which they have to meet.[78] An ideal tribunal should ensure that justice is done to all irrespective of status; and that justice is administered without undue regard to procedural technicalities.[79] The parties before the tribunal have a right to administrative action that is efficient, lawful, reasonable and procedurally fair.[80]

In addition, a tribunal should formulate its own rules of procedure tailored specifically for the kind of disputes that would be presented before it. This ensures that the tribunal is not straddled by procedural matters like the ordinary courts and therefore offer speedier remedies. Although

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[76] Armstrong, Gillian Claire. (2011). *Administrative Justice and Tribunals in South Africa: A Commonwealth Comparison.* (Master of Laws' Thesis, University of Stellenbosch), p. 64 (Citing the Committee on Administrative Tribunals and Enquiries, *Report of the Committee on Administrative Tribunals and Enquiries.* Command 218 (1957) (the Franks Report) p. 42); see also Geoffrey, Marshall. (1957), The Franks Report on Administrative Tribunals and Enquiries. Public Administration, 35: 347-358. doi: 10.111/j.1467-9299.1957.tb01316.x, accessed on 12/8/2014.

[77] GPA, *supra* note 75. Similarly, under Article 1017 (g) of NAFTA, the tribunal must be impartial with no substantial interest in the outcome of procurements to receive bid challenges and make findings and recommendations concerning them.

[78] Armstrong, *supra* note 76 at p. 64 (quoting the Franks Report).

[79] Constitution of Kenya, 2010, Article 159(2).

[80] Constitution of Kenya, 2010, Article 47(1). Article 50 (1) also grants every person to have any dispute resolved in a fair manner before a court or an independent and impartial tribunal.

tribunals are required to conduct their proceedings in an informal manner, such rules of procedure will ensure that the proceedings are conducted in an orderly manner. Further, this would make it easy for the tribunal to properly sift the facts and weigh the evidence before it as well as ensure procedural fairness to all the parties. According to the Franks Committee, these rules should be in subsidiary legislation and not in the statute establishing the tribunal.[81]In order to ensure fairness in the proceedings, the procedural rules must provide that the parties have access to all proceedings and that witnesses can be presented and give evidence.[82] The parties should also be granted adequate time to prepare for their cases before the hearing can commence as well as the opportunity of being heard before a decision is reached.[83] Such rules should provide that the respondent be served with the complaint in good time indicating clearly the complaint, the grounds for the complaint and the remedies sought from the tribunal.[84]

According to the UNCITRAL Model Law, an ideal public procurement administrative review tribunal must ensure fairness in the review process by providing the following matters in its procedural rules: that notice of any review proceedings and their substance should be given to all participants in the award procedure; a notice that they may participate in the challenge proceedings and may lose their right to bring the same type of claim in the future if they fail to do so; a copy of the decision of the administrative review body should be provided within five days of the decision to the complainant, the procuring authority or any other participant in the review proceedings; and that a copy of both the decision and complaint should be made available promptly for public inspection, with a proviso that no information should be disclosed if this would be contrary to law, would impede law enforcement, would not be in the public interest,

[81]Armstrong, *supra* note 76.
[82] GPA, *supra* note 75.
[83] Arrowsmith *et al*, *supra* note 1 at p. 767.
[84] Jones, *supra* note 64 at p. 284 (Franks Report).

would prejudice the legitimate commercial interests of the parties or would inhibit fair competition.[85]

The Model Law also suggests that a review body should give a written decision, indicating the reasons for it and the remedies granted.[86] This is important so as to enable an aggrieved party to seek further relief either by way of appeal or judicial review. This provision also ensures that there is transparency in the review process. However, according to the Franks Committee, reasons for the decision may not be given in cases of national security or where the disclosure of reasons may be contrary to the interests of any person primarily concerned with the decision.[87] The GPA provides that decisions should given in writing with a statement describing the basis for them but not necessarily available to the public as suggested by the UNCITRAL Model Law.[88]

2.2.4 Timeliness in dispensing justice

A tribunal should ensure that justice is not delayed.[89] According to the Franks Committee Report, an ideal tribunal must dispose of the disputes before it expeditiously and faster than the ordinary courts.[90]

[85] Arrowsmith *et al*, *supra* note 1 at p. 767-768.
[86] Arrowsmith *et al*, *supra* note 1 at p. 767-768. Similarly, under NAFTA, the review body's decision in respect of bid challenges should be in writing, provided in a timely manner, and made available to the parties and interested persons.
[87] Jones, *supra* note 64 at p. 290.
[88] GPA, supra note 72.
[89] Constitution of Kenya, 2010, Articles 47 (1) and 159 (2).
[90] The GPA and NAFTA also provide that decisions of the tribunal must be rendered in a timely manner.

2.2.5 Promotion of Alternative Dispute Resolution Mechanisms

Article 159 (2) (c) of the Constitution requires tribunals to promote alternative forms of dispute resolution including mediation, reconciliation, arbitration and traditional dispute resolution mechanisms.

2.2.6Accessibility

Under Article 6 (3) of the Constitution, each state organ is required to ensure reasonable access to its services in all parts of the country. PPARB is a state organ and hence it is under a constitutional duty to ensure that its services are available in all parts of the country where they are required. In order to enhance access to its services, an ideal tribunal should endeavour to carry out public awareness campaigns which would inform the public on the availability of the tribunal proceedings in resolving the particular disputes within its mandate.[91] The public should be made aware of the jurisdiction of the tribunal, the nature of its proceedings, its location as well as the cost of presenting the disputes before the tribunal.

Further, according to the Franks Committee, an ideal tribunal renders its services cheaply as compared to the ordinary courts. The cost of preferring disputes before PPARB should be reasonable and affordable.[92]

A person appearing before the tribunal must be granted the right to be represented by a lawyer of his choice and this should only be curtailed in the most exceptional circumstances.[93] Although proceedings before a tribunal are informal, the presence of a lawyer in the proceedings is

[91]Jones, *supra* note 64 at p. 290.
[92] Constitution of Kenya, 2010, Article 48. Cost-effectiveness is one of the principles that should guide public procurement under Article 227 (1) of the Constitution.
[93] Jones, *supra* note 64 at p. 286.

valuable as it is a daunting task for the parties to represent themselves satisfactorily.[94] The lawyers are however required to conduct themselves differently from when they appear before the ordinary courts of law. It is also necessary that legal assistance and advice be provided at the state's expense to parties who cannot afford legal representation.[95] This also enhances access of tribunal services by parties who are desirous of presenting their disputes before a tribunal for resolution but cannot afford legal services.

2.2.7 Transparency

An ideal tribunal must embrace the core value of transparency or openness. According to the Franks Committee, openness requires the publicity of proceedings and knowledge of the essential reasoning underlying the decision.[96] Article 50 (1) of the Constitution requires that disputes be resolved in a public hearing in order to ensure transparency in the proceedings. Further, under the GPA, states are required to provide non-discriminatory, timely, transparent and effective procedures to enable suppliers and service providers to challenge or protest alleged breaches of the Agreement arising in procurements in which they have, or have had, an interest.[97] The GPA also requires that tribunal proceedings take place in public and that documents are disclosed to the tribunal.[98] The tribunal must therefore observe transparency in the proceedings.

Although public hearings are very central in proceedings before a tribunal, Article 50 (8) of the Constitution provides for the exclusion of the press or the public from any proceedings on the basis of protection of witnesses or vulnerable persons, morality, public order or national security. The Franks Report also states that in certain circumstances, a tribunal can hold its sittings in

[94] Ibid.
[95] Ibid.
[96] Armstrong, *supra* note 76 at p. 64.
[97] GPA, supra note 75 Article XX, para. 2.
[98] Ibid.

camera where the ends of justice so requires.[99] It can thus be said that the question of public hearing is not absolutely guaranteed under the Constitution; it actually depends on the nature of the subject matter in issue.

2.2.8 Expertise in the subject matter of the disputes

Franks Committee found that an ideal tribunal must have the necessary expertise in the subject area of the dispute.[100] Since tribunals deal with matters in a particular area and the membership of the tribunals comprise persons from different professional backgrounds, the tribunal possesses more expertise as compared to the ordinary courts. An ideal tribunal must therefore be composed of members who possess the relevant professional and specialised knowledge in the subject matter of the disputes.

Such a tribunal should be composed of a chairperson who has legal qualifications and who should preside over the hearing of the disputes.[101] The hearing should be conducted by a panel comprising the chairperson and two other persons who should represent in some way each side of the dispute or bring in some professional and technical expertise to the tribunal. These experts are expected to make use of their knowledge and experience to ensure that the tribunal properly understands the facts of the case and appreciates fully the arguments being tendered. Having a legally qualified chairperson enables the tribunal handle the often complex rules and regulations relevant to its decisions. This also enhances objectivity in the treatment of cases and in the proper sifting of facts.[102]

[99] Jones, *supra* note 64 at p. 285.
[100] Ibid at p. 282.
[101] Ibid.
[102] Ibid.

2.2.9 Accountability

Accountability[103]is one of the requirements of public procurement provided for under Article 227 (1) of the Constitution and PPARB should empress it in the discharge of its mandate under the Act.

Franks Committee found that it is important to carry out a feasibility study before establishing a tribunal for purposes of predicting the likely workload of the tribunal at the time of establishment.[104] The study would inform the relevant agency on the likely number of members to appoint to sit at the tribunal. If the workload is likely to be small, it would be appropriate to appoint a small number of appointees or a panel consisting of just some of the appointees to constitute the tribunal and hear all cases before it. On the contrary, if the workload is large, the solution would be to appoint a number of separate tribunals based geographically in appropriate centres. This kind of organization is known as the "presidential" system where a president of the tribunal is appointed and given responsibilities to superintend the general working of the particular tribunals which are themselves organized on a regional basis.[105]

Tribunals are established under statute and there is need to have a proper administrative structure so as to ensure accountability for their functions. This requires that the tribunals are established under the office of the Chief Justice. The organisation, staffing and accommodation of all

[103]Schedler Andreas, "Conceptualizing Accountability" in A. Schedler, Larry Diamond, and Marc F. Plattner (ed.), *The Self-Restraining State: Power and Accountability in New Democracies* (Boulder, CO: Lynne Rienner, 1999) 14-17.Schedler describes accountability as a relationship in which A is accountable to B if A is obliged to explain and justify his or her actions to B or if A may suffer sanctions if his or her conduct, or explanation for it, is found wanting by B.
[104] Jones, *supra* note 64 at p. 281
[105] Ibid.

tribunals should also be the responsibility of the Chief Justice.[106] Such a system would also save on the costs of running the tribunals since the tribunals are brought under one administrative unit as opposed to a situation where each operates under the central department from which the disputes emanate. The tribunals can also share premises since some of them only conduct proceedings on an *ad hoc* basis.

2.2.10 Right of Appeal

An ideal tribunal should have a provision for a right of appeal on facts, law and merits by parties aggrieved by its decisions to an appellate tribunal or court.[107]However, appeals on merits should not be from a tribunal to a minister because of the likelihood of lack of impartiality on the part of the minister in decision-making and the possibility that the minister will be guided by the advice of his officials in his decision. In addition, a right of appeal on points of law should be to the courts from the tribunals' decisions.[108]

2.2.11 Informality

Proceedings before a tribunal are required to be informal. A tribunal should give priority to substantive issues over procedural matters. Tribunals are expected to disregard the strict and complex rules of evidence applicable in ordinary courts.[109]Hearsay evidence in respect to matters of opinion and the production of statistical and other materials should be permitted in proceedings before a tribunal without regard to the "best evidence" rule applied in ordinary

[106] Ibid at p.275. In the UK, the Frank's Committee recommended the setting up of a Council of Tribunals for the purpose of superintending over the operations of tribunals as well as the appointment of members of tribunals. The Council was also intended to help in formulation of procedural rules for the tribunals based on common principles but tailored to the needs of each. A Council of Tribunals was established and an Act of Parliament, the Tribunals and Enquiries Act of 1958, enacted as a result of these recommendations.
[107] Jones, *supra* note 64 at p. 290.
[108] Ibid at p. 290.
[109] Ibid.

courts. However, this kind of informality should not lead to injustice and the presence of a legally qualified chairperson should help the tribunal to attach appropriate weight to the various kinds of evidence adduced.[110]

2.2.12 Powers and Mandate of an Effective Public Procurement Review Tribunal

Ordinarily the statute establishing the particular tribunal provides the jurisdiction of the tribunal which includes the nature of disputes that the tribunal should entertain, the parties who can seek redress before it, and the powers that the tribunal can exercise. The UNCITRAL Model Law suggests that the review procedures should be available to any supplier or contractor that claims to have suffered, or who may suffer, loss or injury due to a breach of duty imposed on the procuring entity. Under the GPA, it is only the interested bidders in procurements in which they have, or have had, an interest that may institute or initiate a complaint before such a tribunal.[111] The Model Law does not limit the right of a state to confer standing on other persons to seek for review other than the aggrieved bidders but requires that contractors be given such a right as a minimum standard.[112]Subcontractors, trade associations, interested government bodies, taxpayers and members of the public should not be granted such a right as this would lead to disruption in provision of public goods and services. This would also increase the cost in public purchasing and contribute to inefficiency in public procurement.[113]

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[110] Ibid at p. 289.
[111] GPA, *supra* note 75, Article XX, para. 2. Under the EU procurement regime, a complaint before a review tribunal can only be lodged by a person who has had or has an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement.
[112]UNCITRAL, *UNCITRAL Model Law on Procurement of Goods, Construction and Services with Guide to Enactment* (2011), article 52 paragraph 1, retrieved from <http://www.uncitral.org/../2011Model.html> accessed on 12/8/2014.
[113] Ibid.

