DISPUTE RESOLUTION MECHANISM UNDER THE KENYAN PUBLIC PROCUREMENT AND DISPOSAL ACT, 2005: A CRITICAL ANALYSIS

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DECLARATION

This thesis is my original work and has not been presented for a degree in any other university.

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DEDICATION

To My Family

This work will always remain in remembrance of your unyielding support and encouragement.

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GOD BLESS YOU ALL!

ABBREVIATIONS

ABBREVIATIONS

a. DPP -Directorate of Public Procurement
b. EAC - East African Community
c. GDP -Gross Domestic Product
d. GJLOS -Governance, Justice, Law and Order Sector
e. IPAR -Institute of Policy Analysis and Research
f. PPDA - Public Procurement Oversight Authority
g. SWAP - Sector Wide Approaches

TABLE OF STATUTES

a. Civil Procedure Act and Rules
b. Constitution of Kenya
c. Exchequer and Audit (Procurement) Regulations 2001
d. Kenya (Protection of Fundamental Rights and Freedoms and the Individual) Practice and Procedure Rules 2001
e. Law Reform Act Cap 26 Laws of Kenya
f. Public Procurement and Disposal Act, No 3 of 2005

LIST OF CASES

a. Chief Constable of The North Wales Police v. Evans(1982) 1WLR 1155
b. Essential Mountain Links Limited v. Securities Nominees Limited and another(2006) eKLR
c. Kenya Bankers Association & 7 others v Minister for Finance & another (No 4) (2002) 1KLR
d. Kenya Revenue Authority vs. De La Rue Currency and Security Print Ltd & 2 others[2009] eKLR
e. MARBURY v MADISON5 US 137 (1803)
f. Mariga V. Musila [1984] KLR
g. Mohammed & Mugai Advocates v. Nairobi Water Services application No. 15 of 2005
h. Republic v Registrar of Societies & 5 others ex parte Kenyatta & 6 others (2008) 3 KLR (EP) p.521
i. Republic v. Public Procurement Administrative Review Board & another Ex parte Selex Sistemi Integrati (2008) e KLR
j. Uni-Impex (Import and Export) Ltd and the Ministry of Health (KEMSA) Application No. 5/2004

TABLE OF CONTENTS

PAGE

CHAPTER ONE

1. INTRODUCTION AND CONCEPTUAL ISSUES

1.1 Historical Background of the Problem

Kenya, for a long time did not have a structured public procurement regulatory framework. Up to the early 1970s public procurement in Kenya was largely undertaken by the British firm Crown Agents as most local supplies were inadequate and hence most of the needs of the new government could only be met from external sources. After this the government established supplies offices within its ministries and departments and appointed supply officers to be in charge of procurement for their respective ministries and departments. Procurement was regulated by the Ministry of Finance which issued regulations and guidelines in the form of circulars to the ministries and other public agencies from time to time.[1]

Therefore, between 1963 to 1969 the procurement function was being conducted by the Crown Agents. Between 1969-1978 procurement processes were done by Treasury Circulars. In 1978-2001 public procurement was guided by the government of Kenya of Kenya Supplies Manual (1978). The Ministry of Finance effected the same in form of Treasury Circulars. Further the Ministry of Finance provided advise, guidance and operating instructions related to procurement of goods, materials, equipment and services. Thus various forms were used in tendering (notice, evaluation etc).

There was a revised "Blue Book" entitled District Focus for Rural Development (Revised February 1995). This book was issued by the office of the President and it spelled out the relationship between the central government and the districts. Thus Procurement procedures were followed at district level. There was a further revised draft of Kenya Supplies Manual (1997). The Director, Supplies Services, Department of the Treasury within the Ministry of Finance had prepared an update of the 1978 Supplies Manual. The draft incorporated many of the instructions, issued over time in the form of Treasury Circulars.

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[1] Walter Odhiambo and Paul Kamau. 2003. Public Procurement: Lessons from Kenya, Tanzania and Uganda,Working paper No. 208, OECD Development Centre.

The principal regulations which were applied in regard to procurement were the Government Financial Regulations and Procedures also known as Financial Regulations. These regulations also dealt with other aspects of administration of government finances. The Financial Regulations established the Central Tender Boards, the Ministerial Tender Boards and the District Tender Boards. The Central Tender Boards comprised of members appointed by the permanent secretaries of the respective ministries and dealt with procurement of goods and services worth Kshs. 2 million and above while the Ministerial Tender Boards dealt with procurement of goods and services worth Kshs. 2 million and below.[2]

The District Tender Boards were responsible for procurement of goods and services at the District level. The circulars issued by the Ministry of Finance from time to time also set out the details of public procurement procedures and policies which included the procurement thresholds and review of adjudication procedures. This procurement system had several deficiencies as there were no sanctions spelt out against public officers who engaged in corrupt practices and the fact that the circulars were scattered in several government documents. There was lack of harmony between the Regulations and the circulars and this led to abuse by unscrupulous government officers.

Further, there was no provision for dissatisfied bidders or the general public to appeal against the decisions of the various tender boards in cases of irregularities. The appeals allowed were to Central Tender Board from the District Tender Boards, to the relevant permanent secretaries against the Ministerial Tender Boards and those against the Central Tender Board and the Department of Defence tender board to the permanent secretary Ministry of Finance. This tender protest mechanism was within the government circles and gave government officials several opportunities to manipulate the procurement process for their own personal gain. There was no provision for independent judicial review as the administrative review decisions by the above named bodies were deemed final. There were also issues related to general lack of transparency and accountability of the procurement system.

[2] Ibid

In 1978 the Ministry of Finance published a Supplies Guide that regulated public procurement in the country up until.[3] In 2001 changes were introduced in public procurement which included the passing of the Exchequer and Audit (Procurement) Regulations 2001 (hereinafter referred to as the Regulations). The Regulations abolished the Central Tender Board and decentralized the procurement process by allowing public entities to set up tender committees responsible for all procurements within each entity. Besides, a monitoring and supervisory body, the Directorate of Public Procurement (DPP), was set up.[4] DPP was the central organ for policy formulation, implementation, human resource development and oversight of the public procurement process in Kenya.

The Regulations were to apply to all 'public entities' and supersede all previous government circulars and other instruments dealing with public procurement. These public entities included government ministries, government departments such as the Central Bank of Kenya, administrative districts, state corporations, public universities and other public institutions of learning, local authorities, and cooperative societies. As an exception to this general rule, however, the Regulations did not apply where the Minister for Finance decided, in consultation with the head of the procuring entity, that 'it is in the interest of national security or national defense to use a different procedure.'[5]

The DPP took over from the Minister for Finance the general responsibility for public procurement. Its functions included monitoring the overall functioning of the public procurement process and advising the minister, preparing of procurement manuals, advising and assisting procurement entities in undertaking procurement, inspecting the records of procurement entities and training procurement officers.[6]

In so far as dispute resolution is concerned, the Regulations provided for the administrative review of procurement decisions, which formed a critical part of the efforts to ensure

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[3] J.M Migai Akech, (2005), Developing Partners and Governance of Public Procurement In Kenya: Enhancing Democracy in the Administration of Aid, International Law and Politics, Vol37. Pp 829-868.

