

**ACCOUNTABILITY IN PUBLIC SECTOR
PROCUREMENT:
A CASE STUDY OF THE STATE LAW OFFICE**

**A Thesis Submitted in Partial Fulfillment of the Requirements for the
Award of Degree of Master of Laws (LL.M) of University of Nairobi**

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DECLARATION

I, **FLORENCE MUMBI KIAWA** do hereby declare that this thesis is my original research and that all sources used are cited. I further certify that the work has not been submitted for a degree in any other university.

Signed Date

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This thesis has been submitted for examination with my knowledge and approval as the university supervisor.

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PROFESSOR MIGAI AKECH

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To my dear husband Joseph and children; Mutinda, Kate and Emmy for whom without their love and understanding I would not have gone this far. To my mother, and the entire family for their prayers and continued support.

LIST OF ABBREVIATIONS

ADB	AFRICAN DEVELOPMENT BANK
ARB	APPEALS REVIEW BOARD
CTB	CENTRAL TENDER BOARD
DAC	DEVELOPMENT ASSISTANCE COMMITTEE
DTB	DISTRICT TENDER BOARD
EACC	ETHICS AND ANTI-CORRUPTION COMMISSION
GDP	GROSS DOMESTIC PRODUCT
IMF	INTERNATIONAL MONETARY FUND
KACC	KENYA ANTI-CORRUPTION COMMISSION
MTB	MINISTERIAL TENDER BOARD
MTC	MINISTERIAL TENDER COMMITTEE
OECD	ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT
PPAB	PUBLIC PROCUREMENT APPEALS BOARD
PPCRAB	PUBLIC PROCUREMENT COMPLAINTS, REVIEWS AND APPEALS BOARD
PPD	PUBLIC PROCUREMENT DIRECTORATE
PPDA	PUBLIC PROCUREMENT AND DISPOSAL ACT
PPDR	PUBLIC PROCUREMENT AND DISPOSAL REGULATIONS
TOC	TENDER OPENING COMMITTEE
U.K	UNITED KINGDOM
U.S	UNITED STATES
UNCITRAL	UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

USAID **UNITED STATES AGENCY FOR INTERNATIONAL
DEVELOPMENT**

WTO **WORLD TRADE ORGANIZATION**

ABSTRACT

The project looks into accountability in public sector procurement with the case study being the State Law Office. It has examined how procurement in the public sector has been abused, the reasons for the same and ways of promoting accountability and transparency.

Chapter one looks into the concept of accountability in public sector procurement and contextualizes procurement at the State Law Office. Eventually the importance of procurement in a bid to save the Government from losing funds has been critically examined by employing the principles of sound procurement namely competition, publicity, transparency and market criteria.

Chapter two addresses the continuous quest for accountability in public sector procurement considering its contribution to our country's GDP. Integrity in the administration and promotion of a sound procurement system will be advocated. Assessment pillars of public procurement namely the legislative and regulatory framework, institutional framework and management capacity, procurement functions and market performances, integrity and transparency of the procurement system will be examined critically.

The world best practices have been considered so as to serve as a bench mark. The Model Law on procurement (UNCITRAL) has been taken as the point of reference coupled with the existing laws and regulations. Guidelines on accountability such as having a clear chain of command tied with effective control mechanisms, handling complaints in an equitable manner and subjecting public procurement to public scrutiny have been considered.

Chapter three has dealt with public procurement reforms in Kenya. It has addressed the historical background of procurement from the colonial times through the 1970s. It has considered the numerous tender boards that existed which are the Central Tender

Boards(CTBs) for procurements above 2 million Kshs, Ministerial Tender Boards(MTBs) for procurements below 2 million Kshs and District Tender Boards for procurements at lower government levels. A number of financial regulations were put in place to guide procurement. Procurement law after the year 2001 has been looked into which was characterized by a unification of all financial circulars; by the establishment of the Exchequer and Audit (Public Procurement) Regulations. The Public Procurement Directorate (PPD) to regulate procurement operations and appeals and review bodies which were established have been examined.

In 2005, the Public Procurement and Disposal Act (PPDA) was enacted followed by the Public Procurement and Disposal Regulations (PPDR) of 2006. Bodies like the Public Procurement and Oversight Authority (PPOA), the Public Procurement Board and the Public Procurement Appeals and Review Board (PPARB) were established in a bid to promote accountability and transparency. Corruption and its effect on procurement has also been problematized.

Chapter four has addressed the practical aspect of procurement at the State Law Office, the organisational structure in connection to procurement, the problems or shortcomings and reform measures. Chapter five has concluded and recommended on the way forward. This is in a bid to promote accountability and transparency in the entire public sector procurement and more specifically at the State Law Office.

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CHAPTER ONE

1.0 BACKGROUND TO THE STUDY

1.1 Introduction

Procurement refers to the function of purchasing goods and services.¹ Public procurement on the other hand is the acquisition by public bodies of the various goods and services that they need for their activities.² Any procurement begins with planning,³ choosing a provider, and after the contract is made, there follows the process of contract administration.⁴ In all these stages, accountability should be taken into consideration which ensures that a body charged with a function, performs it or that the body gives reasons for failure to perform such tasks with prescribed repercussions.⁵

Accountability within the public sector has largely been hindered by unethical conduct among some public officials, lack of clear laws, impunity⁶, political patronage,⁷ failure to enforce existing sanctions,⁸ among other reasons. Lack of proper accountability amongst the public has caused economic loss due to malpractices in government institutions.⁹

This study aims at examining accountability in public sector procurement and more specifically the strengths and weaknesses of the Public Procurement and Disposal Act 2005 as it relates to procurement of goods and services within the State Law Office. The

¹Sue Arrowsmith and Others, *Regulating Public Procurement: National and International Perspectives* (Kluwer Law International 2000) 1.

² Ibid.

³ Ibid at 2.

⁴ Ibid.

⁵Eliud Moyi and Eric Ronge, 'Taxation and Tax Modernization in Kenya: A Diagnosis of Performance and Options for Further Reform' (2006) Institute of Economic Affairs, Nairobi, 30.

⁶Kenya Anti-corruption Commission, *Preventive Services 2007*, The Anti-Corruption and Economic Crimes Act 2003 Explained (Kenya Anti-Corruption Directorate of Preventive Services 2007),

⁷ J.M. Migai Akech, 'Development Partners and Governance of Public Procurement in Kenya: Enhancing Democracy in the Administration of Aid' (2005) 37 New York University Journal of International Law and Politics 829, 17.

⁸Arrowsmith, *Supra* Note 1 at 19.

⁹Akech, *Supra* Note 7 at 17.

procurement of services for instance defence counsel by the State Law Office and the procurement of goods that is, from simple items such as stationery to complex contracts for instance construction works, purchase and disposal of vehicles among others.

The research will critically examine the procurement procedures that have been used by the State Law Office, the strengths or adequacy of the same, the weaknesses of the procedures and how to address these problems for instance, conflict of interest and inappropriate influence in evaluations among others. The study will also address the question of why proper accountability has not been seen despite the existence of a myriad of statutes on the subject and more specifically the Public Procurement and Disposal Act¹⁰, the Public Procurement and Disposal Regulations,¹¹ the Public Officer Ethics Act¹², the Anti-Corruption and Economic Crimes Act,¹³ the Code of Regulations for Public Officers,¹⁴ the Supplies Management Practitioners Act¹⁵, the Public Procurement and Disposal General Manual,¹⁶ the Public Procurement and Disposal (public private partnership) Regulations¹⁷ and the Constitution of Kenya 2010.¹⁸

1.2Context of the Study

Recently, there have been procurement irregularities touching on government institutions, such as the investigation of senior public officers in the Ministry of Foreign Affairs,¹⁹ and the Ministry of Water,²⁰ among many others by the Kenya Anti-Corruption

¹⁰The Public Procurement and Disposal Act 2005.

¹¹The Public Procurement and Disposal Regulations 2006.

¹²The Public Officer Ethics Act 2003.

¹³The Anti-Corruption and Economic Crimes Act 2003.

¹⁴ The Code of Regulations for Public Officers .

¹⁵Supplies Management Practitioners Act 2007.

¹⁶Public Procurement and Disposal General Manual 2009.

¹⁷Public Procurement and Disposal (Public Private Partnership) Regulations 2009.

¹⁸ The Constitution of the Republic of Kenya 2010.

¹⁹JohnNgirachu,` Ministry Ignored All Warnings on Tokyo Deal' *The Daily Nation*(17th October, 2010) at 10.

Commission (KACC) (now Ethics and Anti-Corruption Commission (EACC)). These procurement irregularities have brought about the need to critically investigate, why rampant anomalies exist in public procurement despite the existence of laws regulating the process.

Similarly, procurement of defence counsel by the State Law Office, to represent the government of Kenya in a number of cases for instance the Anglo leasing case of 2002 and for the Hague, International Criminal Court (ICC) trials on post-election violence,²¹ among other services has been an issue of concern. The procurement of goods also has been shrouded with conflict of interest, discretion and secrecy especially at the evaluation stage. This has raised questions on the transparency of the procedures hence hindering accountability to a large extent. Improvement of accountability in the public sector can therefore have a direct and beneficial effect on the overall economic situation of a country,²² necessitating institutions like the World Bank, Organization for Economic Co-operation and Development (OECD) and regional institutions for instance the African Development Bank (ADB) to assist developing countries review and revise their procurement systems.²³

²⁰Walter Menya, 'Water Agency Lost Billions in Tender Scam' *The Daily Nation* (3rd November 2010) at 5.

²¹Oliver Musembi and Casper Waithaka, 'Tackle ICC Before April' Says Mutula, *The Daily Nation* (21st March 2011) at 56; Alex Ndegwa, 'How Kibaki Team plans to stall ICC' *The Standard* (25th March 2011) at 1; John Ngirachu and Wanjiru Macharia, 'Team Queries Hiring of Foreign Firms' *The Daily Nation* (24th June 2011) at 10.

²² OECD, Integrity in Public Procurement: Good practice from A to Z <<http://ssrn.com/abstract=9870269>> accessed 20th April 2011 at 10.

²³ Strengthening Procurement Capacities in Developing Countries, volume 3 at <<http://www.ecd.org/data/ecd/12/14/34336126.pdf>> accessed 1/4/2011.

1.3 Problem Statement

This study will examine the Public Procurement and Disposal Act as it relates to procurement of goods and services within the public sector in Kenya and more specifically at the State Law Office, which is similar to other institutions in the public sector, with a view to identifying its strengths and weaknesses, and suggesting reform proposals.

1.4 Objectives

1.4.1 Main Objective

The main aim of the study will be to interrogate accountability in public sector procurement in Kenya, by examining the Public Procurement and Disposal Act, look into its weakness, gaps and suggest possible reform measures.

1.4.2 Specific Objectives

Other objectives will be to understand how the State Law Office has conducted its procurement, examine the strengths, address the weaknesses if any and suggest possible reforms.

1.5. Research Questions

This study will seek to answer the following questions

1. How has the public sector in Kenya conducted its procurement of both goods and services?
2. Has the public sector complied with the Public Procurement and Disposal Act while procuring its goods and services? To what extent?

3. How has the State Law Office conducted its procurement of both goods and services?
4. Has the State Law Office complied with the Public Procurement and Disposal Act while procuring its goods and services? To what extent?
5. What are the strengths and weaknesses of the Public Procurement and Disposal Act as applied in both the public sector and more specifically at the State Law Office?
6. How can the weaknesses if any of the Public Procurement and Disposal Act and the procurement procedures in the public sector and at the State Law Office be addressed

1.6 Significance of the Study or Justification

By interrogating the application of the Public Procurement and Disposal Act and its regulations, the study will suggest measures that could enhance accountability in public sector procurement, propose reforms to the procurement laws, regulations and also create a point of reference which people can learn or apply as a bench mark in procurement procedures.

1.7 Conceptual Framework

A primary impact on procurement is on public funds and therefore it is important to secure the best possible value for money in the way goods and services are obtained; to ensure that government money is not wasted.²⁴ This means that accountability is very crucial in every step of procurement. This has therefore resulted to mechanisms involving both normative and institutional infrastructure to be installed, so as to ensure

²⁴Arrowsmith, Supra Note 1 at 8.

that a body charged with a function performs it or that the body gives reasons for failure to perform such tasks with prescribed repercussions.²⁵

To promote accountability, the principles of competition, publicity, use of commercial criteria and transparency should be enhanced.²⁶ Proper planning for the huge expenditure involved in public procurement is an essential element of good procurement in government systems.²⁷ This helps to promote the procurement objectives of providing quality goods and services through open and fair competition.²⁸

The principle of competition means that there should be competition between a number of contractors to ascertain which contractor can offer the most favourable terms for delivering government's necessities.²⁹ It also involves equal treatment of all players which prohibits differentiation between economic operators.³⁰ Competitive tendering process requires that bids in large contracts be submitted by different contractors, and then be compared on the basis of the price and other relevant criteria through a formal evaluation process, while for smaller contracts, the usual approach is to ask for informal quotations from a number of different firms.³¹ Competition ensures that government obtains value for money and helps maintain the integrity of public procurement since it is an effective means of achieving transparency which prevents abuse of discretion.³²

²⁵Moyi and Ronge, Supra Note 5 at 30.

²⁶Akech, Supra Note 7 at 21.

²⁷Benon C. Basheka, 'Procurement Planning and Accountability of Local Government Procurement Systems in Developing Countries: Evidence from Uganda' [2008] 8 Journal of Public Procurement <http://www.ippa.ws/IPPC3/JoPP%208%283%29/IPPC_Ar4_Basheka.pdf> accessed 15 November 2011 at 380.

²⁸ Ibid

²⁹Akech, Supra Note 7 at 21.

³⁰ Sue Arrowsmith, *The Law Of Public Utilities Procurement*, (2ndedn Sweet and Maxwell, London 2005) 198

³¹ Arrowsmith, supra Note 1 at 29

³² Ibid at 22.

Publicity on the other hand complements competition in the sense that suppliers are able to find out about contracts and express their interest or tender.³³ This is as a result of freedom of information required in procurement.³⁴ It helps tendering firms know which contracts exist and after tendering, know why they have not won a contract.³⁵ This goes a long way in promoting transparency and accountability in the sense that non bidders can take advantage of disclosure for public interest reasons, where by citizens or civil society can use the information to establish whether a procuring entity has obtained value for money.³⁶

Commercial criteria in making procurement decisions on the other hand, involves basing decisions on the ability of firms to undertake the contract,³⁷ and consideration of bids on commercial criteria such as price, product and quality.³⁸ The goods, services or works being acquired should be suitable for the requirements and any contract should be concluded on the best possible terms. This is not necessarily that the firm offering the lowest price must be considered but the total life cycle costs of a product (including running costs and maintenance costs) as well as initial price.³⁹ It is often the case that the lowest bidder does not win the contract, non-commercial criteria such as industrial and social policies are often controlling,⁴⁰ thus governments may limit contract awards to disadvantaged categories of persons or groups.⁴¹

³³ Ibid

³⁴ Arrowsmith, Supra Note 27 at 98

³⁵ Ibid

³⁶ Ibid at 99

³⁷ Ibid

³⁸ Ibid.

³⁹ Arrowsmith Supra Note 1 at 29.

⁴⁰ Ibid.

⁴¹ Constitution , Supra Note 18 Article 227.

Since commercial criteria are not always controlling, the principle of transparency is vital, this means that procurement procedures should consist of clear rules and mechanisms for ascertaining that the rules are followed.⁴² Transparency in procurement is characterized by clear procedural rules for choosing contractors, the application for which is often verification.⁴³ Transparency ensures that only relevant considerations are taken into account by making it difficult to conceal corruption or other improper influences in the procurement process.⁴⁴ The most fundamental principle of transparency is that rules of the game must be known by all participants.⁴⁵

An ideal public procurement system should have sufficiently publicized rules of procedure to circumscribe discretion within procurement entities.⁴⁶ Further it should ensure that the procurement entities comply with the applicable rules for instance, compliance with procedures and the best procurement method considering the existing circumstances, publication of the results of contract awards, the keeping of detailed records of decisions and the furnishing of reasons to participating firms.⁴⁷ It should also have mechanisms for scrutinizing the decisions of procurement entities to ensure that they comply with norms for instance subjecting procurement decisions to oversight by a regulatory body and providing a quasi-judicial organ to which unsuccessful bidders can obtain the review of procurement decisions.⁴⁸

A sound procurement system seems to have two groups of goals; procurement goals and non procurement goals. The procurement goals normally include quality, timeliness, cost

⁴²Akech, Supra Note 7 at 22.

⁴³Arrowsmith, Supra Note 1 at 30.

⁴⁴ Ibid

⁴⁵ Ibid at 74

⁴⁶ Ibid.

⁴⁷ Ibid at 23

⁴⁸ Ibid.

(more than just the price), minimizing business, financial and technical risks, maximizing competition, and maintaining integrity. The non-procurement goals on the other hand include economic goals (preferring domestic or local firms), environment protection or green procurement (promoting the use of recycled goods), social goals (assisting minority), and international relations goals.⁴⁹

Public procurement is a complicated system within which there are many conflicting interests. This calls for sound procurement regulations and principles as mentioned above, so as to increase public confidence in the procedures followed, and to ensure fair and equitable treatment of all persons who deal with the procurement system.⁵⁰This study therefore examines procurement of goods and services at the State Law Office from the view point of the principles of sound procurement. That is, the extent which the procurements within the State Law Office have adhered to these principles.

1.8 Literature Review

This research will review works done by other researchers on the subject under study, address the issue of accountability in public procurement with an aim of setting a benchmark for my study.

Professor Sue Arrowsmith in her book, *Regulating Public Procurement, National and International perspectives* state that in all public procurement, one main objective should be achieving the best value for money.⁵¹ This means to successfully acquire the goods,

⁴⁹Khi V. Thai 'Public Procurement Re-examined'[2001]<[http://ippa.org/jopp/download/vol 1/Thai.pdf](http://ippa.org/jopp/download/vol%201/Thai.pdf)> accessed 15 November 2011 at 27-28.

⁵⁰ Ibid

⁵¹Arrowsmith, supra Note 1 at 28

works or services by the government on the best available terms.⁵² It involves ensuring that the goods or services acquired are suitable for the requirements and that a contract is concluded at the best possible terms.⁵³ This means that it is not necessarily the firm offering the lowest price, but the total life cycle of a product such as price, running costs and quality.⁵⁴ The whole process ought to be competitive, transparent, publicized and commercial criteria should be exercised.⁵⁵

This book will be relevant to my work in that it will serve as a guideline to the principles of sound procurement and promote the quest for value for money in every form of public procurement which has been seen to lack in the public sector. The book is therefore critical to my study especially on enhancing accountability in public sector procurement which is the study area in my work. Over and above these principles integrity in administration of the entire process should be taken into consideration.

Professor Sue Arrowsmith further in her book, *The Law of Public Utilities Procurement* indicates that the application of competition rules depend on the activity to which the particular purchase relates.⁵⁶ This applies to purchasing that is made in connection with offering goods and services as part of an economic activity.⁵⁷ Public procurement in general is an economic activity since it involves commercial transactions.⁵⁸

⁵² Ibid

⁵³ Ibid

⁵⁴ Ibid at 29

⁵⁵ Ibid at 30

⁵⁶ Arrowsmith Supra Note 27 at 64

⁵⁷ Ibid

⁵⁸ Ibid at 65

Publicity on the other hand requires freedom of information. However it can be limited in such cases as in defence procurement which is shrouded with a lot of secrecy. Arrowsmith's book is very significant to my work as it stresses the need to enhance accountability in public procurement in a bid to achieve value for money. This being the main area under study cannot be underestimated since accountability is core to any Government obtaining value for money, thus saving public funds that can be used in other important projects. Her work also addresses procurement in the Department of Defence which if not carefully checked can lead to abuse due to the confidentiality involved. She has therefore provided guidelines on how due diligence should be undertaken so as to promote accountability which is useful to my work.

Similarly, Professor Migai Akech, in his journal article *Development Partners and Governance of Public Procurement in Kenya: Enhancing Democracy in the Administration of Aid*, states that a sound procurement should emphasize four principles namely competition, publicity, use of commercial criteria and transparency.⁵⁹ These principles are very important in the procurement cycle, which coupled with high standards of ethical behavior, integrity and maintenance of internal controls, accountability in public procurement can be achieved.