Under the GPA, an ideal tribunal possesses the same powers as a court and is required to pronounce the proper application of the law and apply sanctions to enforce it.[114]The tribunal is required to limit itself to the complaint before it and hence should not consider extraneous matters that have not been presented before it.[115] The decisions of the tribunal should be binding in nature and effectively enforced.[116]Under NAFTA, the review tribunal has power to deal with all complaints by aggrieved bidders challenging any aspect of procurement.[117]

An ideal tribunal should have the power to administer oaths to witnesses giving evidence as this would deter witnesses from giving false evidence. It should also have powers to issue *sub-poenas* requiring witnesses to attend and produce documents.[118]In addition, a tribunal should have powers to award costs although such an award should be discretionary and in cases where the ends of justice so demands.[119] Tribunals are required to be cheaper than the ordinary courts and therefore in certain circumstances each party may be ordered to pay its own costs. In ordinary courts, costs follow the event.

[114] GPA, *supra* note 75 Article XXII.
[115] See North American Free Trade Agreement (NAFTA), Art. 1017. Retrieved from <www.citizen.org/nafta> accessed on 12/8/2014.
[116] GPA, *supra* note 72 Art. XX, para.7 (a). However, under Article 1017(l) of NAFTA, the tribunal's decisions should be in the form of recommendations and should normally be followed but are not binding in nature. The UNCITRAL Model Law does not state that the decisions of the tribunal must be binding or enforceable.
[117] NAFTA, *supra* note 115. However, the UNCITRAL Model Law provides that an effective public procurement tribunal should not have the power or mandate to review certain decisions of procuring entities, which include: the selection of the method of procurement; the choice of selection procedure for choosing between proposals in a procurement of services; a decision to limit participation in proceedings on the basis of nationality; a decision to reject all tenders, quotations, offers or proposals; and an omission to refer to certain information in the contract documentation, namely the laws and regulations applicable to the procurement.[117] This exemption is necessary so that a distinction is drawn between the requirements and duties on the procuring entity that are directed to its relationship with its suppliers and contractors and that are intended to constitute legal obligations towards the suppliers and contractors on the one hand, and other requirements that are regarded as only being internal to the administration, on the other hand
[118] Ibid at p. 288 (Franks Report).
[119] According to the Franks Committee, most tribunals in the UK did not have powers to award costs and each party would bear its own costs whether it wins or loses.

The UNCITRAL Model law suggests that the tribunal should be given powers to grant remedies or the power to recommend those remedies.[120] The tribunal should also have powers to either require or recommend that the procuring entity do pay compensation to aggrieved parties as a result of its breach of the rules.[121] Such compensation may be awarded for any reasonable costs incurred by the aggrieved supplier or contractor as a result of an unlawful act or decision of, or procedure followed by the procuring entity. Compensation can also be granted for loss or injury suffered by the aggrieved contractor in connection with the procurement proceedings.[122] The damages for such loss can be awarded for the expenses incurred in participating in the award procedure including the costs of preparing the bid or proposal.[123] The GPA provides that, where the tribunal awards compensation to the aggrieved party, the damages may be limited to the costs for tender preparation or protest and such a remedy should only be available to contractors.[124]

Moreover, an ideal tribunal should have powers to suspend the procurement process after the complaint has been lodged pending resolution of the complaint, except in cases of urgency or where the delay would be contrary to the public interest.[125] The tribunal should weigh the balance of interests between the parties involved before granting the suspension.[126] If the tribunal finds that there is no just cause for granting the suspension, the reasons for such a decision

[120]Arrowsmith *et al*, *supra* note 1 at p. 781-782. Some of the remedies include: a declaration of the relevant legal rules or principles; a prohibition on the procuring entity from acting or deciding unlawfully or from following an unlawful procedure; a requirement for a procuring entity which has acted or proceeded in an unlawful manner, or that has reached an unlawful decision to act or proceed in a lawful manner or reach a lawful decision; annulment in whole or in part of an unlawful act or decision; and revision of an unlawful decision by the procuring entity, or substitution of the tribunal's own decision.[120] These remedies are similar to those previously awarded by the PPCARB under the 2001 Regulations.

[121] Arrowsmith *et al*, *supra* note 1 at p. 795.

[122] Ibid at p. 796.

[123] Ibid at p. 800.

[124] GPA, *supra* note 75.

[125] NAFTA, *supra* note 115 Art. 1017 (j); GPA, *supra* note 72 Art. XX, para. 7 (a). In exercising such powers, the tribunal should take into account the interests that are likely to be affected by the suspension and this includes the disruptive effects on public services or projects that are likely to occur due to the delay of the procurement as well as the interest of other participating firms especially the successful bidder.

[126]GPA, *supra* note 72 Art. XX, para. 7 (a).

should be provided in writing.[127] The provision of such powers is crucial as the successful bidder may have concluded the contract with the procuring entity at the time when the tribunal makes its decision and hence rendering the decision nugatory. The tribunal should also have the power to extend the suspension in order to preserve the rights of the applicant as long as the total period of suspension does not exceed thirty days.[128]An automatic suspension of an award procedure may also be provided once a challenge has been instituted pending the hearing and determination of the complaint for at least seven days.[129]

Further, the tribunal should not be granted the power to set aside concluded contracts if damages are adequate as a remedy to compensate the aggrieved bidder.[130] This is because the procuring entity will not be in a position to correct the breach at this stage since the contract has entered into force and hence it defeats the purpose of granting such a remedy.

2.3 Conclusion

In conclusion, an ideal or effective tribunal should essentially possess certain features, namely: independence, impartiality, fairness, cost-effectiveness, accessibility, informality, timeliness, and accountability. These principles seem to converge quite comfortably with respect to the basic design principles of transparency, the rule of law and non-discrimination. The extent of actualization of these values in the functioning of PPARB is an issue to test. As an avenue towards the resolution of complaints by aggrieved bidders, PPARB has to confine itself within these attributes in order to ensure public confidence in service delivery. The ensuing chapter thus

[127] Ibid.
[128] UNCITRAL, *supra* note 65.
[129] UNCITRAL Model Law, Article 56 paragraph 1.
[130] Ibid at p. 786.

applies these attributes in assessing whether PPARB has been effective in discharging its mandate.

CHAPTER THREE

THE EFFECTIVENESS OF THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD (PPARB)

3.0 Introduction

As discussed in the previous chapter, an ideal and effective public procurement review tribunal is one that is accountable, independent, accessible, impartial, timely in its decisions, and whose decisions are enforceable. Such a tribunal enhances confidence in the public procurement system.[131] Since its establishment, PPARB has contributed positively to the achievement of the objectives of public procurement as set out under section 2 of the Act and Article 227 of the Constitution. PPARB has however faced several challenges, which have affected its effectiveness in carrying out its mandate as provided in the Act. This chapter therefore seeks to identify these challenges and the extent to which they have hampered PPARB's effectiveness. The indicators discussed in chapter two are used as a yardstick in assessing its effectiveness.

3.1 The Effectiveness of the PPARB

3.1.1 Timeliness in Resolution of Disputes

Speedy remedies are particularly important in public procurement as the contract will often be awarded, and work begun, quite quickly following the conclusion of the award procedure, making it difficult to correct the breach once the tribunal has heard the case. The promptness of the applicant in initiating proceedings is also important for the speedy resolution of disputes. The length of time taken to hear the complaints is therefore very critical and the longer the period, the

[131]Trepte, P. (2005). *Regulating Public Procurement: Understanding the Ends and Means of Public Procurement Regulation*. New York: Oxford University Press at p. 53.

greater the inconvenience of the suspension or set aside. Thus, only a tribunal which provides for a very rapid resolution of disputes can be effective in enforcing the relevant rules and give adequate protection to the other interests involved.[132]

Section 97 (1) of the Act requires PPARB to conclude the review within 30 days after receiving the request. Regulation 73 (1) (c) of the Principal Regulations requires an aggrieved bidder to lodge a complaint within seven days of the breach complained of, where the request is made before the making of the award, or of the notification under sections 67 or 83 of the Act.[133] Further, the procuring entity is required to respond within five days of service of the complaint.[134] PPARB only deals with reviews that are preferred within the stipulated period since it has no powers to extend time to a party who has not filed his complaint on time.[135]

Many complaints have been dismissed for being filed out of time and many applicants are unable to prepare their requests for review comprehensively thereby necessitating adjournments.[136] The public procurement process involves a lot of documentation and seven days are not adequate to many of these applicants who may also need time to seek legal representation. This study, however, has established that all the decisions of PPARB have been made within 30 days of filing the complaint and this is in compliance with the Act.[137]

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[132] Arrowsmith *et al*, *supra* note 1 at p.762.
[133] Public Procurement and Disposal (Amendment) Regulations, 2013, Legal Notice No. 109 of 2013, at Regulation 20. Previously the period was fourteen days but this was reduced to seven days through this amendment
[134] Ibid at Regulation 21 (3). The period was reduced from seven days to five days through this amendment.
[135] One such case that was dismissed for being filed out of time and the complaint was not heard on merits is *Application No. 39/2013 Associated Motors Limited v The National Treasury*. PPARB stated in that case that it had held in several decisions and particularly in *Volth Hydro GMBH & Company v Kenya Electricity Generating Company Limited Application No. 55/2009* that it did not have jurisdiction to hear and determine a request filed out of time.
[136] Ibid.
[137] Supra note 17.

3.1.2 The Cost of Preferring Disputes before the PPARB

The cost of preferring disputes before PPARB includes the filing fees charged by PPARB on instituting the proceedings, the cost of legal representation before PPARB, the cost incurred by bidders in the preparation of the tender and the tendering process after the award is suspended or set aside as well as the cost suffered by tax payers as a result of delayed delivery of services or goods as a result of the suspension or annulment of the procurement proceedings.

The current schedule of filing fees charged by PPARB is provided under the Second Schedule of the Public Procurement and Disposal (Amendment) Regulations, 2013. These fees include an administrative fee of Ksh.5000.[138] However, upon filing the complaint the fee payable depends on whether the value of the tender can be ascertained or not. For tenders whose value is ascertainable the fee is calculated as follows: a tender whose value does not exceed Ksh.2, 000,000 the fee payable is 1 % of the value of the tender subject to a minimum of Ksh.20, 000; where the value of the tender exceeds Ksh.2, 000,000/- but is not above Ksh.50, 000,000 the fee payable is the fee for Ksh.2, 000,000 plus an additional fee of 0.25 % on the amount above Ksh.2, 000,000; and where the value of the tender exceeds Ksh.50, 000,000 the amount payable is the fee for Ksh.50, 000,000 plus an additional fee of 0.025 % on the amount above Ksh.50, 000,000 but subject to a maximum fee of Ksh.200, 000.[139]

In regard to tenders of unascertainable value the fee payable is categorized into two groups.[140] The first group is the Pre-qualification and other "Unquantified Tenders" and the fee payable is

[138]This was an increased from the previous sum of Ksh.2000.
[139]Under the previous Schedule the maximum fee payable under this sub-category was Ksh.80, 000.
[140]Under the previous Schedule there were three groups falling under this category.

Ksh.40, 000.[141] The second group is in regard to "Any other Tenders" and the fee payable is subject to a minimum of Ksh.10, 000 and a maximum of Ksh.20, 000.