[4] Institute of Public Policy Analysis and Research. 2006. Public Procurement Reforms: Redressing the Governance Concerns, an Occasional Publication of the Institute of Policy Analysis and Research (IPAR).

[5] Section 47 of the Exchequer and Audit (Public Procurement) Regulations, 2001.

[6] Section 4 (4) of the Exchequer and Audit (Public Procurement) Regulations, 2001, No.51, Kenya Gazette Supplement No. 24.

transparency in the procurement process. Pursuant to the Regulations the Minister for Finance established a Public Procurement Complaints, Reviews and Appeals Board to adjudicate complaints submitted by any candidate who claimed to have suffered, or who risked suffering, loss or damage due to breach of a duty imposed on the procuring entity.[7]

The Board's rules of procedure required aggrieved bidders to submit requests for administrative review to the PPD stating the reasons for the complaint.[8] The PPD had power to dismiss the complaints, but where it does not did so, it was required to promptly give notice of the complaint to the procuring entity and interested parties and call a meeting of the Board within twenty-one days.[9] The Board was then required to give decision within thirty days from the date of the notice and must state reasons for the decision.[10]

The remedies that the Board could grant included declaring the legal rules or principles governing subject matter of the complaint, prohibiting a procuring entity from acting unlawfully, requiring a procuring entity to act lawfully, annulling an unlawful act or decision of a procuring entity, revising such decision or substituting its own decisions for such decisions or terminating the procurement proceedings.[11]

The Board was precluded from entertaining any complaints once a procuring entity had concluded and signed a contract with the successful bidder.[12] The parties dissatisfied with the Board's decision could seek judicial review in the High Court.[13]

The main problem that bedeviled the procurement system is ministerial interference with the tender process. While the Regulations did not give government ministers, other than the Minister for Finance, any role in the procurement process, ministers nevertheless intervened and influenced the award of tenders. Many government ministers did not have regard for stipulated laws and regulations and often used their residual powers, such as the power to suspend or fire

[7] Ibid. Section 40(1) and 41(1).
[8] Ibid. Section 40 (1) and 42(2).
[9] Ibid. Section 42(3).
[10] Ibid. Section 42(6).
[11] Ibid. Section 42(5).
[12] Ibid. Section 40(3) and 42(5) (e).
[13] Ibid. Section 42(7).

public officers, to pursue their own interests. The threat of being suspended or fired in many cases intimidated public officers into obeying illegal ministerial directives. Where ministers wanted to manipulate the procurement process, they could use such powers to demand information from the procuring entity, which they could publish and use to cancel tenders, then turn around to claim that the process has been compromised and needs to be restarted.

To further streamline the public procurement process, the government enacted the Public Procurement and Disposal Act No. 3 of 2005 (PPDA). The PPDA borrows heavily from the UNCITRAL Model Law on Procurement of Goods, Construction and Services with Guide to Enactment which endeavors to establish uniformity in procurement laws throughout the world.[14]
To further streamline the public procurement process, the government enacted the Public Procurement and Disposal Act No. 3 of 2005 (PPDA). The PPDA borrows heavily from the UNCITRAL Model Law on Procurement of Goods, Construction and Services with Guide to Enactment which endeavors to establish uniformity in procurement laws throughout the world.[15]
Section 25 of the Public Procurement and Disposal Act, establishes Public Procurement Administrative Review Board as the key body in dispute resolution. It is a continuation of the Public Procurement Complaints, Review and Appeals Board which was established under the Exchequer and Audit (Public Procurement) Regulations, 2001. It was established to promote and uphold fairness in the Public Procurement System through judicious and impartial adjudication of matters arising from disputed procurement proceedings. The Board is not autonomous and is made up of six members nominated by various bodies as prescribed in regulation 68 (1) (a) of the Public Procurement and Disposal Regulations, 2006 and three other members appointed by the Minister.

Under the Act, any candidate who claims to have suffered or who risks suffering loss or damage due to the breach of a duty imposed on a procuring entity by the Act or the Regulations, may seek administrative review.[16] Upon receiving a request for a review under section 93, the

[14] Part VII, Sections 93 to 100 of the Public Procurement and Disposal Act No 3 of 2005 now Cap 3 Laws of Kenya) is similar to Part VI, articles 52 to 57 of the UNCITRAL Model Law on Procurement of Goods, Construction and Services with Guide to Enactment. They both deal with administrative reviews.
[15] Part VII, Sections 93 to 100 of the Public Procurement and Disposal Act No 3 of 2005 now Cap 3 Laws of Kenya) is similar to Part VI, articles 52 to 57 of the UNCITRAL Model Law on Procurement of Goods, Construction and
Services with Guide to Enactment. They both deal with administrative reviews.
[16] Section 93(1) of the Public Procurement and Disposal Act No 3 of 2005.

Secretary to the Review Board should notify the procuring entity of the pending review and the suspension of the procurement proceedings.[17] The Review Board may dismiss a request for a review if the Review Board is of the opinion that the request is frivolous or, vexatious or was made solely for the purpose of delaying the procurement proceedings or the procurement.[18] The Review Board shall meet to review within twenty-one days after receiving the request for the review. It shall complete its review within thirty days after receiving the request for the review.[19] The Review Board is bestowed with several functions amongst which are:

(i) To annul anything the procuring entity has done in the procurement proceedings, including annulling the procurement proceedings in their entirety.

(ii) To give directions to the procuring entity with respect to anything to be done or redone in the procurement proceedings.

(iii) To substitute the decision of the Review Board for any decision of the procuring entity in the procurement proceedings; and

(iv) To order the payment of costs as between parties to the review.[20]

The decisions of the Public Procurement Administrative Review Board are final and binding on the parties unless judicial review commences within fourteen days from the date of the Review Board's decision.[21] If judicial review is not declared by the High Court within thirty (30) days from the date of filing, the decision of the Review Board shall take effect. Any party to the review aggrieved by the decision of the Review Board may appeal to the High Court and the decision of the High Court shall be final.[22]

1.2 Statement of the problem

Since the enactment of the PPDA public procurement in Kenya has remained structured, orderly and relatively accountable. The Act's contribution to the country's economy and governance cannot be gainsaid. It established a dispute resolution mechanism that has handled complaints from procurement players to some degree. Despite the dispute resolution mechanism, corruption

[17] Ibid. Section 94.
[18] Ibid. Section 95.
[19] Ibid. Section 97.
[20] Ibid. Section 98.
[21] Ibid.. Section 100(1).
[22] Ibid.. Section 100(2).

and bad practices reign the procurement process. With Anglo Leasing, Goldenberg scandals, irregular sale of public properties like the Grand Regency Hotel, Kenya Petroleum Authority fuel scandal and other dubious deals going on unabated, one questions the role and efficiency of dispute resolution mechanism under the Public Procurement and Disposal Act, No 3 of 2005.