Akech's article has proved very useful because it has addressed contemporary issues on why corruption is rampant today a problem which is mostly occasioned by political patronage.⁶⁰ He appreciates the fact that considerable efforts have been made to reform the national procurement systems, since procurement contributes to a very large percentage of government revenue. This is evidenced by the fact that about sixty percent

⁵⁹Akech, *Supra* Note 7 at 21-22

⁶⁰*Ibid* at 16.

of Kenya's government revenue is spent on procurement, hence public procurement reforms and sound procurement systems are vital.⁶¹ This article will therefore be used in analyzing the milestones taken in procurement and help in problematizing the quest for continuous reform in a bid to enhance transparency, efficiency and accountability in procurement.

Bruce Stone in his article *Administrative Accountability in the 'Westminster' Democracies: Towards a New Conceptual Framework* states that the quest for accountability is a response to the biases associated with discretion.⁶² The possession of various sorts of discretion by administrators, gives rise to expectations and suspicions in a diverse range of groups which create a need for the exercise of discretion to be justified or legitimized.⁶³ Accountability therefore leads to satisfaction of legitimate expectations about the use of administrative discretion or the legitimization of discretion.⁶⁴

Institutional mechanisms which justify discretion and which may at times be employed include arrangements for appealing against decisions or review mechanism, arrangements for outside participation in decision making, arrangements where decision making is placed in the hands of acknowledged experts on the assumption that decisions will thereby be governed by the norms as well as expertise of a profession, measures for answerability or the rendering of formal account statements or reasons for decisions and arrangements for external evaluation of decision making.⁶⁵

⁶¹ Ibid.

⁶² Bruce Stone, 'Administrative Accountability in the Westminster' Democracies: Towards a New Conceptual Framework and Governance' (1995) *An International Journal of Policy and Administration*, at 509.

⁶³ Ibid

⁶⁴ Ibid.

⁶⁵ Ibid.

Stone contributes to my work in that he gives guidelines on accountability such as making clear that accountability goes beyond bureaucratic or hierarchical notions of control and formal explanations.⁶⁶ Rules on discretion in public procurement should be addressed by having clear laws hence leaving a very small room for discretion. This can be justified by the understanding that anyone with bad motives can plead discretion to justify any unlawful procedures.

Ruth W. Grant & Robert O. Keohane, In their review, *Accountability and Abuses of Power in World Politics* state that accountability implies that some actors have the right to hold other actors to a set of standards, to judge whether they have fulfilled their responsibilities in light of those standards, and impose sanctions if they determine that these responsibilities have not been met.⁶⁷

The concept of accountability therefore implies that, the actors being held accountable have obligations to act in ways that are consistent with accepted standards of behavior and that they will be sanctioned for failures to do so.⁶⁸ Accountability functions to expose and sanction two sorts of abuses namely: the unauthorized or illegitimate exercise of power, and decisions that are judged by accountability holders to be unwise or unjust.⁶⁹ Enhancing accountability requires establishing institutions, that provide information to those people trying to hold power-wielders accountable and that enable them to impose sanctions on the power wielders.⁷⁰

⁶⁶Ibid at 510.

⁶⁷Ruth W. Grant & Robert O. Keohane, 'Accountability and Abuses of Power in World Politics' (2005) 99(1) *American Political Science Review*, 29.

⁶⁸ Ibid.

⁶⁹ Ibid

⁷⁰ Ibid at 30

Grant and Keohanestress on accountability mechanisms and emphasize largely on the legal mechanism. To them, in both the participation model; where the performance of power wielders is evaluated by those who are affected by their actions and the delegation model; whereby performance is evaluated by those entrusting them with powers or those who authorized them, citizens are advised to sue powerful entities for failures of responsibility.⁷¹ Their work is very relevant to my research since it emphasizes on promotion of accountability by making procurement officers answerable to their actions. This will help in coming up with reform measures which are aimed at deterring anyone perpetrating irregularities in public sector procurement.

Their work will assist me in advocating for training among the public and a vibrant civil society. This will empower the affected to question the abuses by power wielders in order for them to abide by the rules and justify their actions which can be done in both the courts and quasi-judicial arenas through both the administrative and criminal law.⁷² Promoting integrity in public procurement is a good approach since it is a more proactive method of robustly dealing with corruption and misconduct. This is because it entails identifying officers who are honest and trustworthy and therefore likely to be suitable for assignment to sensitive areas, hence deterring corrupt behavior and encouraging officials to report incidences of corruption or misconduct.⁷³

Collin Scott in his article, *Accountability in the Regulatory State*, states that the central problem of accountability arises from the delegation of authority to a wide range of public and some private actors through legislation, contracts or other mechanisms.⁷⁴

⁷¹ Ibid at 36

⁷² Ibid

⁷³ Kenya Anti-Corruption Commission, Integrity Testing Programme March 2011.

⁷⁴ Collin Scott, 'Accountability in the Regulatory State' (2000) 27 *Journal of Law and Society*, 40.

Debates over accountability have to grapple with the uncomfortable dilemma of how to give sufficient autonomy to these actors for them to be able to achieve their tasks while at the same time ensuring an adequate degree of control.⁷⁵

In defining and mapping accountability, Scott states that it can be said to be the duty to give account for ones actions to some other person or body. Most important questions are who is accountable, to whom and for what. My research will show that too much discretion and delegation of authority without clear laws, is a contributing factor to lack of proper accountability.⁷⁶ Both discretion and delegation should therefore be regulated and balanced so as to curb abuses.

Janna J. Hansen's journal article, *Limits of Competition: Accountability in Government Contracting* indicates that a process of contracting out government services ought to be accountable to the public, to the agency's relevant constituency, and to the officials involved. This is to be achieved if the formal and informal controls surrounding the contract, and the contract management process supports the goals of reasonable timely decisions, reasonably effective service delivery outcomes, a fair, non-corrupt process and input from the public.

This work is important to my research since it gives ways of which accountability can be achieved by complying with sound procurement mechanisms, how to explore the weaknesses in policies, systems, processes and methods of work, lack of political will, lack of integrity, impunity, gross misuse of discretion coupled with nepotism and

⁷⁵ Ibid

⁷⁶ Ibid at 41.

tribalism.⁷⁷ All these are to be pursued so as to enhance accountability in public sector procurement and save public funds.

Peter Trepte in his work, *Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation*, posits that regulation defines measures employed by the state to promote its economic and social policies.⁷⁸ This is a sustained and focused control exercised by a public agency on the basis of a legitimate mandate over activities that are socially valued.⁷⁹

Procurement regulation should be divided into three categories namely economic, political and international models. The economic model refers to the significance of the market order to the regulation of procurement and highlights the issue of economic efficiency and instances of market failure. It is understood to mean the act of a public body purchasing or acquiring goods, works and services from the market place, while the political model on the other hand recognizes the fact that governments have long used procurement as a tool to pursue a number of other (socially desirable) policies,⁸⁰ for instance industrial policy considerations, regional or national development, protection of domestic production, social policies such as gender or racial equality or the protection of minority rights and environmental protection.⁸¹

The international model brings an added dimension to the regulation of procurement in the national context, given that the government may bind itself to a number of

⁷⁷ Janna J. Hansen, 'Limits of Competition: Accountability in Government Contracting,' (2003) 112 Yale Law Journal, 2470.

⁷⁸ Peter Trepte, *Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation* (Oxford University Press 2004) at 64.

⁷⁹ Ibid

⁸⁰ Ibid.

⁸¹ Ibid at 65

international trade obligations which may limit its scope of action in the field of procurement.⁸² All regulation is purposive. It is an instrument of public policy. The government represents the public interest and is entrusted with a responsibility to achieve and promote certain policies which are assumed to be in the public good and which seek to reflect that public interest. To achieve accountability, clear regulation is crucial so as to be able to know whether the laws have been complied with and question or hold people accountable in case of breach.⁸³

On corruption eradication, Trepte suggests that the most important way of combating corruption in developing economies is the creation of private markets for suppliers since they largely depend on the government for sale of their products, over and above codes of conduct and penalties for corruption. His study on regulation and corruption eradication is very critical to my research as he sets a guideline that can be used in promoting accountability. However, provision of markets for suppliers might not be a solution to combating corruption. The culture of corruption can be eradicated by instilling positive values which in other words is promotion of integrity amongst public officers.

Steven Kelman in his work *Procurement and Public Management: the Fear of Discretion and the Quality of Government Performance* asserts that lack of competition in awarding contracts is a problem in public procurement.⁸⁴ Public officials cannot use common sense and good judgment in ways that would promote better vendor

⁸² Ibid

⁸³ Ibid.

⁸⁴ Steven Kelman, *Procurement and Public Management: The Fear Of Discretion And The Quality Of Government Performance* (Washington D.C. AEI Press 1990) 1.

performance.⁸⁵ To him the system should be deregulated to allow public officials' greater discretion since the ability to exercise discretion would allow government to gain greater value from procurement.⁸⁶

He states that the fear of allowing public officials to use good sense and judgment in procurement works against both the selection of the best contractor and quality of performance of those that are selected.⁸⁷ The fear of discretion makes it more difficult to select the right vendor because public officials cannot use important information that could help predict vendor performance, since the public procurement system forbids officials to exercise.⁸⁸

Procurement regulation according to Kelman has three goals namely- equity which provides fair access to bidders in competing for government business, integrity which reduces the chances for corruption in the procurement process, economy and efficiency which enables procurement to be for the lowest possible price for goods and or services of the desired quality.⁸⁹ The above factors are promoted by full and open competition since competition lowers prices hence it promotes economy, because everyone is granted access and bribery cases become difficulty. Corruption denies citizens equitable access to the procurement process and raises the prices government pays hence high standard of probity is required in procurement.⁹⁰

⁸⁵ Ibid

⁸⁶ Ibid

⁸⁷ Ibid

⁸⁸ Ibid at 1-2

⁸⁹ Ibid at 2

⁹⁰ Ibid

Kelman contributes to my work in that I am able to examine critically whether the exercise of discretion should be allowed in public procurement or avoided because improper exercise can lead to corruption and abuse of power promoting lack of accountability. Discretion is feared because officials cannot be trusted to live up to high standards of probity unless a close eye is kept on them hence establishment of a system of public management based on rules. Discretion has been found to create loopholes which can be exploited in meddling with transparent procurement procedures hence clear laws should be put in place to leave a very small room for discretion.

Anne Janet DeAses in her journal article *Developing Countries: Increasing Transparency and Other Methods of Eliminating Corruption in the Public Procurement Process* states that corruption within procurement has been prevalent throughout the world and is not only limited to developing countries.⁹¹ Although corruption brings to mind bribery, there are many opportunities for both government actors and contractors to engage in other forms of corruption.⁹² Instances of corruption occur mainly before government contracts are awarded and during the procurement process especially during the invitation of bids, a government may have an illicit agreement with a supplier for a particular product and as a result establish such narrow specifications that no other supplier is able to meet the requirements, resulting in no other bids submitted.⁹³

In most developing countries most invitation for bids are published in the smallest, most obscure circulation source that satisfies the advertising requirements and hope that no one sees it. This tactic reduces competition and the favoured supplier is more likely to

⁹¹ Anne Janet DeAses, 'Developing Countries: Increasing Transparency and Other Methods of Eliminating Corruption In The Public Procurement Process' (2005)34 Public Contract Law Journal, 554.

⁹² Ibid

⁹³ Ibid

win the contract. Emergency procurements create another major form of corruption. Direct (procurements) negotiations are allowed due to extreme urgency, national security, and additional needs for an existing contract or the availability of only one supplier.⁹⁴ In this instance, the government may be justified in choosing to negotiate directly with a supplier. Corruption may be encouraged when a government claims exceptional reason for direct negotiations that do not exist hence eliminating competition.⁹⁵

Common pre-award supply side corruptions occur when contractors coordinate ahead of time to offer bribes.⁹⁶ Suppliers may coordinate with each other to fix the bid prices with pre agreed payoffs for the losing bidders. Sellers may also offer the government bribes or other incentives to engage in corrupt practices that favour the supplier.⁹⁷ Additionally, suppliers may attempt to interfere with the evaluation process or the work of evaluators if they are well networked. Corruption can also occur after the contract has been awarded whereby the government may ignore the supplier's lower quality products and reduced quantities.⁹⁸ The supplier may also falsify standard certificates and provide insufficient quantities to make up for the money lost in bribes to the government during the bidding process.⁹⁹ Her study is very relevant to my work since it will enable me interrogate the forms of corrupt practices in public sector procurement in a bid to come up with reform measures while I advocate for integrity in administration of the entire process.

⁹⁴ Ibid

⁹⁵ Ibid at 555

⁹⁶ Ibid

⁹⁷ Ibid

⁹⁸ Ibid

⁹⁹ Ibid

John Linarelli, *Corruption in Developing Countries in Transition: On Legal and Economic Perspectives, in Public Procurement*, states that developing countries are reforming and are thus establishing public procurement systems in order to save their governments money and increase their confidence in new and reformed governments.¹⁰⁰ He supports a clear legal frame work, consistent policies and transparency. To him corruption in developing countries is very high and it is not only caused by the culture of the society but the result of weak enforcement of western economic and political structures.¹⁰¹

Although corruption might have helped facilitate trade by avoiding extensive and 'cumbersome' regulations, the harm to the government and the population is far more reaching. It leads to reduced investments in the country, limited effectiveness of foreign aid, budgetary problems, distorted composition of government expenditure, slow economic growth and development and reduced entrepreneurship.¹⁰² My study will recognize that the disadvantages of corruption outweigh the advantages and seek to promote good procurement practices by promoting integrity and encouraging transparency and accountability.

Irene Hors, *Dealing with Corruption in Developing Countries, in No Longer Business as Usual: Fighting Bribery and Corruption*. The OECD found that corruption slows foreign direct investment, distorts the size of government expenditure and the decision making

¹⁰⁰ John Linarelli (ed) Sue Arrow Smith & Arrow Davies :*Corruption in Developing Countries in Transition On Legal and Economic Perspectives, In Public Procurement: Global Revolution* (Kluwer Law International 1998) at 125.

¹⁰¹ Ibid

¹⁰² Ibid at 126.

process for public investment projects.¹⁰³ In addition, corruption limits development by slowing a developing nation's full participation in the global economy.¹⁰⁴ Her study on public procurement in developing countries is very relevant and is of great value to this research as it proves important in understanding the problems of public procurement in developing countries which Kenya is one.¹⁰⁵ However my study will look in to ways of curbing corruption in public procurement and the benefits of accountability.

Professor MigaiAkech in his book, *Privatization & Democracy in East Africa* states that accountability is critical to democracy because it ensures that those who wield power, whose exercise may adversely impact upon the vital interests of citizens are accountable for its exercise.¹⁰⁶ His research on accountability is very critical since it is a relationship between power wielders and those holding them to account whereby the latter have the right to hold the former to a set of standards, to judge whether they have fulfilled their responsibilities in light of those standards and to impose sanctions if they determine that the responsibilities have not been met.¹⁰⁷

Accountability therefore guarantees that power is exercised fairly or justly thereby ensuring that it does not unduly compromise the liberties and livelihoods of individuals and groups that make up society. Akech's book will guide me into interrogating why accountability should be promoted, what accountability entails and who should be held

¹⁰³ Irene Hors, 'Dealing with Corruption in Developing Countries, in No Longer Business as Usual: Fighting Bribery and Corruption (2000) OECD at 159.

¹⁰⁴ Ibid

¹⁰⁵ Ibid.

¹⁰⁶ MigaiAkech, *Privatization & Democracy in East Africa* (East African Educational Publishers Ltd 2009) at 33.

¹⁰⁷ Ibid

accountable; and explore ways of promoting accountability within public procurement and more specifically in Kenya.

1.9 Assumptions

The study will take in to consideration the following assumptions-:

1. That all respondents at the State Law Office will answer all survey questions honestly and to the best of their ability if only confidentiality is promised.
2. It is also assumed that my employment with the State Law Office which is the case study will not interfere with the objectivity of my research work.

1.10 Methodology

The study is designed to be an exploratory research predominantly based on review of literature. The methods to be used will include both primary and secondary sources of data. Library services will be highly utilized in exploring the relevant materials from textbooks, scholarly articles and reports on the subject to support the arguments made in the study. Internet searches and newspaper reports will also be very useful in providing data on current literature especially on tender scandals since the media has in many instances acted as whistleblowers.

Oral interviews on the other hand with the procurement officers and users at the State Law Office will be undertaken within the period of study so as to give practical experience. The introductory questions will be general in nature so as to set the climate or atmosphere in a bid to arrive at the open ended questions in the interview guide. The interviews will be carried out during the period of study and considering the secrecy in

the dealings on procurement, research ethics such as confidentiality, anonymity, honesty, and respect for colleagues among others shall be taken into consideration.¹⁰⁸

The population for the procurement officers being quite small; that is ten procurement staff members, I will interview all of them. As concerns the users, I will interview the officers in charge of requisition of items from the stores from the seven departments. This is because they are in direct contact with the users on a day to day basis and are therefore in charge of all complaints and compliments if any from these departments.

1.11 Limitations

Being a study of a public institution (the State Law Office), the requirements of the Official Secrets Act,¹⁰⁹ may bar officers from divulging a lot of information. This problem will however be overcome by not disclosing their identity so as to maintain confidentiality and obtain all the necessary information required.

¹⁰⁸David Resnik, 'Research Ethics', <http://www.niehs.nih.gov/research/resources/bioethics/whatis/> accessed on 2nd November 2011.

¹⁰⁹ Official Secrets Act, Chapter 187 Laws of Kenya

CHAPTER TWO

2.0 ENHANCING ACCOUNTABILITY IN PUBLIC PROCUREMENT

This chapter will conceptualize accountability in public procurement in a bid to explain why the same is significant. It will also elaborate on the principles of sound procurement which must be adhered to and finally come up with the world best approaches that should serve as a bench mark for our country and more so to our various government departments.

2.1 Conceptualizing Accountability in Public Procurement

Accountability requires that a body charged with a function performs it and that the body gives reasons for failure to perform such tasks with prescribed repercussions.¹¹⁰ It implies that some actors have the right to hold other actors to a set of standards, to evaluate whether they have fulfilled their responsibilities in light of those principles, and impose sanctions if they determine that these responsibilities have not been met.¹¹¹

Public procurement accounts for a significant proportion of the Gross Domestic Product (GDP) of any country, hence the need to ensure that accountability systems are put in place.¹¹² This can be supported by the view that, for instance in 1994, public procurement in the European Union accounted for fourteen percent (14%).¹¹³ Closer home, in East African countries Uganda and Tanzania, the estimated size of government procurement in the year 2001 was about thirty five percent(35%) and nine percent(9%) respectively.¹¹⁴ Similarly, in most government institutions the State Law Office being

¹¹⁰Moyi and Ronge, Supra Note 5 at 30.

¹¹¹ Grant and. Keohane, Supra Note 67 at 29.

¹¹²Arrowsmith and Others, Supra Note 1 at 1.

¹¹³ Ibid.

¹¹⁴ Walter Odhiambo and Paul Kamau, 'Public Procurement: Lessons from Kenya, Tanzania and Uganda' (2003) OECD Working Paper No.208 at 13.

one, a lot of funds are expended in procurement of goods and services. There is therefore the need to promote sound procurement which in return enhances accountability in the sense that it promotes effective procurement.

A primary impact on procurement is on public funds.¹¹⁵ It is important to secure the best possible value for money in the way goods and services are obtained, to ensure that public money is not wasted.¹¹⁶ All those who potentially benefit from government spending also have an interest in preventing waste in procurement, since money lost this way can mean higher taxes, or less to spend elsewhere on other important projects.¹¹⁷ The performance of contractors on the other hand, can have a direct and important impact on the government's ability to fulfill its responsibilities to its citizens.¹¹⁸ Effective management of the procurement process to ensure an appropriate choice of provider is therefore a key element in this process.¹¹⁹

2.1.1 Integrity in Public Procurement Management.

Public procurement has an aspect of offering significant opportunities for those involved in the process, to obtain political advantage or to dispense political patronage.¹²⁰ Thus contracts can be given to firms in regions that are important for the government in a forthcoming election, or can be used to reward political supporters or 'buy' official opponents. Procurement contracts can also be placed to benefit the personal interests of politicians, officials or their family and friends or they can be given to those firms that

¹¹⁵Arrowsmith, Supra Note 1 at 8.

¹¹⁶ Ibid.

¹¹⁷ Ibid.