Other fees that are charged by PPARB include: adjournment fees of Ksh.10, 000; fees payable on filing a preliminary objection of Ksh.5, 000; and a fee of Ksh.40, 000 in regard to a complaint against the decision of the Director-General of PPOA either under section 106 (3) or 117 (3) of the Act.[142]

The fees payable by litigants before PPARB are on the higher side as compared to the fees payable at the Magistrates Courts and even the High Court. For instance, the adjournment fees payable at the Magistrates Court and the High Court is Ksh.200 and Ksh.400 respectively whereas at PPARB the fee is Ksh.5, 000. The very high scale of fees charged by PPARB increases the cost of litigation. One of the key attributes of an effective public procurement tribunal is that it should be cheaper than the ordinary courts.[143]Article 48 of the Constitution also requires that the fees payable by parties appearing before the courts and tribunal should be reasonable and must not impede access to justice. PPARB has therefore failed to provide justice that is cheaper than the ordinary courts as is expected in regard to proceedings before a tribunal.

3.1.3 Accessibility

Accessibility is one of the most important attributes of an effective public procurement review tribunal as discussed in the previous chapter. The Act or the Regulations do not provide the place where PPARB would be located for purposes of discharging its functions. There is also no

[141]Under the previous schedule the fee payable for both Pre-qualification and other "Unquantified Tenders" was Ksh.10, 000 for simple tenders; Ksh.20, 000 for medium tenders; and Ksh.40, 000 for complex tenders.
[142]Prior to the amendment the fee payable for a request under that section was Ksh.20, 000. The Secretary to PPARB is granted powers under Part II of the Fourth Schedule to demand for any additional fee if the fee paid at the time of filing of the request is less than that ascertained to be chargeable
[143]Jones, *supra* note 64.

provision as to whether PPARB can have branches or offices in different parts of the country in order to enhance access by its clients to its services. However, the Secretary of PPARB is required to invite the members of PPARB to attend the hearing three days before the hearing and the invitation should indicate the time, date and place of the hearing.[144]

PPARB is located on the 10th Floor of the National Bank Building along Kenyatta Avenue in Nairobi City County. PPARB operates most of the time from Nairobi but in some few instances it has conducted its sittings out of Nairobi. Some of the places where it has conducted its sittings include Kisumu, Kakamega, Murang'a, Nyeri and Karatina. However, PPARB does not have registries out of Nairobi and therefore parties have to travel from all parts of the country to file their complaints in Nairobi.[145] The study established that even with the devolution of government's services to the counties and the increased procurement activities in these areas PPARB does not have any plans to open registries or offices out of Nairobi in the foreseeable future.[146]

Any party appearing before PPARB is entitled to representation by an advocate or any other person of his choice at the hearing of the complaint.[147] Whereas this is positive, the phrase "any other person of his choice" may lead to situations where parties are represented by persons who do not understand and follow the proceedings before PPARB. This is especially so in view of the complex nature of procurement matters and as a result the hearing of such cases may take longer than where parties are represented by lawyers. This may delay justice and also affect the efficiency of the PPARB in executing its mandate.

[144] Regulation 78 (1) of the Principal Regulations.
[145] Interview with Ms Pauline Opiyo Secretary to PPARB on 29/9/2014.
[146] Ibid.
[147] Public Procurement and Disposal Regulations, 2006 at Regulation 76.

This provision is however important in situations where a party may elect to be represented by a person who has expert knowledge in the subject area for instance, a project manager, procurement manager or such other persons who may be more conversant with the issues in question. In such circumstances, such representation enhances the effectiveness of PPARB as all the relevant issues are brought to the fore and hence improving the quality of its decisions.[148] A perusal of decisions of PPARB and its predecessor PPCARB indicates that in majority of the cases, the parties to the requests have been represented by advocates. There are only a few cases where parties have appeared in person but these are mostly in low value procurements.[149] The lack of legal representation in these cases can be attributed to the high cost of preferring disputes before PPARB.

In addition, the provision for legal aid and advice to aggrieved bidders who cannot afford legal representation is an important aspect in ensuring access to justice. This is however not provided for under the Act or the Principal Regulations. In Kenya, a National Legal Aid Scheme had been established in the year 2008 under the then Ministry of Justice and Constitutional Affairs but the same has not been operationalised. In addition, small enterprises, micro enterprises and other disadvantaged groups as provided under the Public Procurement and Disposal (Preference and Reservations) Regulations, 2011[150] and Public Procurement and Disposal (Preference and Reservations) (Amendment) Regulations, 2013[151] require to be assisted to access justice and legal representation before PPARB through legal aid and advice thereby reducing the costs of pursuing protests before it. This would improve the effectiveness of PPARB as more requests

[148] Interview with Mr. Mwaniki Gachoka, former Member and Chairman of PPCRAB and PPARB respectively on 21/8/2014.
[149] www.ppoa.go.ke/index.php?option=com_content&view=category&id=63&Itemid=166 Accessed on 4/7/2014, 7/7/2014 and 11/7/2014.
[150] Legal Notice No. 58 of 2011.
[151] Legal Notice No. 114/2013 published on 18/6/2013.

would be preferred before it and therefore correct most of the breaches of the law that occur in low value procurements that usually go unchallenged.

PPARB has not been accessible and has therefore not met one of the key requirements of an effective public procurement administrative review tribunal. This has increased the cost of litigation and for that reason the effectiveness of PPARB has been hampered.

3.1.4 Fairness

As indicated in chapter two, an effective public procurement review tribunal must ensure that the proceedings before it are conducted in a fair manner. This means that its decisions should be given in writing, reasoned and available to the parties; it should formulate its own procedures that are available to the parties; the parties should be granted an opportunity to be heard before a decision is rendered; and the parties should be allowed to call witnesses and produce any relevant evidence.[152]

The procedural rules governing proceedings before PPARB are made by the Minister and not PPARB and are contained in the Principal Regulations. The applicant is required to file a written complaint containing the grounds of the complaint and the alleged breach of the Act or rules with the PPARB.[153] The complaint is made in a prescribed form and this makes it easy even for parties who are unrepresented to present their complaints. The respondent is served with the complaint and is required to respond in writing.[154] The matter thereafter proceeds for hearing. However, the period granted to aggrieved bidders to file complaints before PPARB was reduced from fourteen to seven days and the period granted to the respondent to respond was also

[152]UNCITRAL, *UNCITRAL Model Law on Procurement of Goods, Construction and Services with Guide to Enactment* (2011), *supra* note 112.
[153]Public Procurement and Disposal Regulations, at Regulation 73.
[154]Ibid at Regulation 74 (3).

reduced from seven to four days.[155] However, the reduction of this period has not improved the effectiveness of PPARB since the period within which PPARB is required to determine the complaint was not amended and remains thirty days. The period is also not adequate to enable parties prepare their documents. This is also compounded by the fact that the registry of PPARB is based in Nairobi and hence parties must travel from all parts of the country to Nairobi to file their complaints.

The fact that there are procedural rules guiding the proceedings of the PPARB has ensured that the proceedings are conducted in an orderly manner. All the parties are also treated fairly. PPARB allows parties to present their evidence before it although the same is not taken under oath. Parties proceed by way of oral submissions.

An ideal tribunal is required to give its decisions in writing and these decisions should be reasoned and available to the parties. The Act and the Principal Regulations do not provide that the decisions of PPARB have to be made in writing, reasoned or made available to the parties. However, a perusal of the decisions made by PPARB indicates that its decisions are well-reasoned, in writing and are available to members of the public since they are available on the website of PPOA. Further, the remedies granted are clearly spelt out in the decisions. The members of PPARB do not take down the proceedings but the proceedings are recorded by a stenographer although they are not published in a hansard. However, a party can obtain copies of proceedings from PPARB in case of an appeal to the High Court.[156] PPARB launched a Public Procurement Decisions Digest on 10/9/2013 and which contains a summary of its decisions.[157] However, only a few copies of the Digest were printed and hence it is not available to the public

[155] These changes are contained in the Public Procurement and Disposal (Amendment) Regulations, 2013.
[156] Interview with Ms Judith Guserwa, former Member of PPARB on 5/9/2014
[157] The launch was reported by the Standard Newspaper of 11/9/2013 at page 24.

and public procurement stakeholders. This was attributed to the failure by PPOAB to allocate funds to PPOA that administers PPARB for the publication of the Digest.[158]

Further, the rules are not exhaustive on all procedural matters and do not incorporate the provisions of the Civil Procedure Act.[159]Such a provision would help PPARB deal with matters such as mode of service of documents upon parties, filing of affidavits and other mundane issues that are important in ensuring fairness and impartiality in dispensing justice between the parties. Although Regulation 74 of the Principal Regulations provides that the Secretary to PPARB is required to serve the complaint upon the respondent but the manner in which the service is to be effected is not provided for. Further, the Secretary is a procurement professional and is not well versed on legal matters on how service of documents is required to be effected in legal proceedings. There have been several instances that PPARB has adjourned the hearing of complaints due to lack of evidence of service upon the procuring entities or where a party although served with documents has not been granted reasonable time to respond to the complaint.[160] The lack of such provisions undermines the effectiveness of PPARB in carrying out its mandate.

3.1.5The Powers and Mandate of PPARB

For a public procurement review tribunal to be deemed as effective, it must possess certain kind of powers. Usually, the power and mandate of a tribunal is provided for in the particular statute

[158] Interview with Ms Pauline Opiyo, Secretary to PPRB on 29/9/2014.
[159]Cap 21 Laws of Kenya. Regulation 11 of the Rent Restriction Regulations made under the Rent Restriction Act Cap 296 Laws of Kenya grants the Rent Restriction Tribunal the discretion to apply the Civil Procedure Rules whenever necessary and in circumstances where no procedure is provided under the Act. Similarly, the Co-operative Tribunal has similar powers provided at Rule 6 of the Co-operative Tribunal (Practice and Procedure) Rules, 2009 made under the Co-operative Societies Act, Cap 490 Laws of Kenya.
[160] Interview with Ms Natasha Mutai a former Member of PPARB on 22/9/2014.

establishing it. The mandate includes the nature of the disputes that the tribunal can entertain, the parties who can seek redress before it and remedies it can grant to aggrieved parties.[161]

PPARB has power to nullify any act of a procuring entity including the entire procurement proceedings and can direct the procuring entity to do or redo anything in respect of the procurement.[162] It can also substitute its decision for that of the procuring entity. These powers in the researcher's view are substantive and have enabled PPARB to correct violations of procurement law.

Further, for a tribunal to be deemed to be effective, it must have the power to formulate its own rules of procedure which are tailored to its needs. The procedural rules relating to proceedings before PPARB are formulated by the Minister pursuant to the provisions of section 140 of the Act and are contained in the Principal Regulations. The Act or Regulations do not provide for any consultation by the Minister with PPARB or other stakeholders in public procurement. For instance, the publication of the Public Procurement (Amendment) Regulations, 2013 in two Legal Notices, Legal Notice No. 106 and 109 of 2013, brought a lot of confusion to the public procurement stakeholders. Both Notices appear in the same Kenya Gazette Supplement No. 89 of 2013 published on 18/6/2013. The Regulations made under Legal Notice No. 109 of 2013 were later revoked.[163]

[161]Under section 93(1) of the Act, any candidate who claims to have suffered or risks suffering loss or damage due to breach of a duty imposed on a procuring entity by the Act or the Principal Regulations, may apply for administrative review before the PPARB. Section 93(2) of the Act exempts certain matters from review and these are: the choice of procurement procedure; a decision by the procuring entity under Section 36 of the Act to reject all tenders, proposals or quotations; where a contract has been signed in accordance to Section 68 of the Act; and where an appeal is frivolous.

[162]Public Procurement and Disposal Act 2005, section 98.

[163]Interview with Mr. Sospeter Kioko, former member of PPARB, on 30/9/2014. This study established that the dual publication of the regulations was caused by the fact that one set of regulations emanated from PPOA and the other set from the Directorate of Public Procurement (DPP) under the Ministry of Finance/National Treasury. Although there is no reference to the DPP in the Act and PPOA took over the functions of DPP that had been bestowed upon it

The Minister also reduced the time which aggrieved tenderers are required to present their complaints to PPARB from fourteen to seven days and the filing of the response by the procuring entities from seven to five days by virtue of the above Regulations. Again, there was no consultation with PPARB being the entity affected by the amendment as well as other stakeholders in procurement.[164] The amendment has not in any way enhanced the efficiency of PPARB as intended since section 97 (1) of the Act that gives the time limit within which PPARB is required to make its decisions was not amended. This amendment has therefore made PPARB ineffective as the parties do not have adequate time to prepare for their respective cases.[165]

In addition, the fees payable by parties appearing before PPARB were increased through the same amendment.[166] The stakeholders in public procurement matters including members of PPARB were also not consulted before this amendment was effected and this has hampered access to the services of PPARB especially by aggrieved contractors and thereby reducing its effectiveness in carrying out its mandate.