Corruption in our country has become a menace affecting each and every sector in our country and almost perpetrated by each and every individual in Kenya. Within the public offices for instance, corruption has become the order of the day and this does not preclude the dispute resolution mechanism system envisaged in the PPDA 2005. The perpetrators of corruption in the public procurement system are the very own persons who ought to ensure its efficiency.

Since corruption is vice which has been bedeviled the public sectors and a form of underground kind of crime, it is hard to prove. For one to prove corruption will take decades to investigate the persons allegedly involved. In public procurement, the persons having the requisite knowledge in it and the laws, regulations and guidelines in process are the very persons who manipulate procuring entities to approve a particular bidder and disprove another. For such individuals sitting the board, its hard for them to step down for they already have an interest.

This research interrogates the role, efficiency and the significance of this dispute resolution mechanism in procurement. In Kenya corruption has affected in public procurement processes calling into question the role of dispute resolution mechanisms in discouraging corruption. The research further makes recommendations on the best way of improving dispute resolution mechanisms in the procurement.

This paper therefore seeks to address the role, efficiency and challenges of the said dispute resolution mechanism. It shall further recommend how the dispute resolution may be improved. The purpose of the study is to find out the extent to which the Dispute Resolution Mechanism is efficient and recommending ways of improving the same.

1.3 Research Questions

1. How has the Dispute Resolution Mechanism under the Act improved public procurement process in Kenya?
2. What are the challenges that impact on effective operation of dispute resolution mechanism under the Act?
3. Are there practical solutions to the challenges that dispute resolution mechanism faces?

1.4 Research Justification

Public procurement forms a major component in Kenya's GDP and directly affects all spheres of human life. Public procurement is also a major tool in effecting economic, social, political and environmental agenda in any country. Given its significance, the process of public procurement should be effectively regulated and implemented to ensure optimum results are achieved. Whenever there are successes and failures, there is need to interrogate these success and failures with a view to improving public procurement processes.

The justification for this research is therefore two fold, to contribute to the relevant procurement authorities, ways of improving the implementation of the PPDA and possible reform areas and to contribute to knowledge and raise possible areas for further research.

1.5 Research Objective

1. To find out how the Dispute Resolution Mechanism under the Act has improved public procurement process in Kenya
2. To identify the challenges that impact on effective operation of dispute resolution mechanism under the Act.
3. To suggest practical solutions to the challenges that dispute resolution mechanism faces.

1.6 Literature Review

A lot of academic ink has flowed on the general area of public procurement and several areas incidental to it. But there is limited literature on the issue of enforcement and implementation of

the Public Procurement and Disposal Act 2005. A lot of literature was reviewed as I endeavor to stitch this study together and what follows is a review of a sample of such materials.

Assessment of the procurement system in Kenya:[23] This is an assessment done jointly by the independent consultancy Ramboll Management and the Public Procurement Oversight Authority. In their assessment they employed the OECD-DAC methodology for assessment of National Procurement Systems which offers a detailed and operational assessment framework categorized under four pillars. In each pillar they identified the strengths and weaknesses as reviewed below;

a. Legislative and regulatory framework

The assessment found out that there is a sound legal framework in place in Kenya. It also found out that there were standard tender documents developed for goods, works and services. It on the negative found out the following weaknesses;

(i) at the time there was no procurement manual yet in place,
(ii) procedures for pre-qualifications lacked clarity,
(iii) inadequate procedures for registration of contractors,
(iv) no procedures for using technical capacity as a key criterion,
(v) excessive thresholds for domestic preferences.

b. Institutional framework and management capacity

On this pillar, the legal framework was found to support planning in the budget formulation process, PPOA had been established and procedures for performance contracting and performance evaluation are in place. This pillar was also marred with several weaknesses which included the following;

(i) Procurement planning is not carried out systematically,
(ii) Existing laws and procedures do not support timely procurement, contract execution and payment,
(iii) Lack of feedback mechanism,
(iv) Low stake awareness of web-based procurement information system,
(v) System for collecting and promoting procurement statistics not fully utilized

[23] Ramboll Management (2007), Assessment of the Procurement System in Kenya, Public Procurement Oversight Authority.

(vi) Competence development needs are not adequately addressed.

c. Procurement operations and market practices

In this pillar Procurement decision making authority was found to be fully delegated, a professional workforce was being developed and there is an open and constructive dialogue between government and the private sector. The procurement entities were found to be weak with little education being undertaken to improve their capacity.

d. Integrity and transparency of the procurement system

In this last pillar an effective internal audit system and a well-functioning and independent complaints review and appeals mechanism was found to be in place. Lack of procurement proficiency, limited access to Appeal Review Board and limited public access to procurement information were found to be the main weaknesses under this pillar.

This paper is very relevant to the present study in the sense that it assesses the effectiveness of the public procurement system in Kenya. It looks both at the legislative, enforcement and implementation strengths and weaknesses and makes recommendations to improve the system. The paper however, is past in time since it was done two years ago. So much has changed since then and with accelerated use of electronic technology new challenges have cropped up. The study being undertaken proposes to focus mainly on enforcement and implementation of PPDA in the current environment and shall study this aspect in greater detail.

Mwaniki Gachoka, the current Chairman of the Administrative Review Board, made a presentation on the critical areas of improvement in the current law.[24] He discusses various sections that hamper the operations of the Administrative Review Board which include the following;

(i) The definition of a candidate in section 3 of the Public Procurement and Disposal Act which limits the range of people who may seek redress in the procurement process,

(ii) Section 36(6) of the Act ousts the jurisdiction of the High court in so far as termination of a procurement proceedings by the procurement entity is concerned,

[24] Mwaniki Gachoka, Critical Areas of Improvement in the Current Law, 2nd Annual General Public Procurement Stakeholders Forum held on the 31st July 2009.