¹¹⁸ Ibid

¹¹⁹ Ibid at 9

¹²⁰ Ibid at 10

are prepared to pay bribes.¹²¹ This may be prejudicial to effective and value for money procurement as well as undermining the integrity of government; hence being important matters of concern to most procurement systems.¹²²

Regulation of public procurement is therefore very crucial and has recently undergone and continues to undergo significant development.¹²³ Regulation provisions are usually put in place for domestic reasons where individual governments use them to promote domestic objectives.¹²⁴ Most importantly, value for money, prevention of corruption, promotion of industrial or social policies in developing market economies, and also as a method of improving their existing market based procurement systems supported by the UNICITRAL Model Law.¹²⁵ Various international organizations providing aid for state projects have also developed formal procurement rules for instance the European Union.¹²⁶

2.2 Principles of Sound Procurement

Any procurement begins with the planning decision to make the purchase, which in the first place involves deciding whether there is need for the particular goods or services.¹²⁷

A good situation in point would be to ask the question for instance whether certain equipment is required or whether it would be better to merely upgrade the existing one.¹²⁸

¹²¹ Ibid at 11

¹²² Ibid.

¹²³ Ibid at 15

¹²⁴ Ibid

¹²⁵ Ibid

¹²⁶ Ibid

¹²⁷ Ibid at 1.

¹²⁸ Ibid.

The process would also involve ensuring that the purchaser has the legal capacity to undertake the transaction, obtaining any relevant approvals within the government chain of command and arranging the necessary funding.¹²⁹ The second phase is then to choose which firm is to be the provider of the goods or services required and to conclude a contract with that party.¹³⁰ This involves for example drawing up the specification to explain the institution's needs to potential contractors, deciding what type of award procedure to use, selecting the winning contractor, debriefing bidders and signing the agreement.¹³¹ Once the contract is made, this follows the process of contract administration.¹³² This includes supervision to ensure that the promised goods and services are properly delivered, arranging for payment of the contractor, dealing with disputes if any and various contractual matters.¹³³

2.2.1. A Sound Procurement System

Professor MigaiAkech in his article states that a sound procurement system should stress four principles, namely competition, publicity, use of commercial criteria and transparency.¹³⁴ These principles should be taken into consideration so as to promote accountability and transparency in any procurement process.

Akech states that the principle of competition entails contracts being awarded by holding a competition between a number of competitors to establish which one of them can offer the most favorable terms for delivering government's supplies.¹³⁵ He further asserts that competition not only ensures that government obtains value for money but is also

¹²⁹ Ibid at 1

¹³⁰ Ibid

¹³¹ Ibid at 2

¹³² Ibid

¹³³ Ibid

¹³⁴ Akech, Supra Note 7 at 21

¹³⁵ Ibid.

important in maintaining the integrity of public procurement.¹³⁶ This is because it is a valuable means of achieving transparency which prevents abuse of discretion.¹³⁷ Competition to him ensures that government obtains goods and services that are appropriate to its requirements, with the requisite financial and technical capability on the best possible terms.¹³⁸

The above notwithstanding, there is the danger that rules established to promote competition in public procurement may not yield much since government agencies are barred from consulting with suppliers.¹³⁹ This is believed to promote integrity in the process,¹⁴⁰ since if governments were allowed to do so; it would be easy for potential suppliers to work with corrupt government officials to rig specifications.¹⁴¹ These values that emphasize transparency and accountability may result in government not obtaining value for money in most instances,¹⁴² since there is no room for negotiation beforehand.

This can be distinguished from the normal practice in private sector, which is not bound by transparency rules, and where continuous negotiation between buyers and sellers exist.¹⁴³ Professor Sue Arrowsmith states in her book that proposals have been offered to limit the counterproductive effects of open competition in public procurement, “and include a requirement of written decisions justifying procurement decisions, making of procurement decisions through multiple-member evaluation panels, peer control in the

¹³⁶ Ibid

¹³⁷ Arrowsmith, Supra Note 1 at 7.

¹³⁸ Ibid

¹³⁹ Ibid

¹⁴⁰ Ibid at 8

¹⁴¹ Ibid

¹⁴² Ibid

¹⁴³ Akech, Supra Note 7 at 21.

decision making process, subsequent oversight of decision rationales and recording of exparte or informal contracts.”¹⁴⁴

Publicity on the other hand complements competition by ensuring that suppliers get to know what contracts exist so as to participate in the process.¹⁴⁵ Specifications should be drawn up so as not to intentionally exclude certain procedures and rules should be put in place so as to reject non-responsive bids.¹⁴⁶ Publicity is as a result of freedom of information required in procurement and it helps firms tendering know which contracts exist and also after tendering why they have not won a contract.¹⁴⁷ This goes a long way in promoting transparency and accountability in the sense that non bidders can take advantage of disclosure for public interest reasons, where by citizens or civil society can use the information to establish whether a procuring entity has obtained value for money.¹⁴⁸

The use of commercial criteria is also very critical in making procurement decisions. It involves basing decisions on the ability of firms to undertake the contract and consideration of bids on market value for instance price, product and quality.¹⁴⁹ Thus it is often the case that the lowest bidder does not win the contract.¹⁵⁰ In deed noncommercial criteria such as industrial and social policies govern the process a lot; thus government may limit contract awards to disadvantaged ethnic groups,¹⁵¹ or categories of persons or groups previously disadvantaged by unfair competition ordiscrimination.¹⁵²The goods,

¹⁴⁴Arrowsmith, Supra Note 1 at 9.

¹⁴⁵ Ibid at 16

¹⁴⁶ Ibid.

¹⁴⁷ Ibid

¹⁴⁸ Ibid at 99

¹⁴⁹Arrowsmith, Supra Note 1 at 17.

¹⁵⁰Akech, Supra Note 7 at 22

¹⁵¹ Ibid.

¹⁵²Constitution , Supra Note 18, Article 227(2).

services or works being acquired should be suitable for the requirements and any contract should be concluded on the best possible terms, where it is not necessarily the firm offering the lowest price is considered, but the total life cycle costs of a product(including running costs and maintenance costs), as well as the initial price.¹⁵³

The principle of transparency is crucial since commercial criterion is not always the main guiding factor. Transparency requires that procurement procedures should consist of clear mechanisms for verifying that the set rules are followed.¹⁵⁴ A publication of the results of contract awards, the keeping of detailed records of decisions and furnishing of reasons to participating firms should be upheld so as to ensure that the entire process is transparent.¹⁵⁵ There should also be in place mechanisms to scrutinize procurement decisions to ensure that they comply with the law.¹⁵⁶ Professor Arrowsmith states that such mechanisms include subjecting procurement decisions to oversight by a regulatory body and providing a quasi-judicial forum to which unsuccessful bidders can obtain the review of procurement decisions.¹⁵⁷

Transparency in procurement is characterized by clear procedural rules for choosing contractors, the application for which is often verification.¹⁵⁸ Transparency ensures that only relevant considerations are taken into account by making it difficult to conceal corruption or other improper influences on the procurement process.¹⁵⁹ The most

¹⁵³ Arrowsmith Supra Note 1 at 29.

¹⁵⁴ Ibid at 18

¹⁵⁵ Ibid at 19

¹⁵⁶ Ibid

¹⁵⁷ Ibid

¹⁵⁸ Arrowsmith, Supra Note 1 at 30.

¹⁵⁹ Ibid

fundamental principle of transparency is that rules of the game must be known by all participants.¹⁶⁰

A sound public procurement system can enhance accountability in the sense that procedures can be made clear, thus compliance can be monitored. This in return can give answers to questions touching on whether the right procedure has been complied with while failures are sanctioned. In addition to the above four principles, the principles of fairness and equity should be complied with in any procurement system.¹⁶¹The Parliament (of Kenya) in this case shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented with specific provisions as to sanctions against contractors that have not performed according to professionally regulated procedures, contractual agreements or legislation.¹⁶²

The Public Procurement and Disposal Act¹⁶³ establishes procedures for procurement and the disposal of unserviceable, obsolete or surplus stores and equipment by public entities.¹⁶⁴ This is to achieve the objectives of maximizing economy and efficiency, promoting competition and ensuring that competitors are treated fairly, promoting the integrity and fairness of those procedures, increasing transparency and accountability in those procedures, increasing public confidence in those procedures and facilitating the promotion of local industry and economic development.¹⁶⁵

¹⁶⁰ Ibid at 74

¹⁶¹ Constitution Supra Note 18 Article 227

¹⁶² Ibid Article 227 (2) (c).

¹⁶³ Act, Supra Note 10.

¹⁶⁴ Ibid

¹⁶⁵ Act, Supra Note 10, Section 2

2.2.2 Assessment Pillars of Public Procurement in Kenya

A framework for evaluating a developing country's public procurement system (Kenya being one) has been devised by the Development Assistance Committee (DAC) of the Organisation for Economic Cooperation and Development (OECD), together with the World Bank.¹⁶⁶ The aim has been to develop an integrated set of tools and good practices to improve procurement systems.¹⁶⁷

Various benchmarks have been put in place to establish whether the elements of a well-functioning public procurement system are in place.¹⁶⁸ The benchmarks are based on four pillars namely -: Legislative and Regulatory Framework, Institutional Framework and Management Capacity, Procurement Operations and Market Practices, Integrity and Transparency of the Procurement System.¹⁶⁹

2.2.2.1 The Legislative and Regulatory Framework

This involves the existence, availability, quality and use of the legal and regulatory framework from the highest level (Acts and Regulations), down to the operational procedures, guidelines, model tender documents and standard conditions of contract.¹⁷⁰

The current public procurement framework has been strengthened by having a sound legal framework in place. With the enactment of the PPDA and Regulations,¹⁷¹ Kenya today has a sound and comprehensive legal framework for public procurement since for instance; the PPDA clearly establishes the procurement methods to be applied and all

¹⁶⁶Public Procurement Oversight Authority, Assessment of the procurement System in Kenya (2007) <[http:// www.go.ke](http://www.go.ke)>Accessed on 25th August 2011.

¹⁶⁷ Ibid

¹⁶⁸ Ibid

¹⁶⁹ Ibid

¹⁷⁰ Ibid at 9

¹⁷¹ Act, Supra note 10 and Regulations ,Supra Note 11

relevant procedures for procurement.¹⁷² The PPDA and Regulations cover goods, works and services for all procurement using national funds.¹⁷³

2.2.2.2 Institutional Framework and Management Capacity

This assesses how the procurement system as defined by the legal and regulatory framework in Kenya is operating through the institutions, management systems and practices forming part of the overall public sector governance.¹⁷⁴ The legal framework provides guidance on procurement planning linking the planning process up with the budgeting process.¹⁷⁵ All procurement shall be planned by the procuring entity concerned through an annual procurement plan.¹⁷⁶

The PPDA establishes the Public Procurement Oversight Authority (PPOA),¹⁷⁷ and the Board of the Authority, which play a fundamental role of ensuring compliance with the procurement procedures.¹⁷⁸ The legal framework therefore defines the responsibilities of the above organs or bodies so as to ensure that proper guidelines are given on procurement.¹⁷⁹

2.2.2.3. Procurement Functions and Market Performances

These systems (legal/regulatory and institutional) operate at the level of implementing procuring entities as well as on the procurement market.¹⁸⁰ The current legal framework provides for a fully decentralized procurement process, leaving full responsibility of

¹⁷² Act, Supra Note 10.

¹⁷³ Act Supra Note 10 and Regulations, Supra Note 11

¹⁷⁴ Public Procurement Oversight Authority

¹⁷⁵ Ibid

¹⁷⁶ Ibid

¹⁷⁷ Act, Supra Note 10, Section 8.

¹⁷⁸ Ibid.

¹⁷⁹ Ibid

¹⁸⁰ Ibid

undertaking procurement to the tender committee and procurement unit at the level of the procuring entity.¹⁸¹

Steps have also been taken towards developing a professional procurement workforce.¹⁸² While the procurement profession still suffers from lack of adequate procurement competences; important steps have been taken in recent years to establish a sound basis for a professional and procurement discipline.¹⁸³ For instance, establishing a scheme for recruitment of procurement officers and capacity development through training programmes.

2.2.2.4. Integrity and Transparency of the Public Procurement System

This relies on a number of control mechanisms, including 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.¹⁸⁴ Establishment of sound internal audit mechanisms and compliance with them is crucial.¹⁸⁵ This is clearly described in the PPDA and PPDR. The Appeals Review Board (ARB) constitutes the first avenue for complaints.¹⁸⁶ The PPDA also provides for judicial review to the High Court for decisions by the Appeals Review Board.¹⁸⁷

¹⁸¹ Ibid at 16

¹⁸² Ibid

¹⁸³ Ibid

¹⁸⁴ Ibid

¹⁸⁵ Ibid

¹⁸⁶ Act, Supra Note 48, Section 93-99

¹⁸⁷ Ibid at Section 100.

2.3 World Best Practices

The Organisation for Economic Cooperation and Development (OECD) estimated the value of the government procurement market to be US\$2,000 billion in 1998, which was equivalent to 7% of world Gross Domestic Product (GDP) and 30% of world merchandise trade¹⁸⁸ It has been estimated that between US\$30 to US\$43 billion could be available in the procurement marketplace in Sub-Saharan Africa.¹⁸⁹ Most industrialised countries spend at least 10% of their GDP on public procurement.¹⁹⁰ Consequently, developed and developing countries have need for a well-functioning public procurement system.¹⁹¹ This is particularly true for developing countries, where procurement usually accounts for a high proportion of total expenditure, for instance 40% in Malawi and 70% in Uganda, compared with a global average of 12-20%.¹⁹²

In most developed countries, public procurement takes place within a framework of international obligations.¹⁹³ An example is the World Trade Organisation's Agreement on Government Procurement or the Procurement Directives made under regional agreements such as the European Union or the North America Free Trade Agreement.¹⁹⁴ Public procurement in most developing countries does not have to meet these international requirements.¹⁹⁵ Consequently, the pressure to reform may not have been as strong and some developing countries retained a procurement system that differed little

¹⁸⁸ Organisation for Economic Cooperation and Development, 'The Size of Government Procurement Markets' (2002) at 8.

¹⁸⁹ Wayne Wittig, 'Building Value through Procurement: A Focus on Africa' International Trade Centre UNCTAD/WTO (1999). p.8 <<http://www.legacy.transparency>> accessed 25th November, 2011.

¹⁹⁰ Trionfetti F, 'Home-biased Government Procurement and International Trade.' In S. Arrowsmith and M. Trybus (Eds), *Public Procurement: the Continuing Revolution* (The Netherlands, Kluwer Law International 2003) at 227.

¹⁹¹ Ibid

¹⁹² Development Assistance Committee (2005), 'Harmonising Donor Practices for Effective Aid Delivery; Strengthening Procurement Capacities in Developing Countries' OECD p. 18

¹⁹³ Ibid

¹⁹⁴ Ibid

¹⁹⁵ Ibid

from that which was in place during colonial times.¹⁹⁶ However, in recent years, the momentum for reform has increased, partly in consequence of requirements set by the World Bank and other donor organisations as conditions for providing development aid, but principally because the inefficiencies of the unreformed systems have become obvious.¹⁹⁷

Most donors consider that a well-functioning procurement system is an essential requirement if their funds are to be used effectively to promote development.¹⁹⁸ Where such a system is not provided by the host country, donors may insist on using their own procedures.¹⁹⁹ There has been a trend in recent years for using national systems where these are suitable, through multi-donor budget support programmes.²⁰⁰ As most developing countries prefer the flexibility that comes with receiving development aid through budget support, they have an incentive to reform their public procurement and financial management systems.²⁰¹

The United Nations Commission on International Trade Law (UNCITRAL),²⁰² has played a major role in removing obstacles to the flow of international trade.²⁰³ With its Model Law on Procurement of Goods, Construction and Services it has furthered the progressive harmonization and unification of the law of international trade and enhanced

¹⁹⁶Edgar Agaba and Nigel Shipman, 'Importance Of Public Procurement Reform In Developing African Countries' <http://www.ippa.ws/IPPC2/BOOK> accessed 25th November 2011 (2006) at 377

¹⁹⁷ Ibid at 374

¹⁹⁸ Ibid

¹⁹⁹ Ibid

²⁰⁰Abeillé B, 'Overview of Procurement Reforms in Africa: Paper presented at the Joint World Trade Organisation/World Bank Regional Workshop on Procurement Reforms 2003' <<http://www.wto.org>> accessed 25th November 2011.

²⁰¹ Ibid

²⁰²Robert R.Hunja, 'The UNCITRAL Model Law on Procurement of Goods, Construction and Services and its impact on Procurement Reform' at 97 in Sue Arrowsmith and Arwel Davies(eds), *Public Procurement: Global Revolution* (Kluwer Law International, London 1998)

²⁰³ Ibid

broader participation in particular developing states.²⁰⁴ Legislation that has been enacted on the basis of the Model Law will be applicable to the procurement of all goods, construction and services that are financed by public funds hence enhancing efficiency and effectiveness in public procurement.²⁰⁵

However, the Model Law recognises that some states may wish to exempt procurement involving national defence or national security from the application of the law.²⁰⁶ It is also recognized that procurement financed by external resources may often be subject to procurement procedures established by the source of the funds.²⁰⁷ It is expected, however that any exemptions from the law would be narrowly proscribed and publicly notified either in the law itself or in procurement regulations.²⁰⁸

The main objectives of the Model Law are to maximize economy and efficiency in procurement, foster and encourage participation in procurement proceedings by suppliers and contractors, especially where appropriate, participation by suppliers and contractors regardless of nationality, and thereby promote international trade, promote competition among suppliers and contractors for the supply of the goods or construction to be procured providing for the fair and equitable treatment of all suppliers and contractors, promote the integrity , fairness , public confidence in, the procurement process and achieve transparency in the procedures relating to procurement²⁰⁹

²⁰⁴ Ibid

²⁰⁵ Ibid

²⁰⁶ United Nations Commission on International Trade Law (UNCITRAL) Model Law on Procurement of Goods, Construction and Services Article 1(2).

²⁰⁷ Ibid

²⁰⁸ Hunja, Supra Note 199 at 98.

²⁰⁹ UNCITRAL Supra Note 203, preamble.

Governments should support these initiatives by ensuring timely access to information, for instance through the use of new technologies, and providing clear channels to allow the external observer to inform authorities in the case of potential irregularities or corruption.²¹⁰ Procurement goals and policies are implemented either by non legal means such as internal administrative circulars directing the actions of procurement officers (in the United Kingdom, and those countries under the U.K.'s influence such as Malaysia), or by formal statutes, rules or regulations (in France, many European countries and the U.S.).²¹¹

A significant number of countries, particularly the transition countries, have adopted public procurement rules and regulations for the first time or have reformed their existing procurement legal provisions.²¹² Moreover, it seems that the newer the constitution is, the more likely public procurement is provided.²¹³ South Africa's 1994 Constitution²¹⁴, for example, provides that the procurement of goods and services for any level of government shall be regulated by an Act of Parliament and provincial laws, which shall make provision for the appointment of independent and impartial tender boards to deal with such procurements.²¹⁵

The tendering system shall be fair, public and competitive, and tender boards shall on request give reasons for their decisions to interested parties. No organ of state and no member of any organ of state or any other person shall improperly interfere with the decisions and operations of the tender boards. All decisions of any tender board shall be

²¹⁰ Ibid

²¹¹ Thai, Supra Note 49 at 27-28.

²¹² Arrowsmith, Supra note 1 at 1.

²¹³ Ibid

²¹⁴ Republic of South Africa 1994 Constitution, Section 187.

²¹⁵ Ibid

recorded.²¹⁶ Sources of procurement regulations include constitution/charter, statutes (passed by legislative bodies), executive orders (issued by chief executives or their delegates), rules and regulations (issued by agency heads), and administrative law decisions (administrative decisions on claims, protests by independent units such as a board or committee of contract appeals).²¹⁷

In addition to procurement goals, procurement regulations specify, among other things, the procurement organizational structure, roles and responsibilities, procurement phases and process and standards of conduct.²¹⁸ As public procurement is a very complicated system within which there are many conflicting interests, sound procurement regulations are needed in order to increase public confidence in the procedures followed in public procurement to ensure fair and equitable treatment of all persons who deal with the procurement system.²¹⁹ It is therefore essential to have a procurement code, regulations, or manual since the absence of such may lead to unpredictable procurement problems.²²⁰

2.3.1 Accountability

For proper accountability and control, the following guidelines should be taken into consideration-:

2.3.1.1 Institution of a Clear Chain of Command tied with Effective Control

Mechanisms

A clear chain of responsibility should be established by any procuring entity which should define succinctly the authority for approval of spending, signing off and approval

²¹⁶ Ibid

²¹⁷ Thai Supra Note 49 at 27.