It is also pertinent that a public procurement review tribunal be vested with the power to take evidence, administer oaths, summon witnesses who can give evidence and produce documents. Although PPARB is not bound by rules of evidence,[167] it does not have the power to administer oaths and summon witnesses to testify and produce documents before it. There is no provision

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by the Exchequer and Audit Act (Public Procurement Regulations), 2001, the department still exists. All the procurement officials in Ministries belong to the DPP and it oversees their training and career development. PPD is also involved in formulation of public procurement policy. The relationship between PPD and PPOA has been strained and there is overlap in the functions carried out by these entities including the formulation of public procurement policy as well as the regulations under the Act.

[164] This has resulted in so many requests being struck out for being filed out of time as some procuring entities were not even aware of the amendment. In addition, the applicants and the procuring entities are having difficulties preparing all the necessary documents thereby necessitating adjournments.

[165] Interview with Mr. Gicheru the Chairman of PPARB on 29/9/2014; Interview with Mr. Mwaniki Gachoka, former Member and Chairman of PPCRAB and PPARB respectively on 21/8/2014.

[166] The increment is discussed in this Chapter at 3.1.2.

[167] Public Procurement and Disposal Regulations 2006 at Regulation 86.

either under the Act or the Regulations providing how parties are required to tender evidence before PPARB. All that the Regulations require is the filling of a prescribed form by the applicant stating the reasons for the complaint including any alleged breach of the Act or the Regulations.[168] The respondent is required to file a memorandum of response and such documents as the Secretary of PPARB may specify.[169] The parties are not required to file any affidavits and hence the parties can manufacture documents or conceal information from PPARB in order to influence the decision of PPARB. Since parties do not tender sworn evidence PPARB has no way of testing the truthfulness of the assertions made by the parties either in the documents filed or in their submissions.[170] It is therefore crucial that the validity of the evidence tendered before PPARB is tested in order to provide credibility of its proceedings and decisions. This issue arose in the case between Horsebridge and Central Bank of Kenya.[171]

An effective public procurement administrative review tribunal must provide for suspension of procurement proceedings once a complaint by an aggrieved bidder has been lodged before it. This provision is very fundamental since unless procurement proceedings are suspended the procuring entity will proceed to conclude the contract and it will be too late to re-open the award procedure after the complaint is heard and determined.[172]

Section 94 of the Act provides for automatic suspension of procurement proceedings once a complaint is lodged before PPARB and the suspension continues until the complaint is heard and

[168]Ibid at Regulation 73.
[169]Ibid at Regulation 74 (3).
[170] Interview with Mr. Gicheru the Chairman of PPARB on 29/9/2014.
[171]*Application No 65/2012 Horsebridge Network Systems (EA) Ltd v Central Bank of Kenya*. The PPARB found that the purported circular of 26/9/2012 had been manufactured by the tender committee of the procuring entity in an attempt to oust its jurisdiction. The statements of the officials of the procuring entity, though found to be wanting, could not be tested in their truthfulness since they were not made on oath.
[172] Arrowsmith *et al*, *supra* note 1 at p. 772.

determined.[173] PPARB does not therefore have powers to determine whether the procurement proceedings should proceed or be stayed. Further, section 100 (1) provides that the decision of PPARB is final and binding on the parties unless judicial review proceedings are commenced within fourteen days of PPARB's decision. This provision therefore means that if a party applies for judicial review to the High Court within 14 days of the decision of PPARB there is an automatic stay of the procurement proceedings. In addition, section 100 (4) of the Act states that if judicial review is not declared by the High Court within thirty days from the date of filing, the decision of PPARB shall take effect. However, in view of these provisions and the fact that section 100 (4) was held to be unconstitutional and inconsistent with the objectives of the Act, parties in judicial review proceedings in the High Court usually apply and obtain orders of stay of procurement proceedings in order to protect the interests of their clients.[174]

The automatic stay of procurement proceedings is deficient in several ways. Firstly, the system is subject to abuse in that disgruntled bidders who have failed to clinch tenders may file frivolous, vexatious complaints that are not likely to succeed in a bid to delay the procurement process. This is very costly for the country as the delivery of goods or services by the government is delayed.[175].[176].

[173]The Act therefore provides for automatic suspension or stay of procurement proceedings for a period of thirty days from the date of filing the request for review pending the determination of the review. Under section 97 (1) of the Act, PPARB is required to complete the review within 30 days after receiving the request for the review. The GPA, the EU procurement regime and NAFTA all provide that an effective public procurement tribunal should possess powers to consider and determine whether to grant suspension of the procurement proceedings as opposed to the UNCITRAL Model Law that provides for automatic suspension. This kind of system is the one that Kenya adopted and is what is provided under the Act.

[174]Interview with Mr. Mohammed Nyaoga, an Advocate of the High Court of Kenya specializing in public procurement law practice, on 30/9/2014; see also High Court Misc. Civil Application No. 1260/2007 *Selex Systemi Integrati v The Public Procurement Administrative Review Board & The Kenya Civil Aviation Authority.*

[175]An example of this kind of scenario is the promise by the Jubilee government to provide laptops to all standard one pupils in public primary schools in the year 2014. The procurement process stalled after two of the tenderers filed complaints before PPARB and the procurement process was annulled. This was in *Application No. 3 & 4 of 2014 Hewlett Packard Europe BV and Haier Electrical Appliances Corporation Ltd v Ministry of Education Science*

Secondly, a grant of stay of procurement proceedings by PPARB would be more effective than an automatic stay in that PPARB would have powers to order the aggrieved party to comply with certain conditions such as the provision of security for costs incurred by the other parties in the event that the review is unsuccessful. Such conditions would deter bidders from filing frivolous and vexatious complaints.[177] The automatic stay of procurement proceedings does not provide this kind of deterrence.

Thirdly, if PPARB is empowered to determine the grant of suspension of procurement proceedings it would consider certain pertinent matters before making a decision whether to allow the suspension or not. These include: the rights of the applicant; urgent public interest considerations; adverse consequences if suspension is granted; balance of interests as between the parties involved or affected by the procurement; and the preservation of opportunities.

The decisions of an ideal public procurement review tribunal should be binding and enforceable. Although section 100 (1) of the Act provides that the decisions of PPARB are binding there is no provision that these decisions are enforceable. As a result, in circumstances where any party fails to comply with an order of PPARB the affected party has to obtain orders of mandamus from the High Court for compliance. This is time-consuming and costly and undermines the effectiveness of PPARB. For instance, in Application No. 51/2012 & 65/2012 between Horsebridge Network Systems (E.A) Ltd and Central Bank of Kenya, Central Bank of Kenya failed to comply with the decision of PPARB to award the contract to Horsebridge and Horsebridge sought for an order of

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and Technology The successful bidder was aggrieved by the decision of PPARB and moved to the High Court on judicial review and the tender award was nullified on 24/9/2014. Although the case was not found to be frivolous or vexatious, it serves as a good example of cases which have strained the Government's endeavour to meet its objectives.

[177] While this can also be mitigated by orders of costs or damages, the determination of the frivolity of a request for review before making such orders may in itself delay the delivery of Government projects.

mandamus from the High Court compelling the Central Bank of Kenya to comply with the decision of PPARB.[178]

Section 98 (d) of the Act empowers PPARB to order for payments of costs as between the parties to the review. However, a perusal of the awards of PPARB indicates that PPARB has not been awarding costs despite the existence of this provision.[179] In Kenya most tribunals have powers to award costs and do award costs.[180]

This study established that PPARB deliberately opted not to award costs to successful parties on the basis that the Act and the Regulations respectively had just come into operation and it therefore wanted to encourage aggrieved bidders to lodge protests whenever they felt that the procuring entities were in breach of the law. PPARB also took into account the fact that since the country's independence in 1963 to the year 2001 there had not been a specialized independent body entrusted with the resolution of public procurement disputes other than the ordinary courts. PPARB was therefore of the opinion that it could encourage aggrieved bidders to file complaints by not awarding costs. This was also in the public interest since PPARB was also of the opinion

[178] High Court Miscellaneous Civil Application No. 87/2014 Republic v Central Bank of Kenya *Ex-parte* Horsebridge Network Systems (E.A.) Ltd.

[179] Supra note 17.

[180] Examples of such tribunals include the Rent Restriction Tribunal established under the Rent Restriction Act (Chapter 296 Laws of Kenya at section 30 (b), the Co-operative Tribunal established under the Co-operative Societies Act (Chapter 490 Laws of Kenya at Section 79 (3), and the Business Premises Rent Tribunal established under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Chapter 301 Laws of Kenya at section 12 (1) (k). The Advocates Remuneration Order issued by the Chief Justice from time to time by virtue of the provisions of the Advocates Act (Chapter 16 Laws of Kenya at section 44) has in the past only included separate schedules for purposes of assessing costs of proceedings before the Rent Restriction Tribunal and the Business Premises Rent Tribunal and not other tribunals. The current Remuneration Order, the Advocates (Remuneration) (Amendment) Order, 2014, contains an extra schedule in respect of costs of proceedings before other tribunals other than the Rent Restriction Tribunal and the Business Premises Rent Tribunal. Prior to the 2014 Remuneration Order, the Co-operative Tribunal has been assessing costs awarded to parties under Schedule VII that deals with the costs of proceedings in the Subordinate Courts. The High Court in *Misc. Civil Application No. 256 of 2006 Republic v The Co-operative Tribunal, Telkom Kenya Limited & Gilgil Communications Industries Ltd Ex-parte Mawasiliano Sacco Society Ltd* (Unreported) ruled that where the Advocates Act has not provided the schedule of costs of proceedings for a particular tribunal, that tribunal should tax or assess costs under the scale provided for subordinate courts since tribunals are subordinate to the High Court.

that the costs awarded to successful parties would be astronomical taking into account the value of the tenders. Further, in instances where the procuring entities lost the cases, the costs would have to be borne by the taxpayers and hence would be a great burden on the exchequer. Another reason that it advanced was that there was no basis to assess the costs as between parties since there was no schedule provided for PPARB under the Advocates Remuneration Order. In addition, PPARB argued that the Act does not also provide any guidelines for the award of costs and hence it was difficult for PPARB to assess the costs payable.[181] PPARB also argued that it was difficult for it to make an award for payment of costs since there is no provision in the Act or the Regulations granting the chairman of PPARB the same powers as those of a Deputy Registrar of the High Court under the Civil Procedure Rules and which would enable the chairman to tax or assess the costs.[182]

The successful parties are obviously entitled to recover the costs incurred in the proceedings and if these parties are the bidders, they should be compensated in terms of costs due to the non-compliance of the law by the procuring entities. This is also important in that in instances where PPARB nullifies or sets aside the tender award and the procuring entity is ordered to retender, the bidders who had participated in the procurement process and especially the winning bidder have no guarantee that they will succeed after the retendering. The nullification or setting aside of the tender award may have been caused by the flouting of the rules by the procuring entity and not due to any mistake on the part of the bidders. The award of costs in such circumstances would deter the procuring entities from breaching the law and enhance confidence in the

[181] Interview with Ms Pauline Opiyo Secretary to PPARB on29/9/2014. This study established that consultants had been hired by PPOA sometimes in the year 2010 for the purpose of formulating a scale for the award of costs but the task was not finalized.

[182] Interview with Mr. Mwaniki Gachoka, former Member and Chairman of PPCRAB and PPARB respectively on 21/8/2014. The chairman or deputy chairman of the Co-operative Tribunal has powers to assess the costs by virtue of Rule 7 (2) of the Co-operative Tribunal (Practice and Procedure) Rules, Legal Notice No. 10 of 2009.

procurement system. The award of costs can also deter disgruntled bidders from filing frivolous and vexatious requests since once they lose the cases they will meet the costs of the other parties in the proceedings. The law would therefore become self-policing.