(iii) It is not clear who meets the costs of the reviews,

(iv) The judicial review provided in the Act is not in tandem with other laws on judicial review namely the Law Reform Act and Order 53 which provides 21 days after leave as opposed to 14 days after the Board's decision under the Act,

(v) Appealing to the High Court may open up hearing afresh prolonging procurement process as compared to seeking Judicial Review,

(vi) No provisions in the regulations on how parties should make presentations in the hearing. The provision for the Board to determine such other parties to the Review is not clear,

(vii) There is a perceived conflict of interest in the Review against the Director Generals orders since he is the one who appoints the Secretary of the Board from among the staff of the Authority.

The presentation discusses other important issues which are key for the discussion in this study but which do not directly touch on the procurement dispute resolution mechanism.

H. K. Kirungu, the Manager, Policy and Research of the Public Procurement Oversight Authority, did a presentation on the Public procurement Situation in Kenya.[25] Kirungu outlines the history of public procurement as follows: that between 1963 to 1969 procurement function was being conducted by the Crown Agents; between 1969-1978 it was done by Treasury Circulars; between 1978-2001 it was guided by Supplies manual; 2001-2007 it was guided by the Exchequer & Audit (Public Procurement) Regulations and from 2007 to date it was guided by the Public Procurement and Disposal Act, 2005. **Kirungu** identified the Advisory Board, the Oversight Authority and the Administrative Review Board as the key regulators of public procurement in Kenya.

[25] H.K Kirungu, Public Procurement Situation In Kenya, Presented at the 2nd East Africa Public Procurement Forum, 19th August 2009

In Republic vs. Public Procurement Administrative Review Board &another Exparte Selex Sistemi Integrati,[26] Nyamu J, made a decision on the following issues that had been raised by the Advocates.

Firstly, does the section 100(4) of the Public Procurement and Disposal Act, 2005 oust the jurisdiction of the court in judicial review? Section 100 of the Act submits the decisions of the Review Board to judicial review by the High Court but imposes a time bar. Nyamu argued that section 100(4) of Public Procurement and Disposal Act, 2005 cannot possibly be effective in ousting the jurisdiction of the court. The court must look at the intention of Parliament in section 2 of the Act which *inter alia*, promotes the integrity and fairness as well as increase transparency and accountability in public procurement procedures. The courts guard their jurisdiction jealously, but recognize that it may be precluded or restricted by either legislative mandate or certain special contexts. Legislative provisions which suggest a curtailment of the courts' power of review give rise to a tension between the principle of legislative mandate and the judicial fundamental of access to courts. Judges must search for critical balance and deploy various techniques in trying to find it.

Secondly, does the public interest of finality in Procurement Procedures outweigh judicial adjudication? Section 2 of the Public Procurement and Disposal Act, 2005 is elaborate on the purpose of the Act and top on the list, is to maximize economy and efficiency as well as to increase public confidence in those procedures. The Act was legislated to hasten or expedite the procurement procedures for the benefit of the public. Indeed, section 36(6) and 100(4) of the Act which are ouster clauses were tailored to accelerate finality of public projects. The courts cannot ignore the objective of economic efficiency but it must put all public interest considerations in the scales and not only the finality consideration. The Act also has other objectives namely to promote the integrity and fairness of the procurement procedures and to increase transparency and accountability. Fairness, transparency and accountability are core values of a modern society like Kenya. They are equally important and may not be sacrificed at the altar of finality.

Thirdly, is section 100(4) of the said Act unconstitutional for limiting the jurisdiction of the courts to thirty days? Section 77(9) of the Constitution states that a court or other adjudicating authority prescribed by law for determination of the existence or extent of a civil right or

[26] (2008) eKLR

obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by a person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time. A reasonable time is not defined in the Constitution and is left to the Judges' interpretation. It is therefore arguable whether or not section 100(4) offends section 77(9) of the Constitution.

Fourthly, is section 100(4) of the said Act in tandem with the applicable law as regards the procedures in judicial review proceedings? Applications filed in court for judicial review are brought under section 8 and 9 of the Law Reform Act Cap 26 Laws of Kenya and Order LIII of the Civil Procedure Rules. The procedure for judicial review laid in the Act is in conflict with the Law reform Act and Civil Procedure Rules.

Public Procurement: Lessons from Kenya, Tanzania and Uganda:[27] This is a working paper developed by OECD Development Centre. The working paper is a comparative analysis of the public procurement system in Kenya, Uganda and Tanzania. These are three East Africa countries. They have made their public procurement systems more efficient and transparent in line with international procurement guidelines. At the time the paper was authored only Tanzania had in place a legislative framework for public procurement. Kenya and Uganda were yet to enact procurement legislation.

The paper underscores that although the current East African Community (EAC) Treaty does not explicitly address issues related to public procurement, the long history of co-operation among the three countries and similarities in the institutional framework for public procurement make it worthwhile to explore possibilities of joint regional actions in this area. These joint efforts crucially depend on the extent to which policies, laws and regulations and the institutional frameworks in the three countries can be harmonized in the coming years.

The paper concludes by emphasizing that there are certain imperatives for the development of an effective procurement system which are: Strengthening the democratic political process, civil

[27] Walter Odhiambo and Paul Kamau. 2003. Public Procurement: Lessons from Kenya, Tanzania and Uganda,Working paper No. 208, OECD Development Centre.

society and public accountability; creating real market conditions; and improving work ethics in which public good is valued more than individual interests.

Regulating Public Procurement-National and International Perspectives:[28] This book discusses public procurement as involving three main stages which are the preparing for procurement, choosing the provider of the service, goods or works and contract administration. It further discusses the importance and the objectives of public procurement. The main objectives are to ensure value for money, steer economic development and address social and environmental issues. Public procurement regulation is only effective if there is a favourable environment for enforcement and implementation of the procurement laws. The book discusses each and every step involved in procurement right from preparation to administration of contract in great detail.

International Cooperation and the Reform of Public Procurement Policies:[29] This paper examines the available evidence on public procurement practices in developing countries that could be relevant to further multilateral rule making on state purchasing. It finds out that although there is considerable agreement on ends (efficient, non-corrupt, and transparent public purchasing systems), little information is available on means and, in particular, on the effective and replicable strategies that developing countries can adopt to improve their public procurement systems. A concerted effort to substantially add to the knowledge base on public procurement reforms in developing countries, through targeted research and international exchange of information on implemented procurement policies and outcomes, is critical to identifying areas where further binding multilateral disciplines may be beneficial.

Political Connections and the Allocation of Procurement Contracts:[30] This paper analyzes whether political connections of public corporations in the United States affect the allocation of government procurement contracts. The paper attempts to shed light on this issue by analyzing

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[28] Sue Arrowsmith, John Linarelli, Don Wallace. 2000. Regulating Public Procurement; National and International Perspectives, London, Kluwer Law International.