²¹⁸ Ibid

²¹⁹ Ibid

²²⁰ Ibid at 28

of key stages based on a proper segregation of duties.²²¹ In addition, the regularity and thoroughness of controls should be proportionate to the risks involved.²²² Internal and external controls should complement each other and be carefully coordinated to avoid gaps or loopholes and ensure that the information produced by controls is complete so as to make it useful.²²³

Internal guidelines should specify the level of responsibility, the required knowledge and experience, the corresponding financial limits and the obligation of recording in writing of key stages in the public procurement cycle.²²⁴ In the case of delegated authority the responsibility or nature of delegation should be clearly stated.²²⁵ These processes should be embedded in daily management and supported by adequate communication and training so as to enhance integrity, which curbs irregularities and corruption.²²⁶

Regular internal controls such as financial and management controls by officials independent of those undertaking the procurement need to be undertaken.²²⁷ External audits of procurement activities on the other hand are important to ensure that practices align with the processes. It is to be noted that financial audits are critical in that they help detect and investigate fraud and corruption, while performance audits provide information on the actual benefits of procurements and suggest complete improvements.²²⁸

²²¹ Organization for Economic Co-operation and Development (OECD), *Supra* Note 22.

²²² *Ibid*

²²³ *Ibid*

²²⁴ *Ibid*

²²⁵ *Ibid*

²²⁶ *Ibid*

²²⁷ *Ibid*

²²⁸ *Ibid*

The regularity of audits may be determined by considerations such as the nature and the extent of the risks, that is the quantity and associated value, the various types of procurement, the complexity, sensitivity and specificity of the procurement. There should be no minimum threshold for conducting random audits.²²⁹ It is therefore necessary to ensure that audit recommendations are implemented effectively so as to achieve the desired results.²³⁰ Information from external audits on procurement should be publicised to reinforce public scrutiny and public disclosure of internal controls may also be considered in a bid to enhance transparency and accountability.²³¹

2.3.1.2 Handling Complaints in an Equitable Manner

Procuring entities should ensure that bidders have effective and timely access to review systems of procurement decisions and that these complaints are swiftly resolved.²³² To ensure that a review is neutral, a body with enforcement capacity that is independent of the respective procuring entities should rule on procurement decisions and provide sufficient remedies.²³³ Review systems should be analysed to ensure that parties applying for reviews do not just do it for the sake of interrupting or influencing tenders.²³⁴

Alternative dispute settlement mechanisms may also be established to reduce time taken in solving complaints.²³⁵ A major challenge is to ensure that complaints are resolved in a fair manner while ensuring administrative efficiency that is, the delivery of goods and services to citizens in a timely manner.²³⁶ E-procurement for instance should therefore be

²²⁹ Ibid

²³⁰ Ibid

²³¹ Ibid

²³² Ibid

²³³ Ibid at 27

²³⁴ Ibid

²³⁵ Ibid

²³⁶ Ibid

encouraged since it is an effective way of relaying information so that bidders can challenge a questionable decision in time.²³⁷

Persons participating in the review should be secure from external influence and their decisions may also be published, possibly on-line to ensure publicity. Bidders should then be able to refer to an appeal body – administrative and/or judicial – to review the final decision of the procuring authority if need be.²³⁸ Using a professional review body in dealing with complaints may reinforce the legitimacy of decisions and reduce time taken in for solving complaints.²³⁹

Adequate remedies should be available for bidders such as setting aside of the award decision, the use of a standstill period for challenging the decision between the award and the beginning of the contract, suspending temporarily the award decision, annulment of concluded contracts, damages and pecuniary penalties which can extend to lost profits.²⁴⁰ In all these, public interest should be taken as a major consideration.²⁴¹

2.3.1.3 Subjecting Public Procurement to Public Scrutiny and Mostly the Media and Civil Society.

Procuring entities should disclose public information on the key terms of major contracts to the public.²⁴² Reports of oversight institutions on the other hand should also be made widely available to enhance public scrutiny.²⁴³ To complement these conventional accountability mechanisms, procuring entities should consider involving

²³⁷ Ibid

²³⁸ Ibid

²³⁹ Ibid

²⁴⁰ Ibid

²⁴¹ Ibid

²⁴² Ibid at 29

²⁴³ Ibid

representatives from civil society organisations and the wider public in monitoring high-value or intricate procurements that entail significant risks of mismanagement and corruption.²⁴⁴

Freedom of information is a key instrument for enhancing transparency and accountability in the public procurement process and should be encouraged and promoted.²⁴⁵ Records for instance could be made available for civil society organisations, media and the wider public, to uncover cases of mismanagement, fraud, collusive behaviour and corruption.²⁴⁶ Civic education on the wider public, for instance through awareness-raising programmes and communication campaigns, is crucial in supporting the integrity of the procurement process.²⁴⁷

Other stakeholders in the public procurement process may also be involved so as to scrutinize the procurement systems.²⁴⁸ For instance, for development assistance programmes, bilateral and multilateral donors could play a role in strengthening and assessing the quality and functioning of public procurement systems.²⁴⁹ For procurements that involve important risks of mismanagement and possibly corruption, procuring entities should consider the possibility of involving representatives from civil society, academics or end-users in scrutinising the integrity of the process.²⁵⁰ Direct social control mechanisms encourage their involvement as external observers of the whole procurement process or of key decision-making points which promotes

²⁴⁴ Ibid

²⁴⁵ Ibid

²⁴⁶ Ibid

²⁴⁷ Ibid at 30

²⁴⁸ Ibid

²⁴⁹ Ibid

²⁵⁰ Ibid

answerability.²⁵¹ However for it to work anyone participating in the same should keep off conflict of interest and handle confidential information with the degree it requires.²⁵²

2.4 Conclusion

Public procurement system's ability to accomplish procurement policies or goals is influenced by its environment, and in turn, it influences its environment.²⁵³ Environment influencing the public procurement system includes many types for instance market environment, internal environment, legal environment, political environment and socio-economic environment.

Internal forces like the interactions between different departments, the level of professionalism, budget resources, rules, regulation and internal controls have a big impact on any form of procurement.²⁵⁴ Market conditions also have a great influence over public procurement in an effort to maximize competition while the legal environment provides the framework guiding all procurement activities. Political environment on the other hand is concerned with democracy where all participants are actively involved in all aspects of the public procurement system. Lobby groups can influence passing or altering procurement statutes whereby interest groups can push for good systems.

Social, economic and other environmental forces are also considerations which work towards promoting fair play, preference of national or local firms over foreign countries and other geographic locations.²⁵⁵ Considering the nature of public procurement and the

²⁵¹ Ibid

²⁵² Ibid

²⁵³ Ibid at 32

²⁵⁴ Ibid at 33

²⁵⁵ Ibid at 36

impact it has on public funds, the laws, regulations and principles of sound procurement should be complied with; together with considerations on the environment of the procurement system in a bid to promote accountability and transparency.

CHAPTER THREE

3.0 PUBLIC PROCUREMENT REFORMS IN KENYA

This Chapter will set out the history of public procurement in Kenya, how public procurement has grown and changed over time, look in to how it has been bedeviled by a number of vices, corruption being the main one, and the effects of corruption on procurement. The chapter will finally state the strengths and weaknesses of the Public Procurement and Disposal Act in connection with the principles of sound procurement and accountability

3.1 History of Public Procurement in Kenya

The road to reform for procurement laws has been necessitated by the understanding that, public procurement accounts for a significant proportion of the Gross Domestic Product (GDP) of a country. In Kenya for instance, about sixty percent of government revenue is spent on procurement.²⁵⁶

Odhiambo and Kamau, in their OECD Working Paper NO. 208 state that until the early 1970s public procurement in Kenya was largely undertaken by the Crown Agents. This is because local supplies were inadequate and most requirements of the new government could only be met from outside sources.²⁵⁷ The government then established supply departments within its ministries, whereby the Ministry of Finance was mandated to administer the entire process and prepare guidelines.²⁵⁸

²⁵⁶Odhiambo and Kamau, Supra Note 114 at 16.

²⁵⁷Ibid at 16.

²⁵⁸ Ibid

Each supplies entity was independent with its own procurement officers, but major procurements were conducted through the Central Tender Boards.²⁵⁹ Professor Akech in his article states that, in a bid to regulate government finances, procurement being one way of expending public funds, the Ministry of Finance issued the Government Financial Regulations and Procedures (hereby referred to as Financial Regulations).²⁶⁰

He states that the Central Tender Board (CTB) which was a procurement body; composed of members appointed by the permanent secretaries of the ministries they represented, and the Ministerial Tender Boards (MTBs) were established under the Regulations.²⁶¹ He further states that the CTB was responsible for procurement of goods and services valued at Kshs. 2,000,000 and above, while the Ministerial Tender Boards (MTBs) were in charge for procurement of goods and services whose value was below Kshs. 2,000,000.²⁶²

As indicated by Professor Akech, special government departments, for instance the Department of Defence were also allowed to have their own tender boards which operated on the limits and powers of the MTBs.²⁶³ District Tender Boards (DTBs) were also established to take care of procurement at the lower levels of government administration.²⁶⁴ The Financial Regulations did also provide for appeals process.²⁶⁵ Appeals against the decisions of the District Tender Boards went to the Central Tender Board, those against Ministerial Tender Boards; to the appropriate permanent secretaries,

²⁵⁹ Ibid

²⁶⁰ Akech, Supra Note 7 at 17.

²⁶¹ Ibid

²⁶² Ibid

²⁶³ Ibid at 17-18

²⁶⁴ Ibid at 18

²⁶⁵ Ibid

while appeals against the Central Tender Board and Department of Defence Tender Board, lay to the Permanent Secretary to the Ministry of Finance.²⁶⁶

3.1.1 Weaknesses of the Above System

Professor Akech states that the process had a number of shortcomings, for instance an officer in breach of procurement regulations could only be reprimanded or sacked.²⁶⁷ This is going by the provisions of the Government Contracts Act,²⁶⁸ which prohibited personal prosecution of public officers for contracts made in that capacity.²⁶⁹ Prosecution would have been more deterring and most effective if the responsible officers were compelled to pay for any loss that occurred, over and above losing their jobs.

A study conducted by SGS Consultants to assess public procurement systems in Kenya in 1986, came up with the finding that public procurement was not operating efficiently and that the state was losing a lot of money through shoddy deals.²⁷⁰ According to Odhiambo and Kamau, the report strongly indicated the need for reforming the public procurement system in the country.²⁷¹ In 1997, the Government in collaboration with the World Bank commissioned another study to evaluate the country's procurement processes and systems.²⁷² The World Bank supported the study through the Public Procurement and Capacity Reform Project,²⁷³ which study identified the need for a complete review and implementation of a reform process in procurement.²⁷⁴

²⁶⁶ Ibid

²⁶⁷ Ibid at 18

²⁶⁸ Government Contracts Act Cap 25 Laws of Kenya, Section 6 as analysed by Professor Akech.

²⁶⁹ Ibid

²⁷⁰ Odhiambo and Kamau, Supra Note 114 at 19

²⁷¹ Ibid

²⁷² Ibid

²⁷³ Ibid

²⁷⁴ Ibid at 19

According to Odhiambo and Kamau, the study revealed that the public procurement system in Kenya lacked transparency and fair competition.²⁷⁵ The study further revealed that procurement staff were not adequately trained, lacked professionalism, and also lack of a professional body that would oversee and discipline procurement officers made them vulnerable to corruption.²⁷⁶ One of the major recommendations from these two studies was that reforms in public procurement systems were vital if government was to save resources otherwise lost through inflated procurement.²⁷⁷

The study by World Bank argued that improvement in procurement systems would benefit the economy.²⁷⁸ Together with the African Development Bank (ADB), in conjunction with the Government, public procurement reforms were initiated in the late 1990s.²⁷⁹ This reform process created a system that allowed among others, a proper delegation of authority, incentives, procurement thresholds, planning and the development of supplies manuals, which have gone a long way in promoting public procurement.²⁸⁰

The main focus of the reform process was to address the procurement laws and regulations, establish procurement institutions and entities, as well as create adequate and timely evaluation and monitoring mechanisms.²⁸¹ These reforms would increase transparency in procurement

²⁷⁵ Ibid

²⁷⁶ Ibid at 20

²⁷⁷ Ibid

²⁷⁸ Ibid

²⁷⁹ Ibid

²⁸⁰ Ibid

²⁸¹ Ibid

systems and create reputable institutions.²⁸² The public procurement reforms also aimed at ensuring that the procurement laws were streamlined to conform to the international procurement laws and standards.²⁸³

3.1.2 Procurement Law in Kenya after the Year 2001

According to Professor Akech, the government enacted the Exchequer and Audit (Public Procurement) Regulations of March 2001.²⁸⁴ At the same time Public Procurement Regulations were issued by the Ministry of Finance which unified all circulars that had been issued earlier on procurement.²⁸⁵ The Procurement Regulations,²⁸⁶ in Professor Akech's view were based on the UNCITRAL Model Law on Procurement of Goods, Construction and Services,²⁸⁷ which embraces the principles of sound public procurement.²⁸⁸ The Regulations applied to all public entities except where the Minister for Finance decided in consultation with the head of the procuring entity, that it was in the interest of national security to use a different procedure.²⁸⁹

The Central Tender Board was then abolished since public entities established their own tender committees and began to procure independently.²⁹⁰ In 2002, a body known as the Public Procurement Directorate (PPD) was established to regulate procurement operations.²⁹¹ This body was very instrumental in promoting accountability and

²⁸² Ibid

²⁸³ Ibid

²⁸⁴ Akech, Supra Note 7 at 23.

²⁸⁵ Madara Ogot and others, 'Long Term Policy Framework For Public Procurement In Kenya, the State of being accountable, Liability to be called upon to render an account; the obligation to bear the consequences for failure to perform as expected' (2009) <<http://www.answers.com/topic/accountability>> at 18 accessed 1st March 2012.

²⁸⁶ The Exchequer and Audit (Public Procurement) Regulations, 2001, Legal Notice No. 51 of 2001.

²⁸⁷ The UNCITRAL Model Law on Procurement of Goods, Construction and Services

²⁸⁸ Akech, Supra Note 7 at 24

²⁸⁹ Ibid

²⁹⁰ Ogot and others, Supra Note 283 at 18.

²⁹¹ Ibid

transparency in the entire procurement process. In a bid to promote capacity development, about seven hundred procurement officers from different ministries were trained so as to promote professionalism in the sector.²⁹² The Public Procurement Appeals Board (PPAB) which existed was dissolved and replaced with the Public Procurement Complaints Review and Appeals Board (PPCRAB) whereby suppliers were granted the right to appeal.²⁹³

As stated earlier, security contracts were exempted from the Regulations where the Minister for Finance decided, in consultation with the head of the procuring entity, that it was in the interest of national security to use a different procedure.²⁹⁴ This section gave a blank cheque to the minister resulting to scandals such as the Anglo leasing scandal where security was cited to justify procurement by single sourcing which resulted to overpricing of the procured items.²⁹⁵ This scandal involved Kshs.56.5 billion in the process of which the Government lost a lot of money in unclear procurement deals.²⁹⁶

In 2003, an independent procurement review of public procurement was undertaken which identified shortcomings such as, abuse of contract variations, poor record keeping for audit, lack of guidance on low value procurements, lengthy procurement process, conflict of interest, lack of evidence on procured items among many weaknesses.²⁹⁷ This led to the dismissal of 2,000 procurement officers from ministries and state

²⁹² Ibid

²⁹³ Ibid

²⁹⁴ Akech, *Supra* Note 7 at 24

²⁹⁵ Morris Odhiambo, 'Corruption and Regime Consolidation in a Neo-Patrimonial State System' in Joshua Kivuva & Morris Odhiambo (ed), *Integrity in Kenya's Public Service* (Clarion 2010) at 17

²⁹⁶ Ibid

²⁹⁷ Ogot and others, *Supra* Note 283 at 18

corporations in a bid to clean up the entire sector and workforce. Procurement activities were also temporally suspended.²⁹⁸

In 2004, the Public Procurement Directorate (PPD) undertook a training needs assessment; developed training programmes and the government recruited new procurement staff and deployed them to ministries.²⁹⁹ This was in a bid to ensure that the process was led by an untainted work force. The Public Procurement and Disposal Act³⁰⁰ was then enacted, followed by the Public Procurement and Disposal Regulations,³⁰¹ then the Supplies Management Practitioners Act,³⁰² which was formed to support professionalism in the procurement function, the Public Procurement and Disposal General Manual,³⁰³ the Public Procurement and Disposal (Public Private Partnership) Regulations³⁰⁴ and recently the Constitution of Kenya,³⁰⁵ whereby accountability in public procurement has been enshrined in the supreme law of the land.

3.1.3 Shortcomings of the 2001 Procurement Regulations

Professor Akech observed that the Minister for Finance had immense powers to deal with procurement issues as he wished hence frustrating the reform process.³⁰⁶ A case at hand as mentioned earlier was in 2003 when he suspended all public tenders and procurement officers supposedly to purge the system of corruption, while ulterior motives were read in the whole process.³⁰⁷

²⁹⁸ Ibid

²⁹⁹ Ibid

³⁰⁰ Act, Supra Note 10

³⁰¹ Regulations, Supra Note 11

³⁰² Supplies Act, Supra Note 15

³⁰³ Manual, Supra Note 16

³⁰⁴ Regulations, Supra Note 17

³⁰⁵ Constitution of Kenya, Supra Note 18

³⁰⁶ Akech, Supra Note 7 at 33

³⁰⁷ Ibid

Similarly, the provision that allowed the Minister for Finance in consultation with the head of the procuring entity, to use a different procedure if he deemed it to be in the interest of national security was prone to abuse.³⁰⁸ This was because any procurement in the department of Defence could pass as security procurement. Questions then follow on procurement of common items for instance stationery which have nothing to do with threat to security.

In the same vein, membership to the PPCRAB created a conflict of interest.³⁰⁹ The permanent secretaries Ministry of Finance, Office of the President and Solicitor General sat in boards of a number of Government agencies and corporations which were themselves procurement entities.³¹⁰ This was akin to a monkey deciding on affairs of the forest.

The inadequacies of the Exchequer and Audit (Public Procurement) Regulations were summed up in the case *Joram Mwenda Quntai v. The Chief Magistrate Nairobi*.³¹¹ This case involved an alleged abuse of office by the appellant by arbitrarily directing the immediate implementation of a contract without regard to Exchequer and Audit (Public Procurement) Regulations. In the estimation of the Court of Appeal, the Regulations were:

“Badly drafted, sketchy, not well-thought out and do not appear to be likely to solve the perceived problems. For example, the penal regulations make no sense and are lamentably limited in scope and they lack clarity. Moreover, it is wrong jurisprudence to attempt to rescind lawfully executed contracts by criminally

³⁰⁸ Ibid at 34-35

³⁰⁹ Ibid at 35

³¹⁰ Ibid

³¹¹ Civil Appeal No.228 of 2003 (Unreported)

prosecuting the officials of a State Corporation who are deemed to have breached the Regulations”³¹²

3.1.4 The Public Procurement and Disposal Act 2005

The Act is an improvement of the 2001 Regulations in a number of respects. In addition to establishing improved public procurement procedures, it provides for disposal of unserviceable, obsolete or surplus stores and equipment by public entities.³¹³ The Act creates fairly stringent penalties for corrupt practices, fraudulent practices, collusion to engage in inappropriate practice and failure to disclose public interest in the tendering process.³¹⁴ This is meant to curb impropriety in the tendering process for purposes of achieving efficiency, fairness and economy.

It is worth noting that the objects of this Act,³¹⁵ have been elevated to constitutional status by the new constitution,³¹⁶ which states that when a state organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost effective.³¹⁷ The Act has consolidated the gains of strengthening independent institutions for purposes of achieving the objectives. Among the bodies created by the Act for regulation of public procurement are:

³¹² Ibid

³¹³ Act, Supra Note 10 Section 2.

³¹⁴ Ibid Section 38-43.

³¹⁵ Act, Supra Note 10, Section 2.

³¹⁶ Constitution of Kenya, Supra Note 18

³¹⁷ Ibid, Article 227 (1).

3.1.4.1 The Public Procurement Oversight Authority (PPOA)

The body generally ensures compliance with public procurement procedures, initiates public procurement policy and proposes amendments to the Act or regulations.³¹⁸

PPOA is headed by the Director General appointed by an Advisory Board with approval of parliament.³¹⁹ His functions are to enhance transparency and accountability by *inter alia*, processing quarterly and annual reports, to be submitted to the Board and Minister for onward transmission to parliament within thirty days of receipt.³²⁰ The report contains a description of activities of the Authority, overall functioning of the public procurement system, a list of the extent of positive bias to local participation,³²¹ among others.