There is therefore no justification for the failure by PPARB to award costs and this can only be interpreted to show the lack of independence of the PPARB in that it has shied away from exercising powers granted to it under the law for fear of backlash from the appointing authorities. This is especially so since the respondents in the complaints before PPARB are the procuring entities and the Director-General of PPOA and the respondents would be liable to pay costs where there is violation of the law.[183] This study established that PPARB has changed its position on the award of costs and has recently awarded costs in some few cases.[184]

Other than the costs incurred by the parties during the review process by PPARB, there are additional costs incurred by the successful bidder after the award is suspended or set aside as well as the costs suffered by tax payers as a result of the delayed delivery of services or goods

[183] There are certain cases where PPARB has found that the procuring entities flouted the law and thereafter tried to oust its jurisdiction and hence are proper cases where the procuring entities should have been condemned to pay costs. This would act as a deterrence against such violations by the officials of the procuring entities. These cases include *Application No. 39/2012 Anhui Construction Engineering Ltd in Joint Venture with China Aero-Technology International Engineering Corporation (CATIC) v Kenya Airports Authority*, *Application No. 51/2012 and 65/2012 Horsebridge Network Systems (E.A.) Ltd v Central Bank of Kenya* and *Application No. 71/2012 China Jiangxi International Kenya Ltd v Parliamentary Service Commission.*.

[184] Interview with Mr. Gicheru, Chairman of PPARB on 29/9/2014. PPARB awarded costs of Kshs.150, 000/- to the Procuring Entity on 26/8/2014 in *Application No. 32/2014 Nairobi Enterprises v Kenyatta National Hospital*. PPARB held that this was a proper case to award costs to the Procuring Entity as it was clear that the Applicant's intention of filing the request was to buy time and had no interest in prosecuting it. It was therefore found to be an abuse of the PPARB process. PPARB also awarded costs of Ksh.100, 000/- each to the Procuring Entity and the Successful Bidder on 3/6/2014 in *Application No. 17/2014 Deloitte and Touche v Salaries and Remuneration Commission*. PPARB held that the request for review by the Applicant was not well-founded and the Procuring Entity and the Successful Bidder were forced to hire advocates to defend the case. It therefore found that this was a proper case to grant costs to the successful parties to the review. In *Application No. 24/2014 China Wu Yi Co. Ltd v The Kenya Pipeline Company Ltd,* PPARB dismissed the request for review on 30/6/2014 and ordered the Applicant to pay costs to the Procuring Entities and all the Interested Parties. PPARB stated that the Applicant must be condemned to pay costs as it had no evidence in support of its request and the same was based on flimsy grounds. PPARB made orders that the parties agree on the costs and in default, any of the parties would be at liberty to file its bill of costs for taxation. The parties did not agree on costs and there are bill of costs pending for taxation before PPARB. In the two requests where costs were assessed PPARB did not provide any basis for the assessment and the same was not based on the Advocates Remuneration Order and may therefore be open to challenge.

due to the suspension or annulment of the procurement proceedings. Thus, an effective public procurement review tribunal should have powers to award damages to the successful party by way of compensation for such costs. An award of damages to compensate the aggrieved bidders for the losses suffered as a result of non-compliance of the law by the procuring entities acts as a deterrence measure for the breach of the rules. PPARB does not have powers to order for compensation to the successful parties.

The Regulations also grant certain powers to the Secretary to PPARB that ought to be exercised by PPARB through its members and more so the chairman. These include the powers to grant automatic stay of the procurement proceedings under Regulation 74 (2), discretion to reduce the time within which a procuring entity may respond to a complaint under Regulation 74 (3), discretion to determine the notice period within which the parties are required to appear for hearing before PPARB under Regulation 75 (1), extending the working hours of PPARB under Regulation 78 (3), powers to mark complaints as withdrawn under Regulation 83, powers to certify orders of PPARB under Regulation 87 and communication to PPARB on matters pending before it under Regulation 88. A perusal of the decisions of PPARB and its predecessor PPCRAB indicates that the Secretary signs all the decisions.[185] This is not proper as the Secretary does not participate in the decision–making process of PPARB. The grant of these powers to the Secretary undermines the effectiveness of PPARB.

3.1.6 Right of Appeal

An ideal and effective public procurement review tribunal must provide for a right of appeal on facts, law and merits to parties aggrieved by its decision either to the courts or an appellate

[185] www.ppoa.go.ke/index.php?option=com_content&view=category&id=63&Itemid=166 (accessed on 20/7/2014).

tribunal. Section 100 (2) of the Act provides for a right of appeal to the High Court to any party aggrieved by a decision of PPARB and the decision of the High Court on appeal is final. However, most of the parties that are aggrieved by the decisions of PPARB seek judicial review at the High Court as opposed to preferring appeals. From the time PPARB was established to the time of this study only two appeals had been preferred to the High Court.[186]

The right of appeal, although provided for, has not been taken up by aggrieved parties in many instances basically due to the nature of procurement matters and the long period that it takes to conclude appeals in the High Court. Appeals in the High Court take a long time to conclude some as long as 10 years and hence it would not be prudent for parties to prefer appeals as the High Court would also be hesitant to grant orders of stay of the decisions of PPARB pending the hearing and determination of the appeals. If the High Court were to grant stay orders, this would delay or even stop the delivery of services and goods to the public by the government and which would not be in the public interest. Due to this scenario, most aggrieved parties have been filing judicial review applications in the High Court challenging the decisions of PPARB as opposed to preferring appeals since these applications are disposed of faster than the appeals. It is also difficult for parties aggrieved by the decisions of PPARB to prefer appeals to the High Court as there are no records of proceedings. The Chairman and members of PPARB do not take down the record of the proceedings like it happens in other courts or tribunals and only renders its decision in writing. Further, PPARB does not take evidence of the parties and their witnesses. However, the proceedings are recorded by a stenographer but are not printed in a hansard.[187] In

[186]Interview with Ms Pauline Opiyo, Secretary to PPARB on 29/9/2014. The appeals were filed challenging the decision of PPARB in *Application No. 54/2011 MFI Solutions v Ministry of Information* and *Application No. 25/2014 Gillys Security & Investigation Services Ltd v Maseno University*. The appeals are still pending in the High Court at Nairobi and Kisumu respectively.
[187]Interview with Ms Judith Guserwa, former Member of PPARB on 5/9/2014.

an appeal, the appellate court considers the merits of the appeal based on the evidence that was adduced by the parties in the lower court and the applicable law. Without a record of the proceedings including the evidence adduced by the parties it would be difficult for a party to succeed in an appeal.

The reluctance by parties aggrieved by decisions of PPARB to file appeals against those decisions in the High Court means that the merits of these decisions as well the application of the law by PPARB in arriving at its decisions have not been adequately scrutinized by the High Court. This hampers the development of procurement law since a party can only challenge the decision of PPARB by judicial review based on the procedure followed by PPARB in arriving at its decision or if PPARB acted outside the powers granted to it under the Act and not on the merits of the decision.[188]

3.1.7 The Independence of PPARB

The independence of a public procurement review tribunal is one of the most important attributes of an effective bid protest mechanism. In assessing the independence of PPARB, this study looked at the following aspects of its independence: institutional independence; financial independence; and the appointment and removal of members of PPARB.

3.1.7.1 Institutional Independence

PPARB is located on the 10th floor of the National Bank Building along Harambee Avenue within the Nairobi City County. It is hosted by PPOA and there is no indication or signage on the

[188] The scope and reach of judicial review is now well settled since the famous case of *Council of Civil Service v Minister for the Civil Service [1984] 3 ALL ER 935*. The three grounds for judicial review were summarized in that case as "illegality", "irrationality" and "procedural impropriety".

ground floor or the 10th floor of the building to the effect that PPARB is located there. The service charter of PPOA includes the services offered by PPARB.

Section 25 (3) of the Act provides that PPOA shall provide administrative services to PPARB and as a result the Secretary to PPARB and the staff of the secretariat of PPARB are all employees of PPOA. The designation of the Secretary to PPARB is that of a technical manager of PPOA with procurement qualifications and as such he/she attends the management meetings of PPOA. PPARB does not have its own staff and its members serve on a part-time basis. The Secretary as an appointee of the Director-General of PPOA under Regulation 68 (3) of the Principal Regulations is answerable and accountable to the Director-General and not PPARB.[189] The secretariat is not adequately staffed and only has six members of staff including the secretary to PPARB. There are three procurement officers, one clerk and one secretary. These officers do not have any paralegal training in respect to the filing of cases and documents and service of documents upon the parties since PPARB being a tribunal ought to operate as a court.

PPOA is a statutory corporation under the Ministry of Finance and both PPOA and the Ministry of Finance are procuring entities. PPOA is just one of the many state corporations and other bodies that fall under the Ministry of Finance in matters of policy. There have been instances where requests for review have been filed before PPARB against PPOA and the Ministry of Finance and the aggrieved bidders expressed their suspicion on its impartiality. [190]

[189] Interview with Mr. Mwaniki Gachoka, former Member and Chairman of PPCRAB and PPARB respectively on 21/8/2014.

[190]These cases are *Application No. 39/2013 Associated Motors Limited v The National Treasury*; and *PPARB Application No. 34/2010 Alliance Technologies Solutions v Public Procurement Oversight Authority* in which PPARB noted a perceived conflict of interest between its secretariat and the Respondent, in that the Respondent provides administrative services (the secretariat) to PPARB. In order to deal with the said conflict, PPARB excluded the staff of the Respondent from carrying out the analysis of this particular case. PPARB also explained to the parties the unique circumstances it had found itself in before proceeding with the hearing.

The members of staff of the secretariat usually analyze the issues in dispute prior to the hearing of the complaints and are usually present during the hearing. There is therefore likelihood that the staff may make serious misrepresentation of facts to the members of PPARB especially in cases where their employer is involved and thereby influencing the ultimate decision of PPARB. There are also instances where the members of staff of the secretariat have been suspected of leaking decisions or confidential information to parties or interested parties in matters pending before PPARB. The members of PPARB who serve on part-time basis have no administrative authority to discipline or reprimand these officials.[191] According to the Franks Committee, tribunals should not operate as units of departments against which citizens' claims are directed.[192] Further, tribunals should not sit in the same premises as the administrative officers of the department involved in the dispute since tribunals must not only be independent but must be seen to be independent.

This lack of institutional independence of PPARB from PPOA can also be seen from reports in the daily newspapers by journalists who have on many occasions referred to PPARB as PPOA, PPOA's tribunal, PPOA Review Board, Public Procurement Oversight Review Board, a subsidiary of PPOA.[193] From the foregoing, it is clear that PPARB lacks institutional

[191]Interview with Mr. Mwaniki Gachoka, former Member and Chairman of PPCRAB and PPARB respectively on 21/8/2014.

[192] Jones, *supra* note 64 at p. 281-282. The Committee found this practice to be rampant in the UK at the time as well as the secondment of support staff of clerks and assistants from these departments to the tribunals. This kind of practice raised suspicions in respect to the complete independence of the tribunals.

[193]These references include reports made in the following newspapers:- Business Daily of 28/2/2014 at page 1 & 4; The Standard of 15/8/2014 at page 8; Sunday Nation of 6/7/2014 at page 23; The Standard of 1/7/2014 at page 7; The Standard of 27/11/2013 at page 12 in which it was reported that Members of Parliament had questioned the Director-General of PPOA on why he had failed to annul a tender award for supply of cranes by Kenya Ports Authority for flouting the procurement rules. The Director-General was reported to have informed the legislators that the matter had been dealt with by PPARB but that one of the parties in the case had gone to the High Court to challenge the decision of PPARB. What is revealed by this report is that the Director-General and the legislators were of the view that PPARB carries out its mandate under PPOA which should not be the case as the two are distinct entities under the Act.

independence and its impartiality has come into question especially when it adjudicated disputes involving PPOA and the Ministry of Finance.

3.1.7.2 Financial Independence

This study established that PPARB does not have its own budget and the same is factored in within the budget of PPOA. The salaries and any allowances of the secretariat staff, the members' allowances and all other expenses of PPARB are paid by PPOA. One of the functions of PPOAB under section 23 (b) of the Act is to approve the estimates of the revenue and expenditures of PPOA. Under Regulation 72 of the Principal Regulations the members of PPARB are required to be paid allowances by PPOA after the same have been determined by PPOAB. The Director-General of PPOA is a member of PPOAB and is appointed by PPOAB upon approval by Parliament.[194]There is no officer under PPARB who has the authority to incur expenditure also known in the public sector as A.I.E. This means that PPARB depends entirely on PPOA and PPOAB for its financial needs. However, PPARB has not suffered from lack of sufficient funds for its core functions.[195] In circumstances where PPOA or the Ministry of Finance/National Treasury is a party to proceedings before PPARB, its decision may not be deemed as independent or impartial as PPARB may not want to antagonize its paymasters.