[29] Simon J. Evenett and Bernard M. Hoekman, International Cooperation and the Reform of Public Procurement Policies, World Bank Policy Research Working Paper 3720, September 2005.

[30] Eitan G, Jörg R and Jongil S. (2008), Political Connections and the Allocation of Procurement Contracts April. Electronic copy available at: http://ssrn.com/abstract=965888.

the allocation of government procurement contracts across the largest U.S. publicly traded companies by using hand collected data that detail the past political position of each of their board members. Using this classification, the study focuses on the change in control of both House and Senate following the 1994 midterm election and on the change in the Presidency following the 2000 election. An analysis of the change in the value of the procurement contracts awarded to these companies before and after 1994 and 2000, respectively, indicates that companies that are connected to the winning party are significantly more likely to experience an increase in procurement contracts and vice versa. The results remain significant after controlling for industry classifications as well as for several firm characteristics. In total, these findings suggest that the allocation of procurement contracts is influenced, at least in part, by political connections.

Migai Aketch discusses development partners and governance of public procurement in Kenya in enhancing democracy in the administration of aid.[31] The Article reviews Kenya's first Sector Wide Approaches (SWAP), the Ministry of Justice and Constitutional Affairs' Governance, Justice, Law and Order Sector (GJLOS) Reform Program, and its procurement regime in the context of ongoing public procurement reform efforts at the time.

He advances two arguments. First, SWAPs such as the GJLOS Program constitute a form of trans-governmental regulation and should be subject to national administrative law frameworks. Second, the GJLOS Program's procurement regime is inefficient and unlikely to be effective since it creates administrative structures that are not only unwieldy but also run parallel to the national system. It should therefore be harmonized with the national system. Further, this procurement regime is not sufficiently democratic as it is not accountable to the Kenyan people and does not facilitate the meaningful participation of key stakeholders. In the interests of accountability, the private firm entrusted with the task of administering this procurement regime should be subject to the jurisdiction of the national public procurement regulatory authority since it is exercising a public function. **Akech** also discusses in detail the dispute resolution mechanism that existed in the Exchequer and Audit (Procurement) Regulations 2001.

[31] Migai A. (2005), Development Partners and Governance of Public Procurement in Kenya: Enhancing Democracy in the Administration of Aid, International Law and Politics Vol. 37.

1.7 Hypothesis

1. There is need to improve the functioning of the procurement dispute resolution mechanisms and the supporting systems.
2. Lack of political will, weak structures and corruption are the major challenges to effective functioning of the dispute resolution mechanism.
3. There exist practical solutions to the challenges that affect dispute resolution mechanism under the Act.

1.9 Theoretical Framework

This research is mainly based on the procurement concept of 'Value for Money.' Value for money is not about achieving the lowest initial price: it is defined as the optimum combination of whole life costs and quality.[32] This is an essential test against which procuring entities must justify a procurement outcome. Price alone is not a sound indicator and procuring entities cannot necessarily get the best value for money by accepting the lowest price or bid. Best value for money therefore means going beyond the price to get the best available outcome when all relevant costs and benefits over the procurement cycle are considered. Sadly, most public procuring entities in Kenya give the lowest bidder priority to other bidders with minimal consideration of other tender criteria.

Value for Money has been defined as the relationship between economy, efficiency and effectiveness, where;[33]

Economy is the price paid for what goes into providing a service.

Efficiency is a measure of productivity – how much is achieved in relation to the cost of achieving the output.

Effectiveness is a measure of the impact achieved and can be quantitative or qualitative. For example, how many people received benefits and what was the satisfaction level of the claimants in relation to the time taken to deal with their benefit applications.

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[32] National Audit Office, Getting Value for Money from Procurement: How Auditors can Help, Office of Government Commerce.

[33] These values are encompassed in section 2 of the Public Procurement and Disposal Act, 2005.

Value for Money is high when there is an optimum balance between all three – relatively low cost, high productivity and successful outcomes.

The main objectives for the value for money concept include;

a. The acquisition of goods, works and services needed by the government on the best available terms and ensuring that goods, services and works acquired are suitable for the requirements.
b. The contract should be conducted on the best available terms through competitive tendering procedures.
c. Ensuring that the contractor chosen is able to provide what is required on the terms agreed.

Better value for money from procurement can be achieved in many ways, for example:

a. Getting an increased level or quality of service at the same cost.
b. Avoiding unnecessary purchases.
c. Ensuring that user needs are met but not exceeded.
d. Specifying the purchasing requirement in output terms so that suppliers can recommend cost-effective and innovative solutions to meet that need.
e. Sharpening the approach to negotiations to ensure departments get a good deal from suppliers. Procurement agency should act as intelligent customers by discussing with suppliers all the elements of the contract price including level of service, timescale of the assignment, skill mix of the supplier's team and how costs are to be remunerated.
f. Optimizing the cost of delivering a service or goods over the full life of the contract rather than minimizing the initial price.
g. Introducing incentives into the contract to ensure continuous cost and quality improvements throughout its duration.
h. Aggregating transactions to obtain volume discounts.
i. Collaborating with other departments to obtain the best prices and secure better discounts from bulk buying.

j. Developing a more effective working relationship with key suppliers to allow both procurement agencies and suppliers to get maximum value from the assignment by identifying opportunities to reduce costs and adopt innovative approaches.
k. Reducing the cost of buying goods or services by streamlining procurement and finance processes.
l. Reducing the level of stocks held.

Whilst value for money is seen as the primary goal, there is always trade off between value for money and consideration of efficiency in conducting the actual procurement process. Sometimes it is sacrificed to achieve other goals like probity, social and industrial objectives and the development of international trade.

Value for money is enhanced in Government procurement by: encouraging competition by ensuring non-discrimination in procurement and using competitive procurement processes; promoting the use of resources in an efficient, effective and ethical manner; and making decisions in an accountable and transparent manner. In order to be in the best position to determine 'value for money' when conducting a procurement process, request documentation needs to specify logical, clearly articulated, comprehensive and relevant conditions for participation and evaluation criteria which will enable the proper identification, assessment and comparison of the costs and benefits of all submissions on a fair and common basis over the whole procurement cycle.

The complexity of procurement needs can make it more difficult to measure whether value for money is being achieved. Services such as the development of IT related services and professional advice, can be difficult to define precisely or may require considerable feasibility work before a reliable specification can be drawn up; the work may be specialized with only one or two potential suppliers making competition impracticable; and if the service is delivered over a long term there is a need for regular monitoring of the quality.

In the case of goods and services which have a working life over many years there is a need to ensure they are cost effective over their whole working life. This means taking a long term view and not focusing on the lowest purchase price at the expense of long term value for money. Long

term procurement commitments also need to be able to deal with change, for example, a department may wish to take advantage of changes in technology.