3.1.4.2 The Public Procurement Advisory Board (The Board)

This is a fairly independent organization consisting of nine members nominated by prescribed organizations, and approved by parliament.³²² The role of the Board is to advise the Authority generally on exercise of its powers and performance of its functions; approve estimates of the revenue and expenditures of the authority among others.³²³

3.1.4.3 The Public Procurement Administrative Review Board (PPARB)

This is a forum for those aggrieved by procurement procedures to seek administrative reviews.³²⁴ The review is to be completed within 30 days following the request,³²⁵ after

³¹⁸ Act, Supra Note 10 Section 9.

³¹⁹ Ibid

³²⁰ Ibid Section 20 (5)

³²¹ Ibid Section 20(3)

³²² Ibid Section 22

³²³ Ibid Section 23(a)

³²⁴ Ibid Section 25

³²⁵ Ibid Section 93 to Section 100.

which a judicial review will be preferred within 14 days and further to the High Court whose decision will be final.³²⁶

3.2 Corruption in Public Procurement

Professor Akech argues that the bulk of corrupt practices in Kenya have occurred in public procurement.³²⁷ This is mainly because of political interests whereby politicians want to reward their supporters so as to continue remaining in office.³²⁸ Elections are an expensive and elaborate process hence those who want to ascend or remain in power, will be financed by various persons and entities in exchange of lucrative procurement contracts once in power.³²⁹ The role of political patronage in advancing corruption is therefore facilitated by opaque processes and unaccountable regulations and laws.³³⁰

3.2.1 Forms of Corrupt Practices in Public Procurement

Widespread corrupt practices in public procurement include public officers being influenced by their seniors, powerful politicians and businessmen to favor certain firms over others mainly at the invitation and short-listing stage, designing tender documents to favor particular firms and releasing confidential information among others.³³¹ The situation is further worsened by the fact that the procurement system is manned by junior officers, who are easily intimidated and manipulated by their seniors.³³² In most instances the seniors collude with powerful politicians and businessmen leading to entering into deals whereby the junior officers have neither say nor control.

³²⁶ Ibid Section 100(2).

³²⁷ Akech, Supra Note 7 at 16

³²⁸ Ibid

³²⁹ Jeffrey Herbst, 'The Politics of Privatization in Africa, in Ezra N. Suleman and John Waterbury (eds) *The Political Economy Of Public Sector Reform And Privatization* at 240 (Boulder: Westview Press, 1990)

³³⁰ Ibid

³³¹ Odhiambo and Kamau, Supra note 114 at 36.

³³² Akech, Supra Note 7 at 19.

Similarly, public servants are not stopped from running private businesses leading to conflict of interest.³³³ This in return has led many bids to be submitted by companies or businesses owned by public servants and or their close friends and relatives. The end result of this has been lack of objectivity in the entire process leading to bias, awarding of contracts to firms that do not qualify hence offering shoddy services.

Inappropriate use of a procurement method other than open tendering has been used as an avenue for corruption.³³⁴ Suppliers and the officials of the procuring entity may introduce corruption in procurement process, which can be done at the different stages of the procurement process.³³⁵ Before government contracts are awarded and during the procurement process; corruption can take place during the invitation of bids, because the public entity procuring may have an illegal arrangement with a supplier for a particular product so as to ensure no other supplier is able to meet the requirements, resulting in no other submitted bids.³³⁶ This may include specific dimensions and design features favouring a specific supplier's product.³³⁷

Although United States and developed countries publish all invitation bids, in many developing countries; Kenya being one, they will publish their bids in the smallest most obscure circulation source and hope that no one sees it.³³⁸ This tactic reduces competition and the favored supplier is more likely to win the contract.³³⁹ A public entity may also cite emergency so that there is no time for competitive procedures to take

³³³ Ibid

³³⁴ Arrowsmith Supra Note 1 at 555

³³⁵ Ibid

³³⁶ Ibid

³³⁷ Ibid

³³⁸ John Linarelli, Supra Note 100 at 125

³³⁹ Ibid

place.³⁴⁰This is also another source of corruption in public procurement. Corruption after the contract is awarded occurs mainly because the procuring entity may ignore the supplier's lower quality products and reduced quantities for instance, a supplier may falsify standard certificates and provide insufficient quantities to make up for money lost in bribes given to the government in the bidding process.³⁴¹

A report by Transparency International ranked Kenya as number 154 out of 178 of the world corruption index in the year 2010, and stated that Kenya had lost a lot of billions to shady procurement deals in the last seven years.³⁴²The need for reform has thus become urgent, since the business community keeps complaining that inefficiencies in public procurement are contributing to an unsuitable business environment.³⁴³

These inefficiencies for instance, have led to poor physical infrastructure and inefficient services. At the same time, the donor community also began to make the reform of the public procurement system a condition for lending as part of the structural adjustment process.³⁴⁴ Led by the World Bank, these donors in particular sought to harmonise the national procurement systems with international procurement guidelines, in order to make the processes more transparent and to devolve procurement to local entities.³⁴⁵

³⁴⁰ Ibid.

³⁴¹ Ibid at 126.

³⁴² Transparency International *corruption index* <<http://www.guardian.co.uk/.../corruption-index-2010-26>> October 2010 accessed 25th November 2011.

³⁴³ Odhiambo and Kamau, *Supra* Note 114 at 17

³⁴⁴ Ibid

³⁴⁵ Ibid

3.2.2 Anti-Corruption Measures

Principles of good governance are fundamental in a bid to achieve a just, economically sound and efficient public procurement system.³⁴⁶ This is because if the principles are adhered to, then the rule of law, constitutionalism and public good as opposed to public interest shall be pursued. This will promote transparency and accountability in procurement since laws will not be disregarded.

Since 1999, the Government has identified and implemented an extensive set of measures in the area of governance, including anti-corruption measures. The Government established the Kenya Anti-Corruption Commission (KACC) now Ethics and Anti-Corruption Commission (EACC) to fight corruption. The Public Officer Ethics Act³⁴⁷, Code of Regulation for all public office holders and wealth declaration every two years for all civil servants have also worked towards eradicating corruption.³⁴⁸

Further as regards local regulations and international agreements, certain procurement activities involve international governments and organisations such as the World Bank, the International Monetary Fund (IMF) and the United States Agency for International Development (USAID).³⁴⁹ Where these organisations provide the financial support for a project, most of them insist that the recipient government should use international tendering procedures such as the World Bank guidelines among others. The World Bank, for example, will require that its guidelines prevail over the national ones in all projects in which it is involved, regardless of its level of participation.³⁵⁰ The World Bank has

³⁴⁶Ibid at 36.

³⁴⁷ Public Officer Ethics Act ,Supra Note12

³⁴⁸ Ibid

³⁴⁹ Ibid

³⁵⁰ Ibid

been relying on the model procurement law developed by the United Nations Commission on International Trade Law (UNCITRAL),³⁵¹ and adapting it to individual countries' legal systems.³⁵² One of the objectives of procurement reforms in Kenya was to align the national procedures for procurement with the international ones.³⁵³

Corruption in the public sector is widespread and mostly the perpetrators go scot free due to lack of evidence or because they are very senior members in the government.³⁵⁴ The different economic conditions of the different parties in the procurement transaction, the poor civil servant working for the government on one hand and the wealthy companies bidding for the tender on the other hand, creates an environment which is ripe for corruption to thrive.³⁵⁵

There are arguments for and against corruption. Those who support corruption argue that corruption should be left alone as it is the grease that facilitates voluntary exchange and market equilibrium.³⁵⁶ They further argue that bribes serve as lubricants in an otherwise sluggish economy and improve its efficiency.³⁵⁷ In so doing, it ensures that trade takes place smoothly, quickly and without any impediments.

Those against corruption argue that it is a socially wasteful habit and reduces competition for government contracts.³⁵⁸ In addition, the entities which are awarded the tender on the basis of the biggest bribe given are in most cases not the best suited to perform that project which in turn leads to the suffering of the public in general.³⁵⁹ The

³⁵¹United Nations Commission on International Trade Law (UNCITRAL) Model Law ,Supra Note 203

³⁵²Odhiambo and Kamau, Supra Note 114at 36

³⁵³ Ibid

³⁵⁴Arrowsmith,Supra Note 1at 33.

³⁵⁵Ibid at 33.

³⁵⁶Linarelli, Supra Note 100 at 128.

³⁵⁷ Ibid.

³⁵⁸ Ibid

³⁵⁹ Ibid

above notwithstanding, the negative effects of corruption in public procurement are more than the advantages and should be criminalized.

Corruption can be classified in two forms; petty corruption which occurs when citizens are asked for bribes for basic services, or to have an infraction overlooked. The amounts here are small (but hardly petty to the many victims living on less than a dollar per day).³⁶⁰ Large scale corruption which occurs in the public sector, mainly through government procurement includes public purchases made at inflated prices, fictitious companies being paid for contracts they never executed,³⁶¹ among others.

Corruption within procurement systems has been prevalent throughout the world and is not limited to developing countries although developing countries face unique problems.³⁶² Bribery in government procurement is rampant. In 2005 an independent procurement review conducted jointly by the Government of Kenya and the European Union identified several critical problems with the Kenya procurement systems.³⁶³ The review found that there are weak oversight institutions, lack of transparency, poor linkages between procurement and expenditure, delays, inefficiencies and poor records management facilitated corruption in one way or another.³⁶⁴

3.2.3 Fighting Corruption and Ensuring Accountability in the Public Sector

The objective of the Public procurement and Disposal Act was to streamline public procurement in Kenya and ensure transparency hence reducing cases of corruption

³⁶⁰ Ibid

³⁶¹ Ibid

³⁶² DeAses, Supra Note 91 at 554.

³⁶³ Ibid

³⁶⁴ Odhiambo and Kamau, Supra Note 114 at 16

within the public sector.³⁶⁵ The Public Procurement Act and Regulations contain provisions relating to corruption practices including; splitting or inflating procurement³⁶⁶, inappropriate influence on evaluation and unsolicited communications³⁶⁷, fraudulent practices³⁶⁸, collusion³⁶⁹, conflict of interest³⁷⁰ and that no person, agent or employee shall be involved in any corrupt practice in any procurement proceedings.³⁷¹

Corruption in procurement can be reduced mainly through having clear laws which are implemented and practicing the principles of sound public procurement.³⁷² More specific measures could include among others: competitive bidding which entails competitive public notification of bidding opportunities, criteria for choosing winners, opening of sealed bids in the presence of bidders among other principles which are all geared towards enhancing transparency.

Conflict of interest rules should be adhered to for they prohibit government officials from putting themselves in a position where there will be a conflict between their public duty and their own interests.³⁷³ Such rules are helpful in that they reduce the opportunities of corruption and also eliminate suspicion of corruption hence ensuring competition for the government contracts. The Public Officer Ethics Act,³⁷⁴ and the Public Procurement and Disposal Act³⁷⁵ contain provisions relating to conflict of interest

³⁶⁵ Act, Supra Note 10

³⁶⁶ Ibid Section 30

³⁶⁷ Ibid Section 38

³⁶⁸ Ibid Section 41

³⁶⁹ Ibid Section 42

³⁷⁰ Ibid Section 43

³⁷¹ Ibid Section 40

³⁷² Akech, Supra Note 7 at 21

³⁷³ Odhiambo and Kamau Supra Note 114 at 16

³⁷⁴ Public Officer Ethics Act, Supra Note 12, Section 12 (1)

³⁷⁵ Act, Supra Note 10.

rules. A public officer is expected to use his best efforts to avoid being in a position which puts him in conflict between his personal interests and public duties and is not allowed to take part in the procurement proceedings.³⁷⁶

The exemption of national security and defence procurement from the Procurement Regulations creates an opportunity for corruption.³⁷⁷ This exemption can be applied by the government even when the contract does not relate to national security. This leads to lack of transparency or accountability as the public is not privy to such information. One way of resolving this is seen in the establishment of procedures to oversee security procurements by the establishment of inter-ministerial committees.

One of the complaints received from suppliers is that bid evaluation committee members do not always have the technical expertise necessary to properly evaluate bids and as such are prone to be influenced by other factors in evaluation.³⁷⁸ To solve this, technically competent evaluation committee members, experts, observers and monitors should be involved in the process to ensure transparency. Impartial evaluation and comparison of bids should be done by competent evaluators without influence or interference by bidders or other parties.

3.2.3.1 OECD Efforts

The OECD has issued various recommendations and declarations denouncing bribery in international transactions, including the Revised Recommendation on Combating Bribery in International Transactions.³⁷⁹ Member countries are called upon to prevent

³⁷⁶Ibid Section 43 (1) (a)

³⁷⁷Regulations, Supra Note 11

³⁷⁸Arrowsmith, Supra Note 1 at 34.

³⁷⁹Linarelli, Supra Note 100 at 131

and deter corrupt activities in foreign jurisdictions. Some of the recommendations which can be implemented to ensure transparency in public procurement include that entities which are guilty of bribing foreign officials should be sanctioned by being suspended from competition for public contracts.³⁸⁰ Criminalising of bribing of public officers, and sanctions, which can take the form of fines, administrative penalties and confiscation of the bribes should also take centre stage.³⁸¹

3.2.3.2 World Bank Initiatives

The World Bank has put in place mechanisms to ensure that the grants for financing project procurement are used for the specific projects.³⁸² These mechanisms include; procurement assessment reports and appraisals which are done to assess the adequacy of the procurement institutions for loan disbursements, determine a country's need for reform of procurement institutions as part of improving governance and to facilitate the transition to a market economy in the borrowing countries.³⁸³ There are stringent loan conditions which govern the disbursement of loan proceeds through procurements and public opening of bids, which ensures transparency in the bidding process.³⁸⁴

The promulgation of the new constitution will have a major impact on corruption in Kenya since it provides for leadership and integrity as it places a requirement of any public official to adhere to the constitution.³⁸⁵ The constitution provides checks and balances that will ensure that public officials are not involved in corrupt practices, and

³⁸⁰ Ibid

³⁸¹ Ibid

³⁸² Ibid at 135

³⁸³ Ibid

³⁸⁴ Ibid

³⁸⁵ The Constitution of Kenya, Supra Note 18, Chapter six.

guarantees the independence of oversight agencies involved in fighting corruption.³⁸⁶ Cabinet secretaries will no longer be members of parliament, in other words ministries will be run by professionals rather than politicians, and this will reduce cases of corruption in the said ministries.³⁸⁷

The fight against corruption is gaining head way; this can be attributed to a vibrant civil society, bold media and citizens aware of their rights. In the recent past, those in power have realized that perpetuating corruption is not tolerated by the public; several ministers have learnt the hard way having been forced to resign or step aside from their positions. This has send a clear message that those used to perpetuating corruption will no longer be at ease.³⁸⁸

3.3 Strengths and Weaknesses of the Public Procurement and Disposal Act (PPDA), in Connection With the Principles of Sound Procurement and Accountability.

Despite the strengths portrayed in the PPDA, which are clearly depicted under the functions, including establishing procedures for procurement and the disposal of unserviceable, obsolete or surplus stores and equipment by public entities, there are a number of weaknesses that hinder the achievement of the stated objectives.³⁸⁹ These objectives are geared towards maximizing economy and efficiency, promoting competition and ensuring that competitors are treated fairly, promoting integrity and fairness, increasing transparency and accountability and further increasing public

³⁸⁶ IbidPart Three of the constitution Article 152

³⁸⁷ Ibid chapter nine Article 152(3)

³⁸⁸ Ngirachu, Supra Note 19 at 5.

³⁸⁹ Act, Supra Note 10

confidence in those procedures so as to facilitate the promotion of local industry and economic development³⁹⁰

These objectives have not been fully achieved practically leading to the conclusion that procurement laws are either inadequate or outdated to meet the increasing demands of the modern market.³⁹¹The main reason for the passing of laws related to public procurement in Kenya was to remove ineffectiveness in the procurement process.³⁹²The procurement laws therefore inexistence contain room for the procuring entities to go against the objectives stipulated in the Act, hence going against the principles of sound procurement namely competition, publicity, use of commercial criteria and transparency.³⁹³Some of these concerns relate to the following provisions of the Act and Rules-

On open tendering as stipulated in Section 50 to Section 71 of the Act,³⁹⁴ and Regulations,³⁹⁵ 35 to 52 of the Procurement Regulations, when the procuring entity has finalized the process and prepared an evaluation report in terms of Section 66(5) and Regulation 51, the procuring entity is only required to notify the losing parties in writing.³⁹⁶It is not mandatory that the evaluation report shall accompany the letter of notification.

³⁹⁰ Ibid

³⁹¹ Commentary by Mr Mohammed Nyaoga, Law Lecturer University of Nairobi and a Partner in Mohammed Muigai Advocates in LLM Class 2008.

³⁹² Ibid

³⁹³ Akech, supra Note 7 at 21

³⁹⁴ Act, supra Note 10, Section 50 to Section 71.

³⁹⁵ Ibid Section 35 to 52

³⁹⁶ Ibid Section 66(5) and Regulation 51

This contradicts transparency in the sense that the procuring entity can alter the report to the detriment of an applicant seeking for a review, since there is no regulation forcing the applicant to access and inspect the evaluation report.³⁹⁷ A recommendation to the Act and Regulations is to prescribe the right of unsuccessful bidders to access and photocopy the evaluation report as a matter of law within the prescribed time.

The right of aggrieved and unsuccessful bidders to challenge a tender award is another very important point of concern which needs to be looked in to.³⁹⁸ Bid-challenge procedures that are timely, transparent and effective should be established.³⁹⁹ This in essence is to the effect that the Review Tribunal should be able to award interim measures for stay of the tender award pending final determination if it is to be described as timely and effective.⁴⁰⁰

Challenging tender awards in time is necessary because the longer it takes to arrive at a decision, the more the outcome may be rendered nugatory by circumstances. This is because the party awarded the contract may go ahead and perform the contract. In real sense this can defeat the subject for the review which can make the whole review get overtaken by events.⁴⁰¹

Despite the fact that the Act and the Regulations have to a large extent provided directions on public procurement, a number of amendments nevertheless need to be made. Section 100(4) of the Act, for instance which provides that if judicial review is not declared by the High Court within, thirty days from the date of filing, the decision

³⁹⁷ Ibid

³⁹⁸ Ibid Section 93-100.

³⁹⁹ Ibid

⁴⁰⁰ Ibid

⁴⁰¹ Ibid

of the Review Board shall take effect is not good law when looked into carefully.⁴⁰² Considering the duration court matters have been taking due to pressure and laxity at times in the judiciary, then this Section might never serve any purpose.

This is mainly because under the provisions of Order 53 of the Civil Procedure Rules, the High Court in granting leave to file orders of judicial review has the discretion to grant leave to operate as stay or to grant leave and decline to order stay.⁴⁰³ In the former, it means pending the determination of the application all proceedings must stop while in the latter, it means that the aggrieved party can file the judicial review application but the decision sought to be reviewed can still be implemented. This therefore has the danger of contracts continuing to be performed when a judicial review is ongoing which would defeat the reason for the review or appeal. The provisions of Section 100(4) ought to be harmonized with the Civil Procedure Rules to avoid these conflicts.

In the light of the financial and development challenges of developing countries and the need to promote local bidders, it is imperative that the percentage threshold of local preferences and reservations ought to be raised. Towards these end, the current preference threshold of Kshs.50Million for goods or services⁴⁰⁴ and Kshs.200 million, for works provided for in Section 39(8) should be enhanced to a reasonable threshold.⁴⁰⁵ Beyond this threshold, express provisions can be provided making it mandatory for local and international bidders to bid as a consortium before a final

⁴⁰² Ibid Section 100(4)

⁴⁰³ Order 53 of the Civil Procedure Rules,

⁴⁰⁴ Ibid Section 39(8)

⁴⁰⁵ Ibid

threshold is set where international bidders can operate freely. These will go a great length in enhancing technical assistance and capacity building in the country.⁴⁰⁶

Even in an extremely open and entirely competitive tendering process, there ought to be some flexibility. This can help procuring entities incorporate criteria other than the lowest bid into their evaluation of who to award the tender. In other words a procuring entity should be given leeway to award the tender to the lowest evaluated tender.⁴⁰⁷

According to the United Nations Commission on International Trade Law (UNCITRAL) guide to the Model Law on Public Procurement,⁴⁰⁸ tender price easily provides the greatest objectivity and predictability. The trickiest part however is to strike a balance on the criteria to be used, in addition to price in arriving at the lowest evaluated tender.⁴⁰⁹

Even though this criteria is recommended it is important that it be applied with caution in view of the risk that such other criteria may pose danger to the objectives of good procurement practice.⁴¹⁰ This is because such criteria might not be objective hence discretionary and therefore their use in evaluating and comparing tenders could impair competition and economy in procurement. This could have adverse effects of reducing confidence in the procurement process. Criteria should as far as possible be quantifiable and that in the evaluation process, they should be expressed in monetary terms or given, relative weight in the evaluation procedure.⁴¹¹

⁴⁰⁶ Ibid

⁴⁰⁷ Ibid

⁴⁰⁸ United Nations Commission on International Trade Law (UNCITRAL Supra Note 206

⁴⁰⁹ Nyaoga, Supra Note 391

⁴¹⁰ Ibid

⁴¹¹ Ibid

Another major issue of concern is the fact that the entire procurement process is quite lengthy. This creates a lot of delays and losses both directly and indirectly. At times suppliers are forced to escalate their prices to cater for the time wasted defeating the principle of market criteria, where may be market surveys had been conducted long before the awarding of tenders. The entire procurement process should therefore be looked into so as to see how the procedures can be shortened to enhance efficiency.