The lack of financial independence of PPARB undermines its effectiveness in discharging its mandate since it cannot come up with its own programs for instance, awareness campaigns on its

[194] Section 10 (2) and 22 (b) of the Act.
[195] Interview with Ms Judith Guserwa, former Member of PPARB on 5/9/2014.

mandate. The awareness campaigns that have been carried out have all been done under the umbrella of PPOA.[196]

3.1.7.3 Appointment and Removal of Members of PPARB

The manner in which members of a tribunal such as PPARB are appointed and removed affects its independence.[197] The Minister of Finance is granted the power to appoint members of PPARB under Regulation 68 of the Principal Regulations and the appointment is made from two categories. Under the first category the Minister is required to appoint six persons from a list of nominees from fifteen organizations, majority of which are professional bodies.[198]

The appointment of members under this category conforms to the recommendations of the Frank's Committee although it is not clear whether the professional expertise in public procurement of members appointed under this category is an overriding factor in their selection. Further, the appointment of members under this category fits perfectly with the mixed-bench system recommended by the said Committee and this has enhanced the effectiveness of PPARB in carrying out its mandate. This study established that most of the members that were appointed under that category in the year 2007 when the Act was operationalized and whose term ended in

[196]Interview with Mrs. Jane Njoroge, Deputy Director-General, PPOA on 29/9/2014. A good example of how lack of financial independence impacts negatively on the effectiveness of PPARB is the launch of the Public Procurement Law Reports by the Chief Justice on 10/9/2013. The launch was reported in the Standard Newspaper on 11/9/2013 at page 24. Even though the Law Reports were launched there are no copies available to the public from the offices of PPARB. The reasons given for non-availability was that there were no members of PPOAB in office from the year 2011-2013 and hence no budget for printing of the Law Reports had been approved by PPOAB. The Law Reports bear the name and logo of PPOA on the cover and not that of PPARB. PPOA insisted on having the Law Reports published under its name for the reason that it had procured the funds from a donor for the publication.

[197]The provisions on appointment, composition and removal of the members of PPARB are contained under Part VI-A of the Principal Regulations.

[198]These organizations include the Kenya Association of Manufacturers, the Law Society of Kenya, the Architectural Association of Kenya, the Institution of Engineers of Kenya, the Institute of Certified Public Accountants of Kenya; the Kenya Institute of Supplies Management, the Institute of Certified Public Secretaries of Kenya, the Chartered Institute of Arbitrators, the Kenya National Chamber of Commerce and Industry, the Kenya Institute of Management; the Computer Society of Kenya, the Pharmaceutical Society of Kenya, the Federation of Kenya Employers, and the Central Organization of Trade Unions.

September 2013 had expertise in public procurement. This made it easy for the chairman who had a legal background to understand and appreciate certain facts pertaining to procurement. As a result, PPARB was able to make reasoned and credible decisions and most of these decisions were upheld by the High Court on judicial review.[199]

Under the second category the Minister is granted the latitude to appoint three other persons as members of PPARB. The qualifications, experience and mode of appointment is not provided for and this provision is subject to abuse as it permits the Minister to appoint his cronies or persons who have interest in public procurement matters. An example of such a scenario was the amendment of Regulation 68 (b) of the Principal Regulations by Legal Notice No. 15 of 2014 published on 7/2/2014 and which allowed the Minister the discretion to appoint the chairman of PPARB either from category (a) or (b) of Regulation 68 (1).[200] The second term of the members of PPARB that were appointed after the coming into operation of the Act in 2007 came to an end in September 2013. Members of PPARB were appointed on 17/9/2013 but the Minister did not appoint a chairman. One of the members of PPARB that was appointed under Regulation 68 (1) (a) was appointed by the other members to act as the chairman pursuant to the provisions of Regulation 69 (3). This member was the acting chairman for about six months until sometimes in March 2014 when the current chairman was appointed in pursuance to the amendment made by Legal Notice No. 15 of 2014 aforesaid. This amendment has not augured well in the working of PPARB as some of its members are disgruntled and are of the view that the Regulations were amended by the Minister so that a particular member who he had appointed can become the

[199] Interview with Mr. Mwaniki Gachoka, former member PPCRAB and Chairman of PPARB respectively on 21/8/2014.
[200] Public Procurement and Disposal (Amendment) Regulations, 2014.

chairman.[201] Further, while making decisions and in case of a tie the proposal supported by the chairman prevails under Regulation 69 (4). This means that the chairman has an upper hand in the decisions made by PPARB as compared to other members.

Section 140 of the Act grants the Minister the power to make regulations generally for the better carrying out of the provisions of the Act. The provisions on appointment, composition and removal of members is contained in the Regulations and not the Act and therefore the Minister may at any time repeal or amend the Regulations without consultation or reference to anyone.[202] While the Minister cannot abolish the PPARB, the removal of the members at will can, in itself, raise questions on its independence since the members may not be free to make decisions which are not favourable to the appointing authority.

Under Regulation 71 the Minister is empowered to terminate the appointment of a member of PPARB for reasons enumerated under that Regulation.[203] However, the process of removal is not provided for and there is also no provision to grant the affected member an opportunity to be heard and hence the provision may be subject to abuse. This kind of circumstances in effect undermines the perceived independence and impartiality of PPARB. It also affects the quality of its decisions that it makes in view of the fact that public procurement matters are fairly complex and politically sensitive.

[201] Interview with Mr Mwaniki Gachoka, former member and Chairman of PPCRAB and PPARB respectively, on 21/8/2014.

[202] The provisions on appointment, composition and membership of members of other similar tribunals like the Rent Restriction Tribunal, the Business Premises Rent Tribunal and the Co-operative Tribunal are contained in the respective statutes and not the rules made under the statutes establishing them (section 4 of the Rent Restriction Act, section 11 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act and section 77 of the Co-operative Societies Act).

[203] Under Regulation 71, the Minister may terminate the appointment of a member of PPARB on grounds of: mental or physical infirmity; bankruptcy; conviction of an offence under the Penal Code, the Anti-Corruption and Economic Crimes Act, 2003, or the Act or the Regulations or for an offence involving dishonesty; or absence from three consecutive meetings of PPARB to which the member has been invited without reasonable excuse. The Chairman or any member of PPARB may also resign at any time by notice to the Minister.

3.1.8 Impartiality

Impartiality is one of the most important attributes of an effective and credible public procurement review tribunal. This means that PPARB must be free from influence, real or apparent, in the decision-making process. So far there are no reports of any complaints made against any of the members of PPARB with the police or the Ethics and Anti-Corruption Commission (EACC) on the basis that they have been influenced or compromised in making decisions.

However, there have been some newspaper reports in the local dailies that have questioned the impartiality of PPARB in adjudicating public procurement disputes.[204]The reports suggest that the decisions by PPARB in these cases may have been influenced by political, business, corruption and other unethical considerations and PPARB was therefore not impartial in its decisions. There is however no evidence that any investigations were instituted by the relevant government agencies like EACC or the police concerning the manner in which these particular decisions were made.

[204]The Standard Newspaper of 23/3/2010 at page 9 carried a report titled: "PPOA under attack as collusion allegations emerge." It was alleged that in *Application No. 2/2010 Zhongman Petroleum and Natural Gas Group v Kenya Electricity Generating Company Limited*, PPARB, though referred to as PPOA, had colluded with the procuring entity to frustrate the Applicant from pursuing its case. Further, on 14/3/2014 in the Standard Newspaper at page 33 one of the bidders who lost a case before PPARB, Olive Telecoms, published a one page statement titled: "Vested Interests Versus the Children of Kenya". This was in reference to *Application No. 3 & 4/2014 Hewlett Packard Europe BV and Haier Electrical Appliances Corporation Limited v Ministry of Education, Science and Technology*. The said bidder alleged that PPARB relied on the losing bidder's definition of "Original Equipment Manufacturer". PPARB found in its ruling that Olive Telecoms was not an "Original Equipment Manufacturer" and hence should not have been awarded the tender.[204] The bidder stated: "We are further disturbed by the strange and suspicious ruling of the PPARB to the effect that Olive was awarded the laptop tender irregularly and have cancelled the award…. In the process of both tenders, the Olive Consortium has painfully persevered through consistent, sustained, unwarranted and malicious attacks and disinformation. At the same time, a myriad of shady characters have been hovering all over with spurious claims of business and political connections…. PPARB ruling runs counter to the law, available facts and common sense…. The foregoing facts run counter to the extremely strange and suspicious ruling by PPARB. It is inconceivable that this process could be so casually overturned by a team of not more than 7 people sitting for only two days."

Further, other circumstances that may have put the impartiality of PPARB into question is the involvement of the secretariat staff of PPARB who are employees of PPOA in the preparation of analysis reports before the complaints proceed for hearing. This analysis comprises the background, the facts of the case and a checklist indicating whether the procuring entity followed the rules in the procurement process. The analysis is very critical to the conduct of the business of PPARB taking into account the large volumes of documents submitted and the time limit within which PPARB has to render a decision.[205] PPARB has no disciplinary or administrative control over these officers and they are accountable for their duties and responsibilities to the Secretary of PPARB and who in turn reports to the Director-General of PPOA. There is therefore likelihood that the secretariat staff may be influenced when carrying out the analysis and this would eventually affect the decisions made by PPARB.

3.1.9 Accountability of PPARB

For a public procurement review tribunal to be said to be effective it must be accountable for the performance of its functions. However, there are no provisions in the Act or the Regulations indicating to who PPARB is accountable to in the discharge of its mandate. The members of PPARB work on part-time basis and have therefore not been placed on performance contracts like the staff of ministries and state corporations such as PPOA. The secretariat staff is accountable to the Director-General of PPOA on its performance.[206]

Section 20 of the Act requires the Director-General of PPOA to submit four quarterly reports and one annual report for each financial year to PPOAB and the Minister of Finance. This research

[205]Interview with Mr Mwaniki Gachoka, former member and Chairman of PPCRAB and PPARB respectively, on 21/8/2014.
[206]Interview with Ms Pauline Opiyo, Secretary to the PPARB, on 29/9/2014.

established that a report on the performance and activities of PPARB is usually prepared by the Secretary of PPARB and submitted to the Ministry of Finance through the Director-General of PPOA. The performance and activities of PPARB for each financial year form part of the report submitted by the Director-General of PPOA under this section.[207]

It is therefore clear that there is no proper accountability mechanism that has been put in place to measure and account for the performance of PPARB. The lack of institutional independence of PPARB from PPOA and the Ministry of Finance/National Treasury has contributed to a large extent to this situation.

3.1.10 Promotion of Alternative Dispute Resolution Mechanisms

Based on Article 159 (2) (c) of the Constitution, tribunals are enjoined to promote alternative dispute resolution (ADR) mechanisms. However, there is no provision under the Act or the Principal Regulations requiring the PPARB to encourage parties to exhaust ADR mechanisms before lodging their complaint before PPARB.

3.1.11 Transparency

An ideal public procurement review tribunal should be transparent in its proceedings. However, there is no provision under the Act or the Principle Regulations for public hearings of proceedings before the PPARB. This study established that the proceedings of PPARB are not

[207] Interview with Mrs. Jane Njoroge, Deputy Director-General, PPOA on 29/9/2014.

held in public and only the parties to the complaint provided under Section 96 of the Act are allowed into the boardroom where the hearing takes place.[208]

3.1.12 Informality

Under Regulation 86 of the Principal Regulations, PPARB is not bound by the rules of evidence in its proceedings. PPARB therefore upholds the principle of informality in its proceedings. This has enabled PPARB render its decisions within thirty days as required under section 97 (1) of the Act since applying rules of evidence would delay the determination of the complaints.

3.1.13 Expertise in the Subject Matter of the Dispute

The Regulations do not provide that the chairman must have legal qualifications as recommended by the Frank's Committee. However, all the chairpersons of PPARB and its predecessor PPCRAB have had legal qualifications. This has ensured that the proceedings are conducted in orderly manner and that PPARB has been able interpret and apply the legal provisions contained in the Act and the Regulations appropriately.[209] Further, the composition of the membership of PPARB from various professional backgrounds has enhanced the effectiveness of PPARB in that it has been able to competently deal with complaints relating to tenders from a wide range of matters.[210]

[208]Under that section the parties to the review are the Applicant, the procuring entity, the successful bidder and such persons that PPARB may determine. Therefore, members of the public cannot freely attend the proceedings of PPARB without seeking the authority of PPARB.
[209] Interview with Mr. Sospeter Kioko, a former Member PPARB and a nominee of Kenya Association of Manufacturers to PPARB and a supply chain professional, on 30/9/2014.
[210] Ibid.