Buying goods and services through competition remains the best way of ensuring that the best combination of whole life costs and quality is achieved. But it is not always appropriate or cost-effective for low value items, or sufficient on its own for complex goods and services or where no well developed market exists. Increasingly, value for money depends on combining competition with innovative ways of procurement while managing the risks effectively. The wide diversity in the value and type of goods and services which departments purchase mean that no one single procurement method is appropriate to promote value for money.

This research is carried out with the cognizance that value for money is the major underlying consideration in public procurement and any dispute resolution mechanism should work towards ensuring fairness and transparency so that value for money is realized by all players.

1.10 Research Methodology

Secondary data was used in this study. Secondary data is used in illustrating the history of the PPDA and PPOA, their contribution to public procurement in Kenya and in giving of recommendation.

1.10.1 Data Sources

My data sources are secondary.

Secondary data sources include library (text books, journals, magazines, newspapers, articles, reports from research organizations) and the internet, University of Nairobi, Parklands Campus law library and PPOA library shall be critical centers for much of my secondary data.

1.11 Summary of Chapters

CHAPTER ONE

Introduction and Conceptual Issues

This chapter starts off by a historical perspective of public procurement dispute resolution. It also gives justification for the study, literature and methodology of the study.

CHAPTER TWO

Understanding the Public Procurement Dispute Resolution Mechanisms in Kenya

This chapter outlines the existing public procurement dispute resolution mechanisms in Kenya. This chapter analysis the role of the Public Procurement Administrative Review Board, the High Court and tribunals in dispute resolution.

CHAPTER THREE

A Critique the Public Procurement Dispute Resolution Mechanisms in Kenya

Chapter three identifies and discusses the various benefits, challenges and shortfalls encountered by existing Public Procurement Dispute Resolution Mechanisms in Kenya.

CHAPTER FOUR

Conclusion and Recommendations

This chapter provides the conclusion and the possible recommendations to the challenges and shortfalls discussed in chapter three above.

CHAPTER TWO

UNDERSTANDING THE PUBLIC PROCUREMENT DISPUTE RESOLUTION MECHANISMS IN KENYA

2.1 Introduction

The Public Procurement and Disposal Act, 2005 introduces an elaborate dispute resolution mechanism. The main objective of the dispute resolution mechanism established is to solve any procurement dispute to maximize economy, efficiency, to promote competition and ensure that competitors are treated fairly, to promote the integrity and fairness of procurement procedures, to increase transparency and accountability in those procedures, to increase public confidence in procurement procedures and to facilitate the promotion of local industry and economic development.[34]

The main dispute resolution mechanism that the Act provides for is the establishment of the Public Procurement Administrative Review Board. The Act also provides for judicial review and any other claims that may fall in the courts. What follows is a discussion of all the avenues that the Act provides.

2.2 Public Procurement Administrative Review Board

2.2.1 Composition

As stated in the previous chapter, the Public Procurement Administrative Board is the main body responsible for dispute resolution in public procurement. The Review Board's membership and composition is provided by the Public Procurement and Disposal Regulations, 2006 but its administrative services are provided by the Public Procurement Oversight Authority.[35]

The members of the Review Board are appointed for a term of three years and are eligible for a final term of three years.[36] It comprises of six members appointed by the Minister for Finance from the various professional bodies listed under the rules and three other members appointed by

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[34] Refer to section 2 of the Public Procurement and Disposal Act, no 3 of 2005.

[35] Ibid, section 25(2) and (3).

[36] Regulation 67 of the Public Procurement and Disposal Regulations, 2006.

the Minister. The Chairman is appointed from amongst the persons appointed from the professional bodies.[37] The Review Board's members' remuneration is determined by the Advisory Board.

The Quorum of the Review Board is three (3) members including the Chairman but the Secretary of the Review Board may in consultation with the Chairman and the Review Board constitute a panel of three members to hear and determine a request for review and each panel shall elect its own Chairman.[38] The decision of the Review Board shall be taken by a simple majority but in the case of a tie the proposal supported by the Chairman shall prevail.[39]

2.2.2 Jurisdiction of the Review Board

The jurisdiction and powers of the Public Procurement Review Board is provided in various sections of the Public Procurement and Disposal Act. Its jurisdiction may be exercised under the following situations;

a. Claims where a candidate suffers or risks suffering, loss or damage due to the breach of a duty imposed on a procuring entity by the Act or regulations.[40] Certain matters are excluded from the jurisdiction of the Board which include; the choice of procurement procedure, decision by the procuring entity under section 36 to reject all tenders, proposals or quotations, where a contract has been signed with the successful bidder and where the appeal is frivolous.
b. Any claim by a procurement entity or any other person who is entitled to be given an opportunity to make representations, before the Director General makes a decision under section 105 of the Act. Under this section the Director General may make an order against a procurement entity that has breached the Act, Regulations and or any directions of the Authority.
c. A claim by any person debarred under section 115 may request the Review Board to review the debarment. Under section 115 the Director-General, with the approval of the

[37] Ibid, rule 68.

[38] Ibid, rule 69.

[39] Ibid, rule 69(3).

[40] Section 93, supra footnote 1.

Advisory Board, may debar a person from participating in procurement proceedings on the ground that the person has committed an offence under the Act; has committed an offence relating to procurement under any Act; has breached a contract for a procurement by a public entity; has, in procurement proceedings, given false information about his qualifications; or has refused to enter into a written contract as required under section 68 of the Act. The Director-General, with the approval of the Advisory Board, may also debar a person from participating in procurement proceedings on any prescribed ground.

It is noteworthy, however, that the right to request a review to the Board is in addition to any other legal remedy a person may have.[41] Such other right cannot be adjudicated by the Board. The parties who may invoke the jurisdiction of the Board are limited to the procuring entity and the candidate or any person the Review Board may determine. A candidate is defined as a person who has submitted a tender to a procuring entity.[42]

1:2:3 Procedure of the Reviews

The request for a review is made in a prescribed form stating the reasons for the complaint, including any alleged breach of the Act or the Regulations.[43] All written applications must contain the following:[44]

a. The name and address of the applicant.
b. The Procuring Entity.
c. The date of submission of the written application
d. The reference number of the procurement procedure and the date of issuance of the tender documents, request for proposals or request for quotations.
e. The signature of the applicant.

Such an application should be accompanied by such statements as the applicant considers necessary in support of its request. The Regulations state that such a request should be made within 14 days of the occurrence of the breach complained of where the request is made before

[41] Ibid, section 99.

[42] Ibid, Section 3.

[43] Regulation 73 of the Public Procurement and Disposal Regulations, 2006.