3.4 Conclusion

It cannot be overemphasized that an effective and transparent public procurement system, supported by sound legislation, institutional structure and organizational capacity, is the foundation for any public expenditure management framework.⁴¹² Effective public procurement system requires the existence of appropriate links to other parts of public finance management especially budget implementation.⁴¹³ Procurement practice suffers tremendously if the budget structure offers poor guidance with respect to budget implementation.⁴¹⁴ A strong, internal audit function is therefore a necessary requirement for achieving high quality of expenditure management.⁴¹⁵

A strong oversight institution that is effective in establishing a comprehensive legal and regulatory framework is vital.⁴¹⁶ It should regularly update the framework to meet the changing needs of procurement practice, develop a professional procurement cadre that can meet the procurement challenges effectively and implement a procurement monitoring framework that permits identifying key weaknesses in procurement practice.

⁴¹² Procurement Reforms <http://www.crownagents.com/procurement-reform.aspx> Accessed on 15th May 2011

⁴¹³ Ibid

⁴¹⁴ Ibid.

⁴¹⁵ Ibid

⁴¹⁶ Ibid

It should have a strong inspectorate function that with the help of the public auditor must ensure strict compliance with the procurement regulations as well.⁴¹⁷

Hunja states that corruption and malpractices in procurement are facilitated by the general expectation among all participants and among the public at large.⁴¹⁸ He states that the participants in procurement believe that it is the norm and consequently that bribery is a necessary means to obtain government contracts.⁴¹⁹ Leading by example and educating the public about the true costs of corruption can be a powerful means of changing such expectations and of building resistance to corrupt practices.⁴²⁰

Procurement regulators and other anti-corruption agencies need to develop partnerships with civic organisations. Such organisations can come in handy in exposing corruption in procurement and in educating the public about the social cost. When the public at large realise that they are the victims of corruption, as they suffer the consequences of poorly constructed schools, roads and other projects, and fewer resources being available for social programmes, public support for fighting corruption will be enhanced.

⁴¹⁷ Ibid.

⁴¹⁸ Hunja, *Supra* Note 202 at 14

⁴¹⁹ Ibid

⁴²⁰ Ibid

CHAPTER FOUR

4.0 PROCUREMENT OF GOODS AND SERVICES IN THE STATE LAW

OFFICE

This chapter will be a case study of procurement of goods and services at the State Law Office. It will also look into the organisational structure of the State Law Office and the extent to which it relates to procurement, the procurement of goods at the State Law Office and related strengths and problems. Similarly, it will address the procurement of services at the State Law Office, related strengths and problems and finally deal with regulating and enhancing accountability and transparency in procurement at the State Law Office

4.1 The Organisational Structure of the State Law Office and the Extent to Which It Relates To Procurement

The office of the Attorney General (State Law Office) derives its mandate from Article 156 of the Constitution of Kenya 2010.⁴²¹ The office is headed by the Attorney General whose duties are;⁴²² being the legal advisor to the Government, representing the national Government in Court or in any other legal proceedings to which the national Government is a party, other than criminal proceedings and any other function conferred on the office by an Act of Parliament or by the President.⁴²³

The Attorney General performs his functions, and exercises his powers in person or through officers subordinate to him, acting in accordance with his general or specific

⁴²¹ Constitution of the Republic of Kenya, Supra Note 18 Chapter 9, Part 4

⁴²² Ibid article 156 (4)

⁴²³ Ibid

guidance.⁴²⁴ Several functions have been conferred on the Attorney General under the Constitution as stated above or by various statutes and or by policy.⁴²⁵

Over and above the core functions mentioned above and provided under the Constitution, the responsibilities assigned to the Attorney General are executed through various departments in the State Law Office namely; conducting civil litigation and arbitrations through the Civil Litigation Department, reviewing and overseeing legal matters pertaining to registration of companies, business names, societies, marriages, adoptions, Coat of Arms and the official receiver through the Department of the Registrar General, reviewing and overseeing legal matters pertaining to the administration of estates and trusts, through the Department of the Administrator General and the Public Trustee.⁴²⁶

The office further deals with negotiating, drafting and vetting of local and international instruments, treaties and agreements involving the government and its institutions, through the Treaties and Agreements Department. It further adjudicates complaints made against practicing advocates, firms of advocates, a member or employee thereof and ensuring disciplinary action is taken, through the Advocates Complaints Commission. The Legislative Drafting Department on the other hand drafts bills, subsidiary legislation and gazette notices while the Administration Department provides efficient and effective administrative support to the technical departments of the State Law Office so as to accomplish their goals. All these departments are headed by Departmental Heads who have deputies so as to assist in the day to day running of their affairs.⁴²⁷

⁴²⁴ Ibid

⁴²⁵ The State Law Office Service Charter at 3.

⁴²⁶ Ibid

⁴²⁷ Ibid at 4

To achieve the above stated objectives, the State Law Office is guided by its vibrant vision of being the best law firm in the region recognized for its professionalism and efficiency in its service delivery of public legal services.⁴²⁸ The vision is granted support by its mission,⁴²⁹ which entails providing quality and efficient legal services to the Government and the public, upholding the rule of law and good governance, promoting human rights, enhancing democracy and otherwise protecting the national and public interest. In a bid to achieve the above vision, and mission, there are core values,⁴³⁰ that have been cherished in pursuit of excellence in service delivery namely; integrity, transparency, accountability, team spirit, discipline, respect and courtesy among staff, efficiency and effectiveness in service delivery, commitment and dedication to duty, professionalism in service delivery, impartiality and fairness.

The above departments are guided by the general vision however they all have their individual vision and mission, which aims at achieving the overall vision of the State Law Office. In a bid to offer services effectively, each department depends on the procurement section which falls under the Administration Department to provide the required goods and services.⁴³¹ This department comprises of administration, finance, procurement, accounts, human resource management and development, information and communication technology, internal audit, library services and the central planning and monitoring unit. This department is very instrumental in the day to day management of affairs at the State Law Office since it provides administrative and technical support to the legal departments.⁴³²

⁴²⁸ Ibid

⁴²⁹ Ibid

⁴³⁰ Ibid

⁴³¹ Ibid

⁴³² Ibid

4.1.2 Procurement Plan at the State Law Office

It is mandatory for each department to prepare its departmental procurement plan per financial year. Once the departmental procurement plans have been done, they are all forwarded by the respective Departmental Heads to the Central Planning and Monitoring Unit, which then prioritises the items and services to be procured after considering the finances availed by the Treasury.⁴³³ The prioritised list is then forwarded to the Procurement Section that carries out the procurement procedures, to ensure that all departments are supplied with the required items for effective service delivery.⁴³⁴

4.2 Procurement of Goods at the State Law Office and Related Strengths and Weaknesses

The State Law Office procures quite a number of goods. Most procured items are communication supplies for instance telephones, telex, facsimile, mobile phones and general office stationery, general equipment for instance computers, printers, air conditioners, fans, chairs, tables, projectors, vehicles, fuel among others. All these goods are necessary for the successful service delivery to the general public.⁴³⁵

4.2.1 Procurement Methods

The open method of procurement is the most preferred method unless otherwise justified.⁴³⁶ For the same to be effective, accessible publication with clear time limits for competitive procurement is mandatory. This is done in both the Daily Nation Newspaper and the Standard Newspaper since they have a wide coverage or circulation and are therefore capable of reaching a large number of people. The rules on participation are

⁴³³ Interview with procurement Officers, State Law Office Nairobi (4th November 2011)

⁴³⁴ Ibid

⁴³⁵ Ibid

⁴³⁶ Ibid

based on qualitative selection whereby fairness and defined rules that rely on qualifications and ability to perform the requirement are considered. As regards tender documentation and technical specifications, the minimum content of tender documentation is specified, adhering to neutral technical specification with reference to international standards where possible.⁴³⁷

When tenders are advertised, all interested bidders are expected to purchase the tender documents from the State Law Office, fill them and drop the duly completed documents at a designated place; which is mostly at the entrance on a specified date and before a certain time frame; which is usually before the close of business at 5.00pm. To enhance transparency and accountability in the entire procurement process, the tenders are opened by the Tender Opening Committee (TOC); comprising of representation from each department. This committee ensures that the bidders are present at the opening stage. There is then the Ministerial Tender Committee (MTC) which has representation of senior people from each department so as to go about the evaluation and award criteria. The evaluation and award criteria are normally objective and fair because of a large and neutral representation.⁴³⁸

The tendering process is made easy by ensuring that bidders make use of standard or model tender documents so as to give the entire public an equal opportunity to bid. The methodology for evaluation of tenders is based on the price and other fully disclosed factors for instance financial and technical capacity to perform the contract; which then

⁴³⁷ Ibid

⁴³⁸ Ibid

leads to award of contracts. Confidentiality during the evaluation process is maintained.⁴³⁹

In very limited and justified occasions, other methods of procurement other than the most preferred open tendering come in to play. These alternative methods of procurement namely, the restricted tendering method, direct procurement, request for proposals and request for quotations, are applied. Restricted tendering,⁴⁴⁰ is used when competition for contract is limited because of the complex or specialized nature of the goods, works or services and that the time and cost required to examine and evaluate a large number of tenders would be disproportionate to the value of the goods, works or services to be procured. Another consideration is where there are only a few known suppliers of the goods, works or services as may be prescribed in the regulations.

Direct procurement⁴⁴¹ on the other hand is used when under the circumstances there is only one person who can supply the goods, works or services being procured; and, there is no reasonable alternative or substitute for the goods, works or services. It is also used when there is an urgent need for the goods, works or services being procured. Because of the urgency, the other available methods of procurement then would be impractical; and the circumstances that gave rise to the urgency were not foreseeable and were not the result of dilatory conduct on the part of the procuring entity. The procurement section is mandated to ensure that direct procurement is not used in a discriminatory manner.⁴⁴²

⁴³⁹ Interview, Supra Note 433

⁴⁴⁰ Act, Supra Note 10 Section 73.

⁴⁴¹ Ibid at Section 74

⁴⁴² Interview, Supra note 433

In other instances, a request for proposals for procurement is applied if the procurement is for services or a combination of goods and services; and the services to be procured are advisory or otherwise of a predominately intellectual nature.⁴⁴³ Request for quotations⁴⁴⁴ is also used in limited or special instances. For instance if the procurement is for goods that are readily available and for which there is an established market; and the estimated value of the goods being procured is less than or equal to the prescribed maximum value for using requests for quotations.

4.2.2 Procurement Planning

The procurement plans are prioritised depending on the financial or budgetary allocations from Treasury.⁴⁴⁵ This is because lack of integration between the budgeting and procurement processes may lead to cancellation and or insufficient funds to make timely payments, resulting in increased costs and inefficiencies in the use of funds. Procurement planning and information on costing therefore is part of the budget formulation process and contributes to multi-year planning. Since budgeting supports timely procurement, contract execution and payment, it is therefore a mandatory requirement for budget appropriations to be made before any procurement action is initiated.⁴⁴⁶

One main challenge of budgeting at the State law Office is where this very critical committee is composed of tribal alliances. A close look at the composition has shown that majority of the members are from one community hence interfering with objectivity

⁴⁴³ Act, Supra Note 10 Section 76

⁴⁴⁴ Ibid 10 Section 88

⁴⁴⁵ Interview, Supra Note 433

⁴⁴⁶ Ibid

and neutral representation.⁴⁴⁷ Although it can be argued that is not by design that the composition is as it is. This is because most of the officers in the Administration department are seconded from different Ministries but this notwithstanding; the composition should portray a national image.

4.2.3 Weaknesses of the Procurement System at the State Law Office.

Despite the strengths in the procurement of goods at the State Law Office, the same is shrouded by a number of weaknesses and or malpractices. This has been promoted by reasons ranging from failure to understand the relevant laws to inefficiency and conflict of interest.⁴⁴⁸ Firstly, the open tendering method,⁴⁴⁹ which is the most preferred system is not adhered to at all times, hence relying on alternative procurement procedures.⁴⁵⁰ Methods like the restricted tendering⁴⁵¹ are used under the pretext that the cost and time required to examine and evaluate a large number of tenders would be disproportionate to the value of goods, works or services to be procured, as a way of inviting or dealing with their cronies.

Similarly, direct procurement⁴⁵² and request for proposals⁴⁵³ are abused because urgency for the goods is used as a scapegoat, making other methods impractical. These methods go against the principles of sound procurement where transparency, competition, market value and publicity ought to be the guiding principles.

⁴⁴⁷MutindaMwanzia, 'Staff at AG Office Cry Foul Over Claims of Tribalism' *The Standard* (3rd February 2012) at 9

⁴⁴⁸ Interview, Supra Note 433

⁴⁴⁹ Act, Supra Note 10 Section 50 – 71

⁴⁵⁰ Ibid Section 72

⁴⁵¹ Ibid Section 73

⁴⁵² Act, Supra Note 10 Section 74

⁴⁵³ Ibid section 76)

Another weakness comes up during the delivery and inspection stage. At the State Law Office, there are few receiving officers who are mandated to inspect the goods when being delivered. This can be very tedious for them and chances of being compromised are too high, considering the practice of many suppliers who deliver goods on Fridays at four thirty (4.30pm) to five (5.00 pm). This time, nearly everyone is usually in a hurry to leave for the weekend making inspection difficult hence the practice of delivery of substandard goods has not been uncommon.⁴⁵⁴

Inspection of specialized equipment, such as computers, photocopiers, fax machines inter alia has been inept. This is mainly because the few receiving officers who in many instances are junior clerks have no idea what they entail. Despite the fact that there is Information Technology personnel seconded by Treasury or E-Government, the entire State Law Office has about five employees who are supposed to inspect hundreds of such equipment making the work very tedious. Common substandard goods delivered have been stationery for instance pens and that do not write, files and folders that are of poor quality, cartridges that are not full, computers that do not meet the specifications, staff uniforms that do not meet the sizes quoted or tendered for, among others. This poor service leads to a lot of financial loss to the State Law Office since the price is paid in full, not taking into consideration these shortcomings.⁴⁵⁵

One of the main challenges is the procurement of complex goods like heavy machinery. This is because the procurement is to be handled by the Ministry of Public Works. This means that the State Law Office lacks proper supervisory mechanisms hence procedures and quality can be compromised. One of the reasons is that the Ministerial

⁴⁵⁴ Interview, Supra Note 433

⁴⁵⁵ Ibid

Tendering committee (MTC) is only mandated to deal with procurements that do not exceed 10 million while those falling above this amount are handled by the Ministry of Public Works. Procurement below kshs 500,000 is handled by the procurement department without going through the tendering committee making malpractices highly possible to happen.⁴⁵⁶

Conflict of interest should be avoided at all stages of procurement yet it remains a challenge to the procurement section of the State Law Office. People with vested interest sit in the committee resulting in influence of the evaluation procedure. The Planning Department which handles procurement issues has therefore been instrumental in collecting and disseminating procurement information so as to create awareness on these vices and how to curb them. The State Law Office in its bid to promote efficiency in the procurement process has increased the level of competence among procurement officers by training them, organizing information programmes which are consistent with the demand.⁴⁵⁷

4.3 Procurement of Services at the State Law Office and Related Problems

With procurement of services at the State Law Office, the same procedure applicable to procurement of goods applies. This entails each department coming up with a departmental procurement plan for the financial year which is then forwarded to the Central Planning and Monitoring Unit for further action. Mostly procured services include domestic travel, foreign travel and subsistence including airlines, accommodations and subsistence, training expenses, hospitality supplies and services,

⁴⁵⁶ Ibid

⁴⁵⁷ Ibid

routine maintenance of vehicles and other transport services, cleaning services and legal services.⁴⁵⁸

Some very expensive services are procured by or supervised by the Ministry of Public Works. This leaves a lot of unanswered questions since they invite tenders on behalf of the State Law Office and undertake to ensure that good service is rendered. A good example of this is on construction works which are quite expensive. The recent renovation of offices at the State Law Office; changing from individual offices to open space or plan offices is one example of the Ministry of Public Works involvement. In this case, the Ministry authorized the State Law Office to invite tenders where they would work with the winning bidder and both ministries would confirm or check if the work was well executed. A clean report was passed yet some parts were still incomplete or defective for instance, doors that could not open or got spoiled after a week of handing over the work, windows that cannot open, falling curtain rails, very slippery floor tiles which can lead to severe accidents among others.⁴⁵⁹

Despite the understanding that a retention fee is kept until the works have been completed, accepted and commissioned, the retention fee has since been paid and the contractor left the site yet there are a number of anomalies or defects on the entire project. Another good example can also be seen in the recent showdown between the Chief Justice and the Ministry of Public Works touching on the renovation of Milimani Commercial Courts. The Chief Justice claimed that the building started crumbling a few months after the Public Works Ministry handed over the alleged completed works to the

⁴⁵⁸ Service Charter, Supra Note 425

⁴⁵⁹ Interview, Supra Note 433

judiciary.⁴⁶⁰ This is just one of the examples of questionable procurement systems involving large sums of money where in most cases the Public Works Ministry has the mandate to handle.

Similarly, the procurement of legal services at the State Law Office has been of great concern to the public. Most importantly the procurement of counsel to deal with the Anglo leasing scandal; involving the purchase of security equipment for the Ministry of Immigration, and the Post-Election Violence case at the International Criminal Court (ICC) Hague. On both occasions, the Attorney General of the Republic of Kenya procured counsel to handle the cases. This left a lot of questions as to how the process was conducted since competitive tendering was not adhered to.⁴⁶¹

In a bid to defend the move, the office of the Attorney General has hidden under the alternative methods of procurement.⁴⁶² Many are the instances when the office claims urgency and lack of time to invite tenders as the reason for not using the open method of tendering. This has led to loss of public funds since the cost of the process has also been a secret where if that had not been done, a competitive process would be followed and value for money would be achieved.⁴⁶³

Over and above these methods, some classified goods and services must be procured through the supplies branch which belongs to the government. Examples are motor vehicles, repairs and disposal of motor vehicles, and some stationery. This goes against

⁴⁶⁰Showdown between the Chief Justice and the Minister for Public Works on the shoddy renovations at the Milimani Commercial Court.

⁴⁶¹Musembi and Waithaka.Supra Note 21 at 56; Alex Ndegwa, 'How Kibaki Team plans to stall ICC' *The Standard* (25th March 2011) at 1; John Ngirachu and WanjiruMacharia, 'Team Queries Hiring of Foreign Firms' *The Daily Nation* (24th June 2011) at 10.

⁴⁶²Act, supra Note 10 Section 72

⁴⁶³ Interview, Supra Note 433

the principle of competition and market value which is necessary for accountability and transparency in public procurement because there is hardly any competition hence value for money cannot be guaranteed.

One major weakness of procurement at the State Law Office is that they do not inform the unsuccessful bidders hence going against the provisions of the Public Procurement and Disposal Act.⁴⁶⁴ This is very unfair to the bidders because if they have to appeal, then they would not have grounds for appeal since the grounds would be unknown to them because they are treated as secrets.

4.4 Regulating and Enhancing Accountability and Transparency in Procurement at the State Law Office

The development of public procurement regulation has been primarily initiated by western governments.⁴⁶⁵ This is because they have been concerned with increased public spending on public services and utilities. This has also led to frequent corruption scandals, while meeting their commitment to the public.⁴⁶⁶

Procurement regulations may be concerned with a variety of objectives, but the main concern is normally obtaining value for money (economy).⁴⁶⁷ This means acquiring the goods or services required on the best possible terms. Value for money involves a number of aspects, firstly whether the goods, works or services being acquired are appropriate to the requirements. Secondly, value for money entails that the specified

⁴⁶⁴ Act, supra Note 10 Section 67 (2)

⁴⁶⁵ European Bank for Reconstruction and Development.