3.2 Conclusion

Since the establishment of PPARB and its predecessor PPCRAB, the bid protest mechanism has been hailed for restoring credibility to Kenya's public procurement system as opposed to the period prior to that. However, as indicated above, PPARB has faced several challenges in carrying out its mandate and which have undermined its effectiveness. These include, *inter alia*: the lack of institutional independence as it is hosted by PPOA; it does not have its own staff and depends on PPOA for all its requirements; the Secretary and the rest of the secretariat staff are employees of PPOA and report to it. PPOA is a procuring entity and in case of a dispute involving it as a respondent there is an apparent conflict of interest and which undermines PPARB's impartiality and independence; PPARB also lacks financial autonomy as all its financial requirements are met by PPOA; the cost of preferring disputes before PPARB is high and this may discourage many bidders from presenting their grievances; PPARB is not accessible by its clients from different parts of Kenya since it is based and operates from Nairobi where it sits most of the times; and the provisions on the appointment and removal of members of PPARB are contained in the Regulations and not the Act and the Minister may repeal and amend them at will, thereby undermining PPARB's independence.

CHAPTER FOUR

CONCLUSIONS AND RECOMMENDATIONS

4.0 Introduction

The main objective of this study was to assess the effectiveness of PPARB in adjudicating public procurement disputes in Kenya. It sought to find out whether PPARB has carried out its mandate effectively and thereby ensuring that procuring entities comply with the provisions of the Act and the Regulations made under the Act.

Since its establishment, PPARB and its predecessor PPCRAB has resolved many disputes. It has restored credibility to the public procurement system by scrutinizing how the procuring entities carry out the procurement function and where breaches are found to have occurred, corrected them. It has also stopped several irregular and questionable procurements and ensured that procuring entities comply with the provisions of the Act and the Regulations.

However, in carrying out its mandate PPARB has faced several challenges that have hampered its effectiveness. Some of these challenges include: lack of institutional independence in that it is administered by PPOA which is also a procuring entity. This also undermines its independence and impartiality especially in circumstances where PPOA is involved in the disputes in question or in disputes under section 106 and 117 of the Act where the Director-General of PPOA is the Respondent; the cost of preferring disputes before PPARB is prohibitive and many bidders especially the small and micro enterprises may not afford to pay the fees as well as legal representation before it; PPARB is based in Nairobi and hence its services are not accessible in other parts of the country; the legal framework establishing PPARB has several inadequacies. Examples of these inadequacies that this study identified include *inter alia* the following:

PPARB has no power to enforce its own decisions and hence the procuring entities may not comply with its orders; the rules of procedure made under the Act are not comprehensive and there are several gaps; the appointment and removal of members of PPARB are contained in the Regulations and not the Act and are subject to amendment or repeal by the Minister without any consultations; although PPARB resolves the disputes before it within 30 days there is still delay in completing public procurements when parties challenge its decision by way of judicial review or appeal in the High Court as there is no time limit within which the High Court should make its determinations; and it has no powers to hear and determine complaints where the tenders are terminated or contracts entered into.

4.1 Conclusions

This study concluded that PPARB has in carrying out its mandate restored credibility to the public procurement system by ensuring that procuring entities comply with the provisions of the Act and the Regulations. By scrutinizing the manner in which procuring entities carry out the procurement function, PPARB has contributed to a great extent to the achievement of the objectives set out at section 2 of the Act. The establishment of PPARB has also led to the expeditious resolution of public procurement disputes.

The study also concluded that PPARB faces legal and institutional challenges that have hampered its effectiveness. These challenges include lack of institutional independence and inadequacies in the legal and regulatory framework relating to PPARB. In addition, this study found that the reluctance of parties to take up the right of appeal against the decisions of PPARB to the High Court accorded to them under section 100 (2) of the Act primarily due to the delay in concluding the appeals has also negatively affected its effectiveness as well as the development

of case law on public procurement. The study concluded that the provision on the right of appeal to the High Court to parties aggrieved by the decisions of PPARB is necessary in addition to the availability of the judicial review remedy. This is due to the fact that the appeal process deals with an assessment of the facts, law and merits of the decision whereas on judicial review the High Court is concerned with the decision-making process and the legality of the decision.

Further, it was concluded that legal and institutional reforms are necessary in order to deal with these challenges and thereby enhance the effectiveness of PPARB. In addition, PPARB needs to reconsider its practice of not awarding costs to successful parties despite the Act granting it the power to do so as this would deter bidders from presenting frivolous and unfounded disputes before it as well as the procuring entity from breaching the rules. The fees by parties lodging disputes before it should also be reduced in order to enable more bidders to access its services.

4.2 Recommendations

This study makes the following recommendations that if implemented will enhance the effectiveness of PPARB in carrying out its adjudicatory role and also ensure that the objectives of the Act are achieved. These recommendations fall into two broad categories: legal and regulatory reforms and institutional reforms.

4.2.1 Legal and Regulatory Reforms

This study recommends that the mandate granted to PPARB under the Act should be expanded. PPARB should be granted powers to do the following: order for compensation to aggrieved bidders where circumstances justify such awards; enforce its own orders; interrogate terminated procurements as well as those where contracts have been entered into; review, set aside, review,

re-open the proceedings or recall its orders where it comes to its attention that grave errors were made or that the award or orders were obtained by misrepresentation; and administer oaths and summon witnesses to attend and produce evidence. This would go a long way in enhancing the effectiveness of PPARB in discharging its mandate and deal with some of the challenges identified in Chapter four.

The other major challenge is in regard to the appointment and removal of the members of PPARB as well as the composition of its membership. It is proposed that the provisions in respect to these matters should be contained in the Act in order to shield the membership of PPARB from political influence as the Minister can amend and repeal the Regulations at any time and without any consultations and hence undermining its independence. There should be created a post of deputy chairman to take over the duties and responsibilities of the chairman in the event of the latter's absence, death or illness. The recruitment of the members of PPARB should be carried out competitively as this would enhance the independence of PPARB. Further, the chairman and deputy chairman should possess legal qualifications as proposed by Franks Committee and this would enable PPARB conduct the proceedings in an orderly manner, handle the complex rules and regulations relevant to its decisions, objectivity in its decisions as well as help in the proper sifting of facts.

The recruitment of the chairman and deputy chairman should be conducted by the Judicial Service Commission in view of the provisions of Article 260 of the Constitution that defines a judicial officer to include any person presiding over a tribunal. The appointment, dismissal or removal of members of PPARB should also lie with the Judicial Service Commission (JSC) in

view of the provisions of Article 169 (1) (d) and 172 of the Constitution.[211] However, the mixed-bench system where members of PPARB are drawn from various backgrounds should be retained as it has worked well and has enabled PPARB use the knowledge and expertise of the non-lawyers to enable it understand the complex facts relating to procurements and appreciate fully the arguments tendered by the parties. Regulation 68 of the Principal Regulations provides for the appointment of a total of nine members and this includes the chairman. It is proposed that out of the nine members three should have legal qualifications such that in the event there are several disputes, three panels can be constituted. The three panels can then sit simultaneously and each panel is presided over by a lawyer. This would help PPARB to conduct orderly proceedings and in writing of the awards which the non-lawyers have had difficulties in dealing with.

PPARB or the Chief Justice should be granted the power to formulate the rules of procedure in respect to proceedings before PPARB and not the Minister as the Act provides. The rules should be made after consultation with the public, PPARB and other stakeholders in public procurement. This would make PPARB more effective as PPARB or the Chief Justice would be better placed to come up with rules that are simple and yet suitable for its needs. The rules should also include the schedule of fees payable by parties appearing before PPARB and the process of formulation should also be participatory. The fees payable currently were increased in 2013 and are very high and should be reduced. This will encourage more bidders especially the micro and small enterprises as well as the disadvantaged groups who may not afford to pay these fees to seek the services of PPARB for resolution of their grievances. Once PPARB is granted

[211]Although this will call for more budgetary allocations to the JSC, it will be vital in promoting and facilitating the independence and accountability of the PPARB as stated under Article 172 (1) of the Constitution. This may also apply to other tribunals.

powers to formulate its own rules, it would also come up with a scale for the award of costs as between parties and which would take into account the nature of procurement disputes. These rules of procedure should also grant the chairman or the deputy chairman the power to assess or tax the party to party costs. The rules should also provide for the application of the rules of procedure under the Civil Procedure Act and this would deal with situations where certain matters are not provided for under the rules and as a guide to PPARB but without getting saddled by legal technicalities as happens in the ordinary courts. The rules should provide for the filing of affidavits by parties to the review as opposed to statements as PPARB does not proceed by way of oral evidence but by submissions. Without sworn evidence, parties may tender false evidence before PPARB as was noted in the *Horsebridge* case and this undermines its effectiveness. The amendment that reduced the period of filing the requests for review as well as the response to the requests should be revoked as it has not improved the effectiveness of PPARB but has made it ineffective. The timelines prior to the amendment should be restored as this was working well both for the parties and PPARB.

There is also the challenge posed by the grant of certain powers to the Secretary to PPARB that should be exercised by PPARB or its chairman as they relate to the decision-making process and these powers should be clearly provided for in the rules. These include: the power under Regulation 83 of the Principal Regulations allowing the withdrawal of complaints; the power to extend the hearing of matters before PPARB beyond the normal working hours under Regulation 78 (3); the certification of orders of PPARB; grant of orders of stay or suspension of procurement proceedings under section 94 of the Act and Regulation 74 (2); the power to constitute panels of members to hear complaints; and the discretion to determine a reasonable period granted to the parties to prepare for the hearing of the complaints as well as the mode of

service of documents filed by the applicant upon the respondent. PPARB should be granted powers to interrogate the circumstances of withdrawal of complaints before the withdrawal of and if there are no sufficient grounds for withdrawal the applicant should be ordered to pay costs to the procuring entity to deter bidders from filing frivolous complaints. The Secretary should also be recruited competitively by the Judicial Service Commission in view of the provisions of Article 169 (1) (d) of the Constitution. It is also preferable that the Secretary should possess legal qualifications as opposed to procurement since he/she would be proficient in procedural matters such as service of documents and other matters that ensure that there is due process in hearing and determination of the complaints.

PPARB should also exercise its powers on the award of costs as provided for in the Act as failing to do so without any justifiable cause may be termed as illegal and unfair. Section 93 (2) (d) should be repealed as it does not serve any useful purpose since PPARB can only make a determination on the frivolity of a request for review upon hearing it and not before. The Act should also provide for legal aid and advice funded by the state for bidders granted preferences in tender awards in proceedings before PPARB as this would go a long way in encouraging these bidders to present their grievances for resolution. This would also enable disadvantaged groups such as women, youth and persons with disabilities operating small and micro enterprises to challenge the decisions of procuring entities before the PPARB. Section 67 and 36 of the Act or the Regulations should provide the manner in which the notification of award or notice of termination of procurement proceedings should be served as this would reduce cases where procuring entities manufacture such notices after complaints have been filed with PPARB.

The members of PPARB involved in decision-making should append their signature on the last page of the decision to signify their concurrence with the decision. In the event that a member is

not in agreement, such a member should render a dissenting decision and the decision of the majority carries the day and this is in accordance to Regulation 69 (4) of the Principal Regulations. The decisions of PPARB are usually signed by the Chairman and the Secretary only and this is contrary to the said provision as the Secretary is not involved in decision-making.

The Act should be reviewed in order to align it with the Constitution of Kenya, 2010, to reflect on the principles espoused in Article 227 as well as Chapter Six on Leadership and Integrity.

4.2.2 Institutional Reforms

This study also recommends that certain institutional reforms be carried out as a way of enhancing the effectiveness of PPARB. One of the main challenges of PPARB as a public procurement review tribunal is the lack of institutional independence as pointed out in the previous Chapter. PPARB should be completely delinked from PPOA and the Ministry of Finance as these are procuring entities and whose actions as such are subject to review by PPARB. In view of the provisions of Article 169 (1) (d) of the Constitution the administration of PPARB should be transferred to the Judiciary. The resources necessary for PPARB to carry out its mandate whether financial, human or the premises that it operates from should be within the budget of the Judiciary. The remuneration of the members of PPARB as well as the other staff should be determined by the Judiciary. PPARB should be accountable for its performance and programs to the Judiciary and not the Minister of Finance as is the case now.