[44] Public Procurement and Disposal General Manual.

the making of an award or upon notification. Such a request shall be submitted in 15 bound copies and a soft copy with pages numbered consecutively.

Such a request is then filed with the Secretary of the Review Board upon payment of the requisite fees and the Secretary shall acknowledge request for review. The Secretary shall immediately after the filing of the request, serve a copy thereof on the procuring entity or Director General as the case may be. The copy to the procurement entity should also contain a notification of the pending review and the suspension of the procurement proceedings of such procuring entity.[45] Upon being served with a notification of a request, the procuring entity or the Director-General shall within seven (7) days or such lesser period as may be stated by the Secretary in a particular case, submit to the Secretary a written memorandum of response to the reasons for the request together with such documents as the Secretary may specify.[46]

The Secretary shall, within fourteen days of the filing of the request, notify all other parties to the review of the filing and such parties may, at their own expense, obtain copies of the request for review. The Secretary shall then give a reasonable notice of the date fixed for hearing to all parties to the review in the prescribed form.[47] The Secretary shall, at least three days before the date set for the hearing, invite the members of the Review Board to attend the hearing.[48] The Regulations allow for the right of representation, either by an advocate or any other person of choice.

The Review Board may engage an expert to assist it in proceedings in which it feels it lacks the necessary expertise but the opinion of the expert shall not be binding on the Review Board.[49] It is not be bound to observe the rules of evidence in the hearing of a request.[50] The Review Board has a time frame of thirty (30) days after receiving the request to review to complete its review.

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[45] Ibid, regulation 74 (2).

[46] Ibid regulation 74(3).

[47] Ibid, regulation 75.

[48] Ibid, regulation 78.

[49] Ibid, Regulation 85.

[50] Ibid, regulation 86.

1:2:4 Powers of the Review Board

The Public Procurement and Disposal Act grants the Review Board the following powers upon completing a review;

a. Annul anything the procuring entity has done in the procurement proceedings, including annulling the procurement proceedings in their entirety.
b. Give directions to the procuring entity with respect to anything to be done or re-done in the procurement proceedings.
c. Substitute the decision of the Review Board for any decision of the procuring entity in the procurement proceedings.
d. Order the payment of costs as between parties to the review.
e. For reviews made under section 106 of the Act, the Review Board may confirm, vary or overturn the Director-General's order.
f. For reviews made under section 117 of the Act, the Review Board may confirm, vary or overturn the Director-General's debarment of the person.

A decision made by the Review Board is final and binding on the parties unless judicial review is commenced within fourteen (14) days from the date of the Review Board's decision. Any party to the review aggrieved by the decision of the Review Board may appeal to the High Court and the decision of the High Court is final.[51]

2.3 Judicial Review

Courts for a long time have shied away from exercising judicial review on government contracts and procurement processes. This is attributed to some extent to **Dicey** who argued that contractual activities are matters left to the private law and to the influence of the concept of freedom of contract.[52] In recent times however, in Kenya, such a right to judicial review has been even guaranteed in the contract laws.

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[51] Section 100 of the Public Procurement and Disposal Act, No. 3 of 2005.

[52] David Feldman, (1990), Judicial Review and the Contractual Powers of Public Authorities, The Law Quarterly Review, Vol 106.

The Public Procurement and Disposal Act provides for judicial review. Section 100(4) states that judicial review should be declared by the High Court within thirty (30) days from the date of filing. Failure to declare makes the decision of the Review Board take effect. The spirit behind section 100(4) of the Public procurement and Disposal Act, is to ensure that the public interest is served in the least amount of time possible and that projects are carried out expeditiously by making sure that judicial review applications are heard within thirty (30) days from the date of filing the application. The aim is to ensure that there are no delays in finalizing the tenders intended to improve the welfare of Kenyans and that funds are disbursed expeditiously to commence the project hence the limitation of time on judicial review process which guarantees that the process is quick and efficient.

Speed is the hallmark of judicial review and even an application for leave is filed under a certificate of urgency. The law also sets out the period within which to file the application for substantive orders, failure of which the orders granted at leave stage automatically lapse. It is therefore arguable that finality is the very nature of judicial review. It is also arguable that whenever, a party comes to court for redress in public Procurement cases, finality cannot outweigh judicial adjudication as there may be other issues such as integrity, transparency and accountability which are also in public interest and if adjudicated upon by the court, may maximize economy and increase public confidence in the procurement procedures.

Judicial review is a tool used by the High Court to ensure that public institutions exercise power in accordance with the law. Judicial review also enables the High Court to review acts, decisions and omissions of public authorities in order to establish whether they have exceeded or abused their power.

2:4 Procedure

The judicial review application like other judicial review applications are based on the Civil Procedure Rules[53] and Section 8 and 9 of the Law Reform. The relevant procedure for judicial review was discussed in detail in the case of **Republic v. Public Procurement Administrative**

[53] Order LIII of the Civil Procedure Rules

Review Board & another *Ex parte* Selex Sistemi Integrati.[54] The Applicant who had been awarded a tender moved the court by instituting a judicial review centered *inter alia* on the meaning of sections 36(1), (6) and 93(2)(b) of the Public Procurement and Disposal Act. 2005. The Public Procurement Administrative Review Board is a quasi judicial body performing adjudicative functions. The applicant sought an order of Certiorari of the High Court quash the record, proceedings, decision and ruling of the 1st Respondent. The applicant also sought an order of Prohibition to restrain the 2nd Respondent (Kenya Airports Authority), its officers, servants or agents from revoking, cancelling, terminating and or awarding the tender in issue. The Applicant finally sought an order of Mandamus to compel the 2nd Respondent to award tender to the applicant.

The court granted leave to the Applicant to seek judicial review orders. The application like all other judicial review applications was based on Order LIII of the Civil Procedure Rules, Sections 8 of the Law Reform Act.[55] When the application for judicial review came up for hearing the Court's attention was drawn to a Notice of Preliminary Objection which stated that the notice of motion filed for Judicial Review orders was fatally defective and it was time barred in accordance with section 100(4) of the Public Procurement and Disposal Act as judicial review was not declared by the High Court within 30 days from the date of filing as required.

In addressing the preliminary objection the court stated that the basis of the court's power of judicial review is both the Constitution and the Law Reform Act. Section 77(9) of the Constitution states:-

"A court or other adjudicating authority prescribed by law for determination of the existence or extent of a civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by a person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time."

It is clear that the Constitution envisages hearing of a case within a reasonable time with due regard to practicality. A reasonable time is not defined but it is an issue of construction by the

[54] (2008) e KLR.