⁴⁶⁶ <http://www.ebrd.com/pages/sector/legal/procurement>Shtml>accessed 16th December 2011

⁴⁶⁷ Ibid

⁴⁶⁷ Sue Arrowsmith, 'National and International Perspectives on Regulation of Public Procurement: Harmony or Conflict?' at 7 In Sue Arrowsmith and Arwel Davies (eds), *Public Procurement: Global Revolution* (Kluwer Law International, London 1998)

requirements are obtained on the best possible terms which does not necessarily mean the lowest price: total life cycle costs, running costs, maintenance among others are often relevant as well as non-financial considerations such as the quality of the product or service and speed of service delivery.⁴⁶⁸

Finally value for money also involves ensuring that the chosen contractor has the financial and technical capability to fulfill the contract on the agreed terms. This objective is therefore very important hence its prominence in the UNCITRAL Model Law,⁴⁶⁹ which places the objective of ‘maximising economy’ in procurement at the top list of objectives in its preamble. Most of the provisions of both the Model Law and of actual national procurement systems are primarily concerned with this objective.⁴⁷⁰

Other objectives are also pursued in procurement and are also frequently the subject of regulatory provisions. One important objective which influences the content of most national procurement legislation is the maintenance of probity or integrity.⁴⁷¹ The objective has two related aspects which are preventing actual fraud or corruption such as bribery, award of contracts based on personal or family interests, collusion or misrepresentation by bidders.⁴⁷² Secondly, securing the appearance of probity, by ensuring for example that procurement officials and politicians do not have personal interests in government contracts, regardless of whether the interests have any actual effect on procurement decisions.⁴⁷³

⁴⁶⁸ Ibid

⁴⁶⁹ United Nations Commission on International Trade Law (UNCITRAL) Model Law, Supra Note 206

⁴⁷⁰ Arrowsmith, Supra Note 468

⁴⁷¹ Ibid

⁴⁷² Ibid

⁴⁷³ Ibid

Promotion of integrity, fairness and public confidence in the entire procurement process is also provided for in the Model Law.⁴⁷⁴ This is because corruption can undermine the whole fabric of economic and political life. Addressing corruption in public procurement can therefore help to raise general moral standards since integrity helps maintain public confidence. This is because corruption can cause political damage which goes beyond its financial importance. Corruption in procurement may for instance provide a source of funds for those involved in criminal activity hence the need to regulate it.⁴⁷⁵

The basis of most procurement regulation is economic.⁴⁷⁶ It is assumed that the role of the government is one of benevolent benefactor, acting in the public interest and this public interest objective is often seen as a motivation for regulation. A number of policies may arise from a number of sources; public interest policies, pressure from industry sectors that are able to influence the Government, pressure exerted by certain lobby groups, industrial or otherwise who have succeeded in influencing government policies.⁴⁷⁷

Regulation should be achieved while not increasing the expenditure for improved effectiveness and transparency of public spending.⁴⁷⁸ International Standards on public procurement have therefore been prepared to promote transparency in government procurement and enhance world trade competition. The UNCITRAL model law which has been adopted by Kenya provides for international principles of good practice in public procurement.⁴⁷⁹ These laws, principles and rules are applicable in procurement at

⁴⁷⁴United Nations Commission on International Trade Law (UNCITRAL), Supra Note 206

⁴⁷⁵Arrowsmith, Supra Note 468 at 8

⁴⁷⁶Trepte, Supra Note 78 at 135.

⁴⁷⁷ Ibid

⁴⁷⁸ Ibid

⁴⁷⁹United Nations Commission on International Trade Law (UNCITRAL), Supra Note 206

the State Law Office since it is a public body that is entrusted with tax payers' money in its day to running of its affairs.

Since public procurement is a government business, the stages in procurement that is; preparation of specifications, the bidding process and evaluation of bids are encountered by potential problems at each level, hence the need for effective regulation.⁴⁸⁰ While the tendering process in most instances is the subject of clear procedures, the preparation of specifications may become problematic in that the specification process may be highly vulnerable to corruptive influence because it takes place in a less open environment.⁴⁸¹

At the State Law Office for instance, it is possible to circumvent the guidelines for submission to the Ministerial Tender Committee by artificially breaking contracts into smaller parts which fall below the minimum. The specifications may therefore be written to favour a particular supplier making the entire process unfair. In the bidding process, anomalies could occur which could include preparing a short list of bidders, pre-qualification of bidders among others.⁴⁸²

At the preparation of bids stage, price rigging could take place at times, which results in the favoured party making its own lowest bid. Bidders can also organize a bidders' conference where bidders conspire and set prices where the ones to lose out are then compensated by the winning ones. Similarly, under the evaluation of bids stage, the combination of discretion and lack of an oversight body opens the tender committee to opportunities for corruption.⁴⁸³ The evaluation for services is generally more difficult

⁴⁸⁰Trepte, Supra Note 78 at 22

⁴⁸¹ Ibid at 22

⁴⁸² Interview, Supra Note 433

⁴⁸³Trepte, Supra Note 78 at 23

than for goods because there are greater elements of subjectivity in the assessment. It is important to balance the technical – financial result on merit for services.⁴⁸⁴

To reduce discretionary aspects to a minimum, evaluation criteria must be clear both to bidders and the tender committee from the onset. To promote accountability and transparency in the tendering process, experts should be invited for specialised equipment whereby the committee may be unable to evaluate professionally. Large contracts should not be broken into smaller segments to avoid scrutiny by the tender committee.

To further enhance transparency, the State Law Office should open the tender process to public and parliamentary scrutiny after a contract has been awarded. Gazetting tender data, listing the names of bidders, the amounts of bids and the basis for the decision in each contract award should also be considered.⁴⁸⁵ Government auditors or a private audit firm should be engaged to evaluate intensively a random sample of procurement decisions from the specification stage, through bid assessment, to matching of final supply of goods and services with original specifications including determination of standard cost for the goods or services.⁴⁸⁶

Public procurement organizational structure is generally complicated. This makes it essential that each level of management have well-defined authorities and responsibilities delineated throughout the structure, from the issuance of policies, regulations and standards of performance to the supervision and management of the workforce.

⁴⁸⁴ Ibid

⁴⁸⁵ Ibid

⁴⁸⁶ Ibid

4.4.1 Procurement Regulations Element

Public procurement is an important function of government for several reasons. First, the sheer magnitude of procurement outlays has a great impact on the economy and needs to be well managed. Indeed, in all countries in the world, estimates of the financial activities of government procurement are believed to be in the order of 10% – 30 % of GNP.⁴⁸⁷ Secondly, public procurement has been utilized as an important tool for achieving economic, social and other objectives⁴⁸⁸.

The World Bank's Procurement under its loans specifies concerns or objectives of public procurement for projects funded by its loans. It sets out that the loan should be used to buy only those goods and services needed for the project ensure fair competition for all qualified bidders from the World Bank's eligible countries, promote transparency or integrity, and encourage development of indigenous contractors and manufacturers.⁴⁸⁹

Finally, due to many reasons, public procurement has been perceived as an area of waste and corruption.⁴⁹⁰ Whether this is really the most common form of public corruption may be questionable but without doubt it is alarmingly widespread and almost certainly the most publicized. Thai avers that hardly a day goes by without the revelation of another major scandal in public procurement somewhere in the world.⁴⁹¹ Since it is very difficult to assess the cost of corruption, it is essential to establish a procurement system with clearly stated goals and policies.⁴⁹²

⁴⁸⁷ Ibid at 25

⁴⁸⁸ Arrowsmith Supra note 468 at 125.

⁴⁸⁹ Ibid

⁴⁹⁰ Ibid

⁴⁹¹ Thai, Supra Note 49 at 26

⁴⁹² Ibid

The procurement of goods and services at the State Law Office is regulated by an Act of Parliament, regulations and manuals, which make provision for the appointment of independent and impartial tender boards to deal with such procurements. Sources of procurement regulations include constitution, statutes, executive orders (issued by chief executives or their delegates), rules and regulations (issued by agency heads), and administrative law decisions and manuals.⁴⁹³

4.4.2 The Formal Institutions Regulating Public Procurement

In any procurement, institutions are important for they affect the public procurement processes. Some of these institutions constitute the legal framework regulating trade in general and especially public procurement. The United Nations Commission on International Trade Law, UNCITRAL is one international body that works towards harmonization and unification of the law of international trade and provides model rules that nation states may incorporate into their national legislation.⁴⁹⁴ Concerning procurement the UNCITRAL Model Law on Procurement of Goods, Construction and Services was adopted in 1994 and contains procedures aimed at achieving the objectives of competition, transparency, fairness and objectivity in the procurement process, and thereby increasing economy and efficiency in procurement.⁴⁹⁵

The State Law Office procurement is regulated by the existing local laws which have their basis on the UNCITRAL Model Law. The Public Procurement and Disposal Act has been the guiding law in matters of procurement and disposal of unserviceable, obsolete

⁴⁹³ Ibid

⁴⁹⁴ United Nations Commission on International Trade Law (UNCITRAL) Model Law, Supra Note 206

⁴⁹⁵ Anastasius Gavras, and others, 'Procurement As An Innovation Instrument'

<<http://www.inno-utilities.org/public/Documents/Inno-Utilities-Book.pdf>> accessed 6th January 2012

or surplus stores and equipment by public entities.⁴⁹⁶ The Act creates fairly stringent penalties for corrupt practices; which is meant to curb impropriety in the tendering process for purposes of achieving efficiency, fairness and economy.⁴⁹⁷

Over and above the Act, there is the Public Procurement and Disposal Regulations which together with the Act establishes procedures for public procurement and disposal for public entities, in a bid to achieve their related objectives.⁴⁹⁸ There is also in place the Public Procurement and Disposal Manual which has been issued by the Public Procurement Oversight Authority for the purpose of providing guidance to public officials who are responsible for the public procurement process.⁴⁹⁹

It is worth noting that the objects of Public Procurement and Disposal Act⁵⁰⁰ and the Public Procurement and Disposal Regulations⁵⁰¹ have been elevated to constitutional status by the new constitution,⁵⁰² which states that when a state organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost effective.

The Public Procurement and Disposal Act provides for independent institutions which aim at promoting its objectives, which bodies include the Public Procurement Oversight Authority (PPOA),⁵⁰³ which generally ensures compliance with public procurement procedures, initiates public procurement policy and proposes amendments to the Act or

⁴⁹⁶ Act, Supra Note 19

⁴⁹⁷ Act, Supra Note 10 Section 38-43

⁴⁹⁸ Ibid

⁴⁹⁹ Manual ,Supra Note 16

⁵⁰⁰ Act, Supra Note 10

⁵⁰¹ Regulations ,Supra Note 11

⁵⁰² Constitution of Kenya, Supra Note 18 Article 227

⁵⁰³ Act, Supra Note 10 Section 8

regulations. The Public Procurement Advisory Board (PPAB) advises the Authority,⁵⁰⁴ and the Public Procurement Administrative Review Board (PPARB) is a forum for those aggrieved by the procurement procedures to seek administrative reviews.⁵⁰⁵ The review is to be completed within 30 days following the request, after which a judicial review is preferred within 14 days and further to the High Court whose decision is final.⁵⁰⁶

Procurement regulations specify, among other things, the procurement organizational structure, roles and responsibilities, procurement phases, process, and standards of conduct. As public procurement is a very complicated system within which there are many conflicting interests, sound procurement regulations are needed in order to increase public confidence in the procedures followed in public procurement and to ensure fair and equitable treatment of all persons who deal with the procurement system. The existence of regulation is critical because the absence of a procurement code, regulations, or manual may lead to unpredictable procurement problems,⁵⁰⁷ in any institution, the State Law Office being one.

4.5 Conclusion

Procurement at the State Law Office is shrouded with a lot of malpractices. The procurement section should comply with the relevant laws and regulations so as to promote integrity in the entire process. The Ministerial Tendering Committee on the other hand should have a balanced and neutral representation so as to promote

⁵⁰⁴ Act, Supra Note 19 Section 23

⁵⁰⁵ Act, Supra Note 19 Section 97(1) and 100.

⁵⁰⁶ Ibid

⁵⁰⁷ Ibid

objectivity. Conflict of interest should not be entertained since it denies bidders a fair opportunity to participate in the process.

Discretion should also be reduced by adhering to the set laws and procedures. Similarly, the evaluation criteria must be clear to both bidders and the tender committee from the beginning. Experts should be invited to inspect complicated works or equipment and the numbers of staff in these areas should be increased to cater for the large number of employees at the State Law Office. The MTC should therefore take full charge of all types of procurement so as to avoid large contracts been broken into smaller segments to avoid scrutiny by the tender committee.

To further enhance transparency, the State Law Office should open the tender process to public and parliamentary scrutiny after a contract has been awarded. Gazetting tender data, listing the names of bidders, the amounts of bids and the basis for the decision in each contract award should also be considered. Government auditors or a private audit firm should be engaged to evaluate intensively a random sample of procurement decisions from the specification stage, through bid assessment, to matching of final supply of goods and services with original specifications including determination of standard cost for the goods or services. All these should be in a bid to enhance transparency and accountability in the entire procurement process.

CHAPTER FIVE

5.0 CONCLUSIONS AND RECOMMENDATIONS

5.1 Conclusions

Accountability in public procurement should be promoted since it has been established that public procurement has not operated efficiently.⁵⁰⁸ This has led to the state losing a lot of money through shoddy deals; hence the need to reform the public procurement system in the country.⁵⁰⁹ Adherence to public procurement procedures is important if public funds are to be used in the best way possible. Important in this respect is the sound enforcement mechanism that ensures that procurement entities comply with regulations and that those who fail to comply are duly punished.⁵¹⁰ The existing legal framework may however be rather unclear and ineffective in ensuring efficient and economical public procurement.⁵¹¹

The public procurement regulations have sought to streamline public procurement by establishing key institutions.⁵¹² To ensure transparency and accountability, the procurement institutional framework, has devolved power in different procurement organs.⁵¹³ Discretion has been reduced by ensuring that laws exist to curb the same making; which even if they may not be very clear they are a guiding principle.⁵¹⁴ The regulations have further put in place a fair and competitive system so as to enhance the whole process.⁵¹⁵

⁵⁰⁸ Odhiambo and Kamau, 'Supra Note 114 at 16.

⁵⁰⁹ Ibid at 19

⁵¹⁰ Ibid

⁵¹¹ Ibid at 22

⁵¹² Ibid at 23

⁵¹³ Ibid

⁵¹⁴ Ibid

⁵¹⁵ Ibid

Public procurement has undoubtedly become an increasingly important issue in economic and business circles internationally.⁵¹⁶ This is evidenced by the growing interest of donors, governments, civil society, professional organizations, private sector and the general public on matters of procurement.⁵¹⁷ The legal and institutional framework need to be revamped, the laws and regulations need to be clear to avoid confusion or create loopholes, while the institutional framework needs to be strengthened since many lack technical and human resource capacities.⁵¹⁸

It is also important to strengthen the democratic political process, civil society, public accountability and involve work ethics in which public interest or public good is valued more than individual interests.⁵¹⁹ These fundamentals need to be addressed so as to improve public procurement in government institutions and more so at the State Law Office. It suffices to say that the big actor in all the above will be the government.⁵²⁰ Civil society and professional organizations can also play an important part by undertaking an advocacy role for better system, monitoring procurement practices and encouraging the private sector to develop and abide by the codes of conduct.⁵²¹

Efficient, effective and transparent public procurement must be viewed as the responsibility of all stakeholders.⁵²² These include the procuring entities, the suppliers as well as the funders and beneficiaries of the procurement. This means that the principles of sound procurement as stated by Professor MigaiAkech namely; competition,

⁵¹⁶ Ibid at 41

⁵¹⁷ Ibid

⁵¹⁸ Ibid

⁵¹⁹ Ibid

⁵²⁰ Ibid

⁵²¹ Ibid at 42

⁵²² Ibid

commercial criteria, publicity and transparency must be complied with.⁵²³ The success of this will then be measured by the extent to which the public can see a significant increase in the quality of service delivery and achieve value for money.⁵²⁴

It is important to ensure that procurement in the country's public institutions facilities vision 2030 plans, which is the country's development blueprint aiming at creating a globally competitive and prosperous Kenya.⁵²⁵ This translates to transforming Kenya into a newly industrialized, middle, income country providing high quality life to all its citizens by the year 2030.⁵²⁶ The vision is based on three pillars namely, economic, social and political pillars. The economic pillar aims at improving the prosperity of all Kenyans through an economic development programme, covering all the regions of Kenya and achieving an average Gross Domestic Product (GDP) growth rate of 10% per annum beginning in 2012.⁵²⁷

The social pillar on the other hand seeks to build a just and cohesive society with social equity in a clean and secure environment while the political pillar aims to realize a democratic political system, founded on issue based politics that respects the rule of law and protects the rights and freedoms of every individual in Kenyan society.⁵²⁸ Odhiambo and Kamau in their working paper have emphasized the need to create awareness on procurement law and e-procurement, since lack of knowledge or understanding of

⁵²³Akech, Supra Note 7 at 21.

⁵²⁴Public Procurement Oversight Authority, 'The Long Term Policy Framework for Public Procurement in Kenya: The State of Being Accountable, Liability To Be Called On To Render Account; The Obligation To Bear The Consequences For Failure To Perform As Expected' <http://www.answers.com/topic/accountabilities> Accessed 5th January 2012.

⁵²⁵Chris Gachanja, 'Recommendations on Kenya public procurement system and reforms' (presentation for the seminar on procurement reforms and business opportunities in COMESA 2011) <<http://www.ppoa.go.ke>> accessed 7th January 2012.

⁵²⁶Preamble to Vision 2030.

⁵²⁷Ibid

⁵²⁸Ibid

procurement procedures is a recipe to a lot of malpractices.⁵²⁹ Capacity development in the procurement system should be undertaken, because most procurement officers are junior clerks who have no training on procurement and in many instances can be misled by their seniors or manipulated. Compliance tools for instance assessments, audits and investigations should be widened and deepened.⁵³⁰ These tools act as checks to the system which goes a long way in enhancing transparency and accountability.⁵³¹

5.2 Recommendations

The recommendations are expected to cover the entire area of study in a bid to promote transparency and accountability in public procurement. An examination of the methods of procurement will be critical so as to look at the strengths and weaknesses which create loopholes that can be exploited by a corrupt system and or institution and suggest remedies.

The open method of tendering ought to be the mostly used.⁵³² This is because it creates equal opportunities for participation by all interested bidders hence enhancing competition. It has however not been the case since other methods have been applied under exceptional circumstances.⁵³³ The restricted tendering method for instance allows bids to be obtained by direct invitation without open advertisement. It is mainly used where the value or circumstances do not justify or permit the open bidding process.⁵³⁴ Procurement entities in this case maintain a list of pre-qualified providers who are then

⁵²⁹Odhiambo and Kamau, Supra Note 114 at 42

⁵³⁰Ibid

⁵³¹Ibid

⁵³²Ibid

⁵³³Ibid

⁵³⁴Ibid

directly invited to participate in the tendering.⁵³⁵ The procuring entity must demonstrate that open tendering is not viable or prudent.⁵³⁶

The process of pre-qualification is often abused and is an important source of corruption in public procurement,⁵³⁷ since it is very common to find procuring entities being guided by self-interest and not public good. The State Law Office should ensure that the committee that pre-qualifies bidders has representation from neutral members in each department. This is because it has been established that some important committees at the State Law Office are composed of individuals from one community.⁵³⁸ This can to a large extent promote tribalism in all areas of procurement hence loosing objectivity. It should also be mandatory to disclose situations where there is a likelihood of conflict of interest.

On request for quotations and proposals, although they are simplified procurement procedures, which compare price quotations obtained from a number of providers,⁵³⁹ the Ministerial Tender Committee (MTC) should ensure that the process is transparent. Quotations are used mainly in works, while proposals are used for services.⁵⁴⁰ The quotations and requests for proposals should be addressed to not less than three candidates so as to promote competition.⁵⁴¹ The State Law Office should ensure that there is rotation in the sense that there should be different candidates at any particular time so that the same candidates are not considered every time there is need. There is also direct procurement or single source procurement, which is a sole source procurement method

⁵³⁵ Ibid

⁵³⁶ Ibid

⁵³⁷ Ibid

⁵³⁸ Mwanzia, Supra Note 447 at 9

⁵³⁹ Odhiambo and Kamau, Supra Note 114 at 34.