PPARB should be provided with a research unit comprised of officers with procurement and legal qualifications for the purpose of assisting PPARB analyze the facts of the cases presented before it and in view of the voluminous documents involved in procurement that PPARB is required to peruse before it renders its decision and the limited time within which it has to make

an award. Currently, this analysis is carried out by staff of the secretariat to PPARB and who are employees of PPOA. As recommended above these officers as well as other officers of PPARB should be hired by the Judicial Service Commission.

Further, PPARB should open registries in other parts of the country in order to enhance accessibility to its services. It can also provide a platform for filing of complaints online and therefore parties do not need to travel to Nairobi for the said purpose. It is also recommended that PPARB should carry out public awareness programs in order to sensitize the public, contractors and procuring entities on their mandate. As a result more complaints are likely to be lodged with PPARB.

Although PPARB makes its decisions expeditiously and within thirty days as provided under the Act, the procurement proceedings are still delayed when parties obtain orders of stay of these proceedings in the High Court on judicial review or appeal and these cases usually take long before they are concluded. The High Court has no limitations on the period of making determinations either on judicial review or appeal. This study proposes that PPARB should apply for the issuance of Practice Directions by the Chief Justice providing the time within which public procurement cases should be resolved in the Superior Courts. The Chief Justice can also expedite the conclusion of these cases by creating a special unit within the commercial division of the High Court and assigning judges to the unit. The Chief Justice should also issue Practice Directions to address situations where PPARB is ordered to pay costs by the High Court yet it is a tribunal not a party to the proceedings.

This study recommends that the appointment of members of PPARB be staggered so as to preserve the institutional memory and also ensure consistency of its decisions. Further, PPARB

should ensure that its proceedings are recorded and are available to the parties on request. In the event that the proceedings are recorded by a stenographer, these records should be published in a hansard. We also propose that a Council of Tribunals be established as recommended by the Frank's Committee in the UK for the purpose of overseeing and superintending over the operation of tribunals in view of the high number of tribunals in Kenya. The Council would also assist in the establishment of new tribunals, formulation of rules of procedure to suit the circumstances of each of them and in the appointment of members to these tribunals.

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APPENDIX I: INTERVIEW GUIDE

The questions below are intended to guide interviews with key information.

1. **Interviewee Biodata**

    - Name
    - Organization
    - Length of interaction with PPARB
    - Level of responsibility i.e. Member, Support Staff, Secretary of PPARB etc
    - If not working with PPARB, what is the nature of your interaction with PPARB e.g. practicing lawyer, procurement official, official of a procuring entity, civil society, past Member, Secretary or Official of PPARB/PPOA/PPOAB, contractor etc?

2. **The Legislative Framework of PPARB**

    - What are the functions of PPARB?
    - In your view are the provisions of PPDA and the New Constitution adequate in enabling PPARB carry out its mandate?
    - In your view should PPARB have additional mandate/functions and if so, what are your suggestions?
    - Are there any proposals on amendment of the PPDA that you can give to enable PPARB improve in delivery of its mandate?

3. **The Institutional Framework of PPARB**

    Finances of PPARB

    - Does PPARB have its own budget?
    - Who is the accounting officer of PPARB?
    - Who pays the salaries/allowances of members and staff?
    - In your view does PPARB enjoy financial autonomy?
    - Are the funds allocated to PPARB adequate to enable it carry out its mandate?
    - What proposals would you make in regard to funding of PPARB?

Location and accessibility of PPARB by its clients

- Where is the PPARB located?
- Is PPARB housed in its own premises or is it housed by any other entity?
- Does PPARB have other offices or branches outside Nairobi?
- Does PPARB conduct its sittings outside Nairobi and if so how many times in a year in each station?
- Does PPARB have an annual schedule of sittings and if so, how is it disseminated to its clients?
- Has PPARB or any other government agency carried out awareness campaigns on PPARB's existence and mandate?
- With the promulgation of the New Constitution and the coming into existence of the county governments and increased procurement activities in the counties, what has PPARB done or what is it doing to ensure accessibility of its services in the counties?
- Has PPARB complied with the constitutional requirement that each state organ must ensure that its services are accessible to the lowest possible level?
- Does PPARB have a website?
- What proposals would make you in regard to the issue of the location and accessibility of PPARB to its clients?

4. Composition and Membership of PPARB

Appointment of Members of PPARB

- Is the appointment of members carried out competitively?
- Is the expertise of members in respect to procurement matters assessed prior to their appointment, and if so who makes this assessment?
- What expertise is considered for appointment of members of PPARB?
- Do the appointments reflect national and gender diversity?
- Is merit, qualifications and experience the overriding factor for recruitment?
- What are the considerations for appointment of the Chairman of PPARB?
- Are legal qualifications considered in the appointment of the Chairman of PPARB?
- Is the appointment of members staggered?

Removal of Members of PPARB

- In the history of PPARB, is there any member who was removed from office and if so, what were the grounds of removal?
- Is there any member who has resigned as a member of PPARB and if so, what were the reasons for resignation?
- What proposals would you make in respect to the issue of appointment, removal of members of PPARB, composition and membership of PPARB?

5. The Appointment of the Secretary and other Staff of PPARB

The Appointment of the Secretary of PPARB

- Is the Secretary of the Tribunal recruited competitively?
- Is merit, qualifications and experience the overriding factor for recruitment?
- What qualifications are considered in the appointment of the Secretary of PPARB
- Are legal qualifications a consideration for appointment of the Secretary of PPARB?

Appointment of other Staff of PPARB

- Is the support staff of PPARB recruited competitively?
- What qualifications or competencies are considered in their appointment?
- Is the number of support staff adequate?
- What proposals would you make in regard to the appointment of the Secretary and other Staff of PPARB?

6. The Effectiveness of PPARB

- Does PPARB always deliver its decisions within 30 days of filing the request or are there cases of delayed judgements and rulings?
- Does PPARB award costs in proceedings before it?
- Are the costs of filing proceedings before PPARB affordable especially to the SMEs?
- Are there any requests that have been referred to PPARB in regard to request for quotations/ direct procurement?
- Are there any cases that PPARB has dismissed on the basis that they are frivolous/vexatious and

if so how many?

- Has PPARB handled any requests for review under Section 106 and 117 of the Act, and if so how many cases?
- In regard to the automatic suspension of procurement proceedings once a request is filed with PPARB, do you think this provision is effective in comparison to a situation where PPARB is granted powers to grant orders of stay of proceedings on merit?
- What is the implication of this automatic suspension of proceedings in terms of inconvenience and costs incurred by other innocent tenderers and the procuring entities?
- Do you think that a provision for security for costs to be paid by the applicants would make the PPARB more effective and minimize instances of disgruntled tenderers filing frivolous or vexatious requests?
- Can a citizen or other person who is not a participant in procurement proceedings file a request before PPARB and are there any public interest cases filed before PPARB?
- Does the PPARB use precedents to ensure consistency in decision-making?
- How many decisions of PPARB have been overturned by judicial review?
- How many disputes have PPARB and its predecessor PPCRAB resolved since their establishment?
- How many requests have been filed before PPARB and its predecessor per year since their establishment?
- What are some of the major and well-reasoned decisions made by PPARB?
- Do aggrieved bidders fear that they may lose future contracts due to their litigation history and therefore avoid preferring the disputes before PPARB?
- Can a party before PPARB be represented by another party other than an advocate?
- Do you think legal aid and advice should be made available to certain parties that may not afford legal representation such as women, persons with disabilities, youth and SMEs?
- Do you think the provision of legal aid and advice would improve the efficiency of PPARB?
- What period is given to the parties to prepare for hearing of the review?
- Does PPARB have process servers for purposes of effecting service upon parties?
- Should decisions on issues of law be made by simple majority or should they be reserved to the Chairman who has legal qualifications?
- Are the proceedings of PPARB held in public?
- Are the rules of procedure simple?
- Does PPARB dwell on technicalities in making its decisions?

- Does PPARB engage experts in proceedings in which it finds it lacks expertise and if so, who determines who these experts are?
- Does PPARB give reasons for its decisions?
- Does PPARB have a strategic plan?
- Are there any monitoring and evaluation mechanisms in the strategic plan?
- How many appeals have been preferred against the decisions of PPARB?
- How many of these have been successful?
- Do you think it is necessary to have a right of appeal to the High Court for parties aggrieved by the decisions of PPARB in view of the availability of the right to seek for judicial review in the High Court?
- Do you think it would be more preferable for the right of appeal to be limited to issues of law only as is common to many of the decisions of other tribunals?
- In *Selex Sistemi Integrati* Vs *The Public Procurement Administrative Review Board and The Kenya Civil Aviation Authority* the High Court held that Section 100 (4) of the Act is unconstitutional and inconsistent with the main objectives of the Act and is therefore ineffective. That Section provides that if judicial review is not declared by the High Court within 30 days of filing, the decision of PPARB shall take effect. Has this decision affected the effectiveness of PPARB in discharging its mandate as well as the effectiveness of the entire public procurement system in Kenya? If so please explain.
- In your opinion was the enactment of the Public Partnerships Act, 2013 necessary?
- What is your opinion on the establishment of the Petition Committee under that Act for the purpose of resolving disputes?
- What challenges does PPARB face in executing its mandate?
- How can these challenges be surmounted?
- In your opinion, has PPARB been effective in carrying out its mandate and in facilitating the achievement of the objectives of public procurement as provided under the Act?
- What proposals would you make in order to improve the effectiveness of PPARB in carrying out its mandate and in facilitating the achievement of the objectives of public procurement as set out under the Act?

7. Independence of PPARB

- In your view is PPARB an independent institution?
- What factors affect the independence of PPARB?

- Is PPARB free from any influence in its decision-making?
- Some of the members of PPARB are nominated by institutions whose members may prefer disputes before PPARB; does this affect the independence, real or perceived, of PPARB in any way?
- The Secretary of PPARB is appointed by the Director-General of PPOA from amongst the staff of the Authority; how does this affect the independence of PPARB taking into account that PPOA is a different entity from PPARB under Act?
- The Secretary of PPARB is granted powers under the Regulations to constitute panels to hear and determine reviews. Do you think this undermines the independence of PPARB in any way?
- PPOA is a procuring entity within the provisions of the Act and PPARB is administered by PPOA. Do you think that PPARB would be fair and be seen to be fair in cases where PPOA is a party to the proceedings?
- The members of PPARB are paid allowances by PPOA that are determined by PPOAB. Does this undermine the independence of the PPARB?
- The Secretary of PPARB has several responsibilities that affect the effectiveness of PPARB. Who does the Secretary account or report to?
- Who employs the support staff of PPARB and who do they report to?
- Who is the accounting officer of PPARB?
- Under Section 140 (d) of the Act the Minister of Finance has powers to make regulations governing the procedures to be followed in reviews before the PPARB including the panels of PPARB to conduct the reviews. Do you think the independence of PPARB would be enhanced if PPARB carried out this role?
- Whom does PPARB account or report to on its performance?
- To what extent do the provisions of the Act contribute to the independence of PPARB?
- Does the Constitution contain provisions that if implemented enhances the effectiveness and independence of PPARB and/or has it brought new challenges?
- What proposals would you make in order to enhance the independence of PPARB?

APPENDIX II: LIST OF INTERVIEWEES

No.	Name	Designation	Organization	Date of the Interview
1.	Mrs Jane Njoroge	Deputy Director-General	PPOA	29/9/2014
2.	M/s Pauline Opiyo	Secretary	PPARB	29/9/2014
3.	M/s Judith Guserwa Advocate	Former Member	PPARB	5/9/2014
4.	Mr. Mohammed Nyaoga Advocate	-Lawyer practicing in public procurement law -Lecturer in public procurement law	Mohammed and Muigai Advocates -University of Nairobi	30/9/2014
5.	M/s Lucy Barno	Lawyer/Legal & Corporate Affairs Manager	PPOA	29/9/2014
6.	Mr. Mwaniki Gachoka Advocate	Former Member/Chairman	PPCRAB/PPARB	21/8/2014
7.	M/s Josephine Wambua	Member	PPARB	29/9/2014
8.	Mr. Paul Gicheru	Chairman	PPARB	29/9/2014
9.	Mr. Sospeter Kioko	Former Member	PPARB	30/9/2014
10.	Ms Natasha Mutai	Former Member	PPARB	22/9/2014
11.	Mr. Philemon Kiprop	Procurement Officer and also a member of staff of the secretariat of PPARB	PPOA	30/9/2014