⁵⁴⁰ Ibid

⁵⁴¹ Ibid

arguably used when exceptional circumstances prevent competitive bidding.⁵⁴² The method is used mainly for low value procurements involving no contracts.⁵⁴³ Procuring entities must prepare a description of all its needs and specify requirements of quality, quantity, terms and times of delivery.⁵⁴⁴ This method has been commonly abused at the State Law Office especially in the procurement of legal services. Not so urgent matters are given a lot of urgency which leads to directly procuring legal services from cronies.

The Public Procurement and Disposal Act⁵⁴⁵ and The Public Procurement and Disposal Regulations,⁵⁴⁶ provide that the procuring entities may apply prequalification procedure in selecting and should ensure a fair and equal rotation.⁵⁴⁷ However, the concept of fair and equal rotation is not adequately explained and may therefore result to misinterpretation among the procuring entities.

Fair and transparent rules of participation are key elements of a sound procurement framework. Access to participation should be based solely on qualifications and preferably be determined on a pass or fail basis in order to avoid arbitrariness in the decision making process.⁵⁴⁸ Despite the existence of the PPDA,⁵⁴⁹ and Regulations⁵⁵⁰, there are considerable discrepancies between the legislative framework and the procurement function. The excessive use of quotations for instance, constitutes a large percentage of the mode of procurement while the open method of procurement should be the most preferred.

⁵⁴² Ibid

⁵⁴³ Ibid

⁵⁴⁴ Ibid

⁵⁴⁵ Act, Supra note 10

⁵⁴⁶ Regulations , Supra Note 11

⁵⁴⁷ Ibid

⁵⁴⁷ Regulations Supra Note 11

⁵⁴⁸ Odhiambo and Kamau, Supra Note 114 at 34.

⁵⁴⁹ Act, Supra Note 10

⁵⁵⁰ Regulations ,Supra Note 11

In addition to the above, it is vital to promote integrity among procurement officers by initiating an integrity testing programme.⁵⁵¹ This is a tool or a mechanism that verifies organization's professional integrity and or a method of proactive and robustly dealing with corruption and misconduct which encourages integrity in public institutions.⁵⁵²

This programme's objectives

include; identifying officers who are honest and trustworthy and therefore likely to be suitable for assignment to very sensitive areas like the procurement section, creating an aura of omnipresence thereby deterring corrupt behavior, encouraging procurement officials to report when offered bribes and identifying particular officers who engage in corruption or misconduct and determine appropriate course of action.⁵⁵³

This programme is one of the corruption eradication criterion assessed by the Performance Contracting Department in the office of the Prime Minister which can go a long way in promoting public good.⁵⁵⁴ Integrity tests can therefore be directed to specific officers or a group of procurement officers following intelligence information, or not directed at a specific officer but focus on officers in positions exposed to opportunities of misconduct.⁵⁵⁵ This will help at dealing with corruption as both a criminal activity and a management challenge.⁵⁵⁶ The integrity test is an anti-corruption tool which is designed to ensure high standards of honesty among employees.⁵⁵⁷

⁵⁵¹ A programme by the Kenya Anti-Corruption Commission Now (Ethics and Anti-Corruption Commission)

⁵⁵² Ibid

⁵⁵³ Ibid

⁵⁵⁴ Ibid

⁵⁵⁵ Ibid

⁵⁵⁶ Ibid

⁵⁵⁷ Ibid

Regarding the Public Procurement and Disposal Act,⁵⁵⁸ and the institutions under it, the Public Procurement Administrative Review Board (PPARB) for instance, should look into frivolous appeals that are forwarded to the High court.⁵⁵⁹ It should therefore be reviewed and proper standards for review set up so as to reduce the time and cost that can accrue because of the delay. In the same vein, the activities of Public Procurement Oversight Authority (PPOA) ⁵⁶⁰and the Public Procurement Administrative Review Board (PPARB)⁵⁶¹ should be decentralized in a bid to serve a majority of the population.

In the same vein, section 66(5), 67(2)⁵⁶² and regulation 51,⁵⁶³ should be amended to make it not only compulsory for losing parties to be notified in time, but to accompany the evaluation report when notifying losers so as to know the grounds for review. Under section 66 (4)⁵⁶⁴, the successful tender is deemed to be the tender with the lowest evaluated price. This poses problems in the sense that the 'lowest evaluated' should be elaborated since this is not clear. One would wonder whether the lowest price would be a financial matter only or technical capacity so as to deliver. The consideration should therefore be wholesome.

Section 100 (4) is also not also clear and may create confusion since if the High Court does not declare the judicial review application before it within thirty days from the date of filing, the decision of the Review Board shall take effect.⁵⁶⁵ This creates problems because Order 53 of the Civil Procedure Rules states otherwise.⁵⁶⁶ The order is to the

⁵⁵⁸ Act, supra Note 10

⁵⁵⁹ Act, Supra Note 10 section 25

⁵⁶⁰ Ibid Section 8

⁵⁶¹ Ibid Section 25

⁵⁶² Ibid Sections 66(5) and 67(2)

⁵⁶³ Regulations, Supra Note 11

⁵⁶⁴ Act, Supra Note 10 section 66 (4)

⁵⁶⁵ Ibid Section 100

⁵⁶⁶ Order 53, Civil Procedure Rules

effect that the High Court in granting leave to file orders of judicial review has the discretion to grant leave to operate as stay or to grant leave and decline to order stay.⁵⁶⁷In the former, it means pending the determination of the application all proceedings must stop while in the latter it means that the aggrieved party can file the judicial review application but the decision sought to be reviewed can still be implemented. The provisions of Section 100(4)ought to be harmonized with the Civil Procedure Rules.⁵⁶⁸

Discretion on the other hand should be reduced by having clear laws and regulations; leaving little or no room for it. This is because in many instances, the lack of clear laws leaves gaps, which can lead to any sort of interpretation. The State Law Office should apply the open method of procurement unless otherwise justified. This will help to promote transparency and competition since the alternative methods of procurement if applied create opportunities for corruption.

Conflict of interest should be done away with completely. Members of the Ministerial Tender Committee (MTC) and Tender Opening Committee (TOC) should not be permanent. Rotations should apply after some time even if it is per financial year or on quarterly basis. This ensures that new faces sit after a certain period of time making it difficult to be compromised due to lack of familiarity with the bidders. Splitting of contracts should not be allowed, so that all tenders can go through the Ministerial Tender Committee (MTC). This can be achieved by ensuring that departments stick to the procurement plans submitted at the commencement of a financial year, which goes along way in promoting transparency.

⁵⁶⁷ Ibid

⁵⁶⁸ Ibid

Capacity building should be encouraged, whereby procurement officers should have the necessary training. Keeping these officers abreast with the changes of the law is important so as to have an informed work force which can promote best practices in procurement. In addition to the above, those in charge of inspection and delivery of goods and services should be equipped with the necessary knowledge, for instance when information technology equipment is being delivered, there should be specialized staff to handle the inspection. For the delivery of goods on the other hand, each department should produce a staff member to give comments on the quality of the goods being delivered; and if they do not meet the required standards, then they should be returned.

On instances where the Ministry of Public Works is involved, for instance in the purchase of complex heavy machinery and construction works, it should do so in conjunction with the procuring entity. The procuring entity should take a major role in supervising the works being done or equipment being delivered to avoid shoddy services being delivered. The State Law Office in this case should participate in the entire process since they are the consumers.

Procurement of legal services has been of great concern and the State Law Office should not use short cuts or hide under the agency aspect, since the same should be done competitively in an open and transparent system in each financial year. This in return can save the office a lot of funds and also ensure that services are delivered by the best law firms so as to protect public interest and promote competition.

The procurement officers at the State Law Office should be compelled to inform unsuccessful bidders in writing which they do not and also give reasons for the same. If this is achieved, at the end of the day the process will be transparent. The practice has been to inform the successful bidders only; then one wonders how the losers are supposed to lodge their appeal without knowing the grounds.

The evaluation of services is generally more difficult than for goods because there are greater elements of subjectivity in the assessment.⁵⁶⁹ It is important to balance the technical – financial result on merit for services.⁵⁷⁰ It is also necessary to evaluate input by including charges for professional fees, contingencies, and perhaps other influencing factors such as delivery time.⁵⁷¹

On disposals, there are a number of challenges for instance identification of equipment by employees to be disposed off. The problem here is how the employee should establish that equipment is unserviceable, obsolete, uneconomical to operate or when equipment is considered viable for trade in or leasing.⁵⁷² The Public Procurement and Disposal Act should make provision or elaborate further, otherwise items that are not too old may be disposed off under the guise of being obsolete which practice has not been too uncommon at the State Law Office.

To further enhance transparency, the State Law Office should open the entire tender process to public scrutiny after a contract has been awarded. Gazetting tender data, listing the names of bidders, the amounts of bids and the basis for the decision in each

⁵⁶⁹ Organization for Economic Co-operation and Development (OECD), *Supra* Note 22 at 23

⁵⁷⁰ *Ibid*

⁵⁷¹ *Ibid*

⁵⁷² Act, *supra* Note 10

contract award should also be considered.⁵⁷³ Government auditors or a private audit firm might be engaged to evaluate intensively a random sample of procurement decisions from the specification stage, through bid assessment, to matching of final supply of goods and services with original specifications including determination of standard cost for the goods or services.⁵⁷⁴

Developing strategic policies and procedures on a cross-departmental approach will therefore be critical.⁵⁷⁵ This will ensure a more standardized approach to procurement. It is important to ensure there is commitment to the agreed procurement processes at the most senior levels within the contracting authorities. The end result is to make best value for money central to any procurement activity hence making it open, transparent, non-discriminatory and allowing potential suppliers to compete for business on equal terms. In addition it is necessary to ensure that all procurement is undertaken by appropriate qualified professional and experienced staff.⁵⁷⁶

Best practice in public procurement should be used since there are benefits of increased returns. This can be achieved when there are structured procurement processes, quality-based selection process which would lead to achieving best value outcomes.⁵⁷⁷ The best value outcomes need not necessarily be the lowest cost, but the best balance, which is the whole life cost to meet the user requirement.⁵⁷⁸ There is also recognition that the service provider or supplier needs be able to obtain an adequate return to be able to remain

⁵⁷³ OECD, Supra Note 22

⁵⁷⁴ Ibid

⁵⁷⁵ Public Procurement Best Practice Guide

[http://www.cleanvehicle.en/fileadmin/downloads/3yperm/download/PUBLIC PROCUREMENT PRACTICE](http://www.cleanvehicle.en/fileadmin/downloads/3yperm/download/PUBLIC_PROCUREMENT_PRACTICE) accessed 23/12/2011

⁵⁷⁶ Ibid

⁵⁷⁷ Ibid

⁵⁷⁸ Ibid

viable. Selection of the method of procurement to be used should be clearly defined and the process for the selection of suppliers clearly defined as well and transparent.⁵⁷⁹

Measures to prevent risks of corruption should be promoted and more particularly at the stage of needs assessment, contract management system and payment.⁵⁸⁰ These stages are less subject to transparency as they are usually not very well covered by procurement regulations. The situation gets worse when using exceptions to competitive procedures for instance in national security and emergency procurement hence there should be enough checks and balances.⁵⁸¹

In a bid to promote transparency, governments should provide potential suppliers, contractors and other relevant stakeholders, such as oversight institutions with clear and consistent information so that the public procurement process is well understood and applied as equitably as possible.⁵⁸² This should not only be with regard to the formation of contracts but in the entire public procurement cycle.⁵⁸³ Institutions should protect confidential information to ensure a level playing field for potential suppliers and avoid collusion.⁵⁸⁴ They should also ensure that the public rules require a degree of transparency that enhances corruption control while not creating red tape to ensure the effectiveness of the system.⁵⁸⁵

To ensure sound competitive processes, institutions should provide clear rules and possibly guidance on the choice of the procurement method. This will promote

⁵⁷⁹ Ibid

⁵⁸⁰ Ibid

⁵⁸¹ OECD Supra Note 22 at 8.

⁵⁸² Ibid

⁵⁸³ Ibid

⁵⁸⁴ Ibid

⁵⁸⁵ Ibid at 12.

competitive tendering. Although the procurement method could be adapted to the type of procurement concerned, institutions should consider setting up procedures to mitigate possible risks to integrity through enhanced transparency, guidance and control, in particular for exceptions to competitive tendering as extreme urgency or national security.⁵⁸⁶

Recognising officials who work in the area of public procurement as a profession is critical to enhancing resistance to mismanagement, waste and corruption.⁵⁸⁷ Institutions should invest in public procurement accordingly and provide adequate incentives to attract high qualified officials.⁵⁸⁸ They should also update officials' knowledge and skills on regular basis to reflect regulators, management and technology evolutions.⁵⁸⁹ Public officials should be aware of integrity standards and able to identify potential conflict between their private interests and public duties that could influence public decision making.⁵⁹⁰

Government should provide institutional or procedural framework that help protect officials in public procurement against undue influence by politicians or higher level officials. Institutions should ensure that the selection and appointment of officials involved in public procurement are based on values and principles in particular integrity and merit. In addition they should identify risks to integrity for positions, activities of projects that are potentially vulnerable. Government should prevent these risks through preventive mechanisms that foster a culture of integrity in the public service such as

⁵⁸⁶ Ibid at 14.

⁵⁸⁷ Ibid

⁵⁸⁸ Ibid

⁵⁸⁹ Ibid

⁵⁹⁰ Ibid at 18.

integrity training, asset declarations, as well as disclosure and management of conflict of interest.⁵⁹¹

Some problems may be attributable to inadequate knowledge and skill or to lack of essential equipment, for example, a procuring entity may be unable to meet a requirement to place notices of bid opportunities on the regulator's website because it lacks computers with Internet connections.⁵⁹² Corrective measures may consist of capacity building in the broadest sense, to include provision of essential equipment as well as training and professional development. Where regulations have been deliberately flouted, sanctions must be applied rigorously.⁵⁹³

The public procurement process may be viewed as proceeding through various stages of progression.⁵⁹⁴ It has been argued that public procurement reform is most likely to succeed when it proceeds through a six-step process,⁵⁹⁵ that is; Support from highest political levels which is seen as necessary for any organisational change to succeed, as it avoids any doubt about the government's commitment to reform, publicity about the advantages of the system, cooperation between the public and private sector leading to better understanding of each other's' problems and needs. Good procurement training to raise the skills of procurement staff and to familiarise suppliers with the requirements of the reformed system is also very vital. Good procurement legislation both primary legislation and secondary implementing legislation, and establishment of a central public

⁵⁹¹ Ibid at 20

⁵⁹² Ibid

⁵⁹³ Ibid

⁵⁹⁴ Ibid

⁵⁹⁵ Agaba and Shipman, *Supra* Note 196 at 372

procurement office for overall policy making and supervision of public procurement in the country is critical.⁵⁹⁶

The law is complemented by regulations, guidelines, forms, codes of conduct and standard bidding documentation.⁵⁹⁷ These serve to assist the procuring and disposing entities and providers of services, goods and works to carry out procurement and disposal processes according to the law and good practice.⁵⁹⁸ Enforcing compliance with the law and eradicating institutionalised corruption from public procurement are the more difficult steps that may take longer to achieve. At the same time, the legislative and regulatory framework suffers from a number of weaknesses for instance the fact that the procedures for pre-qualification lack clarity.⁵⁹⁹

The momentum for public procurement reform in developing countries, in recent years, has increased, partly in consequence of requirements set by the World Bank and other donor organizations.⁶⁰⁰ This has developed as conditions for providing development aid and because the inefficiencies of the unreformed systems have become self-evident.⁶⁰¹ It is argued further that most donors consider that a well-functioning procurement system is an essential requirement if their funds are to be used effectively to promote development, so that where such a system is not provided by the host country, donors may insist on using their own procedures.⁶⁰²

⁵⁹⁶ Ibid

⁵⁹⁷ Ibid

⁵⁹⁸ Ibid

⁵⁹⁹ Ibid

⁶⁰⁰ Agaba and Shipman, *Supra* Note 196 at 374

⁶⁰¹ Ibid

⁶⁰² Ibid.

Moreover, as foreign assistance budgets are reduced in many donor countries, there will be more pressure to ensure that recipient countries are wisely spending increasingly scarce donor resources.⁶⁰³ Those countries with inadequate controls will face increasing difficulties with donors.⁶⁰⁴ Another reason why procurement issues are attracting increasing attention is that they may condition access to foreign markets.⁶⁰⁵ International trade negotiations, whether bilateral, regional, or multilateral, are a mechanism through which governments address the terms upon which foreign firms can compete in domestic public procurement markets.⁶⁰⁶

Consistent political commitment and support from the highest levels of government is needed not only in support of the passage of legislation through Parliament, but in demonstrating that all the forces of government will be used to make the procurement reforms a success and to punish those who commit malpractices.⁶⁰⁷ If senior people in government who commit procurement-related malpractices continue to hold office without application of sanction, then the government's declarations about zero tolerance of corruption will not be accepted.⁶⁰⁸

Corruption and malpractices in procurement are facilitated by the general expectation among all participants and among the public at large that this kind of behaviour is the norm and consequently that bribery is a necessary means to obtain government contracts.⁶⁰⁹ Leading by example and educating the public about the true costs of corruption can be a powerful means of changing such expectations and of building

⁶⁰³ Ibid

⁶⁰⁴ Ibid

⁶⁰⁵ Ibid

⁶⁰⁶ Ibid

⁶⁰⁷ Ibid

⁶⁰⁸ Ibid

⁶⁰⁹ Ibid

resistance to corrupt practices.⁶¹⁰This is because an informed public is able to know when poor services are offered and this can make them remain vigilant and see to it that their funds are spend wisely.

Good governance promotes accountability and transparency which has been enshrined in the constitution which is the supreme law of the land.⁶¹¹Anti-corruption initiates for instance the existence of the Ethics and Anticorruption Commission, the Anti-Corruption division in the judiciary, the existence of the Public Officer ethics Act, the Code of Regulations and wealth declaration by civil servants should be strengthened so as to encourage transparency and accountability. This will save the government from loss of funds through shoddy deals and make people answerable as regards the sources of their wealth.

The mission of public procurement is to ensure and enable contracting authorities meet their policy and business objectives in the delivery of better public services.⁶¹² To meet these goals, the principles of openness, transparency, value for money, equality of opportunity for all businesses and accountability should be promoted.⁶¹³ All procurement activity needs to reflect best practices in procurement which will ensure the promotion of the above objectives. A positive public procurement culture is quite important which is a top-down commitment and leadership to the process supported by bottom up processes and procedures.⁶¹⁴

⁶¹⁰,Hunja. Supra Note 202 at 14

⁶¹¹ The Constitution of the Republic of Kenya, Supra Note 18, Article 227.

⁶¹²Public Procurement Best Practice, Supra Note 577

⁶¹³ Ibid

⁶¹⁴Agaba and Shipman, Supra Note 196

In a bid to promote accountability in public procurement, and more specifically at the State Law Office, the institution should uphold principles of good governance which entail the rule of law, transparency and accountability inter alia. It is necessary to practice the principles of a sound procurement namely competition, publicity, commercial criteria and transparency.⁶¹⁵ Since public procurement is about public funds which are tax payers' money, proper and accountable systems can lead to saving a lot of public funds which can be used for other important projects.⁶¹⁶

⁶¹⁵Akech, Supra Note 7.

⁶¹⁶Ibid

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APPENDIX: INTERVIEW GUIDE

The interview shall take between fifteen to twenty minutes. This will be sufficient time to obtain the necessary information for the study. The following open ended questions will form the basis of the interview.

1. Name
2. Designation
3. Department

Part A: The Procurement Section

Procurement and Disposal of Goods and Services

1. What system do you use to procure goods and services?
2. How are the departmental needs met?
3. How are the departmental representatives appointed if any?
4. What are the criteria of procurement?
5. What is the level of involvement of employees in the decision making processes?
6. What laws and procedures are applied in the entire procurement cycle?
7. How often is procurement done?
8. What is the quality and effectiveness of the procured goods and services?
9. What are the practices?
10. How are disputes and grievances resolved?
11. How is accountability promoted?
12. Are there sanctions for breach of procedures and regulations?
13. Is there a reward system for compliance?
14. How can the whole procurement system be improved?

Part B: The Departmental Requisition Officers.

1. What are your duties in connection with provision of goods and services to staff members?
2. How often do you requisition for goods and services?
3. What are the concerns by the staff members or users?
4. What compliments or complaints if any do you receive from the users if any?
5. How do you address the complaints or compliments?
6. What issues would you wish to see addressed by the Procurement Department?

THANKYOU