[55] Cap 26 Laws of Kenya

Judge who presides over a case. A reasonable time would depend on the circumstances of the case and other relevant factors that the court must consider. Perhaps thirty (30) days may be reasonable but due to lack of information on the reality on the ground and the courts' calendar, the period may be unreasonable and impracticable. The reasonable period for the hearing and determination of a judicial review case where there is a proper judge/population, ratio e.g. in the United Kingdom, is three (3) months.

The Court appreciated that one of the objects of the said Public Procurement and Disposal Act, in section 2(a) is to maximize economy and efficiency. However, while time is of essence in carrying out projects, speed cannot override justice and an illegality cannot be countenanced by the court merely because the offending party is overzealous to complete a project. It is also one of the objects of the said Act, to promote integrity and fairness of procurement and disposal procedures. The law acknowledges the need for speedy certainty as to the legitimacy of target activities and requires applicants for judicial review to act promptly to avoid frustrating a public body whose decision is challenged, particularly because of public interest. However, limiting or specifying that the court must deal with judicial review within thirty days may be impractical and may lead to denying justice to deserving Applicants.

The Court emphasized that applications filed in court for judicial review are brought under sections 8 and 9 of the Law Reform Act and Order LIII of the Civil Procedure Rules.
Ordinarily, the law can limit the period of filing a suit but the period within which the case must be determined before courts should be a preserve of the courts due to different circumstances such as case backlog, vacation, among others where an applicant may have no control.

Section 8 provides for judicial review remedies while section 9 provides for the making of procedural rules. Section 9 further provides that leave should be taken and that such an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding.

Order LIII of the Civil Procedure Rules provide for the procedure of applying for judicial review. It requires that no application for an order of mandamus, prohibition or certiorari shall be made unless leave has been granted. Such application for leave shall be made *ex parte* to a judge in chambers and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, the grounds on which it is sought, and by affidavits verifying the facts relied on. The applicant shall then give notice of the application for leave not later than the preceding day to the Registrar and shall at the same time lodge with the Registrar copies of the statement and affidavits. The grant of leave operates as stay of the proceedings in question until the determination of the application or until the judge orders otherwise.

When leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within 21 days by notice of motion to the High Court and there shall, unless the judge granting leave has otherwise directed, be at least eight (8) clear days between the service of the notice of motion and the day named for the hearing[56]

The Procedure for judicial review set out by the Public Procurement and Disposal Act has been held to be in conflict with that laid down by the Law reform Act and Order LIII of the Civil Procedure Rules. According to section 100 (1) Public Procurement and Disposal Act, judicial review must be commenced within fourteen (14) days from the date the Review Board makes a decision while under Order LIII, the Applicant must file the same within 21 days after leave is granted. It is arguable that the novel procedure introduced by the Public Procurement and Disposal Act is impractical and may lead to miscarriage of justice. Sometimes it is very difficult to deal with judicial review applications expeditiously because of the weighty issues that need to be determined.

2:5 Scope of Judicial Review Orders

Section 8 of the Law Reform Act provides for the remedies that can be given in a judicial review matter. There are three judicial review remedies which are prerogative writs of mandamus, prohibition or certiorari. The scope of judicial review orders was discussed in the case of

[56] Order LIII R.3 of the Civil Procedure Rules

Republic v Commissioner of Police ex parte Karia[57] in detail. In this case the applicant had sought orders of mandamus to compel the Commissioner of Police to vacate and deliver up vacant possession of a piece of land he alleged belonged to him and an order of prohibition to prohibit the Commissioner and his agents from interfering with his use of the land. The Motion stated that the applicant had brought the application under section 8 and 9 of the Law Reform Act, orders L rules1,2,3,7 and 12 and order LII of the Civil Procedure Rules, section 60, 70 and 75 of the Constitution; rule 10(a)(b) of the Constitution of Kenya (Protection of Fundamental Rights and Freedoms and the Individual) Practice and Procedure Rules 2001; sections 6 and 7 of the Civil Procedure Act; the inherent jurisdiction of the Court and all other enabling provisions of law.

The Attorney General objected stating that, among other things, that the application was bad in law in that the prayers sought were for prerogative orders and as such could not be used to determine the ownership of the disputed property and that orders of mandamus and prohibition could only issue to a public body in its official capacity and acting as such under a particular law.

The court set out the scope of judicial review in its determination of the issues raised. It held that there are three remedies for judicial review namely certiorari which quashes an unlawful decision of a public authority, prohibition which prohibits an unlawful act which a public authority is proposing to perform i.e. it operates as to the future and mandamus which compels a public authority to perform a public duty.

In **Republic v Registrar of Societies & 5 others ex parte Uhuru Kenyatta & 6 others,**[58] the applicants sought an order of certiorari to quash the decision of the Registrar of Societies to change the names of national officials of KANU, order of prohibition staying the effect of the Registrar of Societies decision to make changes of the party officials and order of mandamus to compel Registrar of Societies to reinstate the status of KANU officials as they were before the letter of the Registrar purporting to recognize new officials. It its ruling, the court explained that judicial review remedies of certiorari, prohibition and mandamus, are predicated upon the existence of some positive duty invariably imposed by statute law, requiring the authority,

[57] (2004) 2 KLR

[58] (2008) 3 KLR (EP) p.521.

person or body of persons to exercise the power conferred upon it or them by statute. When the authority, person or body of persons act contrary to that law, or exercise the power invested in them beyond that power, the public law remedies of certiorari or prohibition are invoked to quash the decision made or threatened to be made in the future in the case of the order of prohibition. When the authority fails to exercise the power invested in it, the public law remedy of mandamus comes in handy to compel it to do so.

The judicial review remedies of certiorari, prohibition and mandamus are predicated upon the existence of some positive duty invariably imposed by statute law requiring the authority, person or body of persons to exercise the power conferred upon it or them by statute. When the authority, person or body of persons act contrary to that law, or exercise the power invested in them beyond that power, the public law remedies of certiorari or prohibition are invoked to quash the decision made or threatened to be made in the future in the case of the order of prohibition. When the authority fails to exercise the power invested in it, the public law remedy of mandamus comes handy to compel it to do so.[59]

In summary, Certiorari quashes the unlawful act of a public authority, Prohibition prohibits an unlawful act which a public authority is proposing to perform i.e. it operates as to the future and Mandamus compels a public authority to perform a public duty. These remedies are discretionary in nature and the court may decline to grant them even if deserved, particularly if the court is of the view that they are not the most efficacious in the circumstances of a case.

2.6 Appeals to the Court of Appeal

A party to the judicial review before the High Court may make an appeal to the Court of Appeal. In **Kenya Revenue Authority vs. De La Rue Currency and Security Print Ltd & 2 others**[60] the applicant issued an invitation to tender for the printing, supply and delivery of self adhesive stamps. The 1st respondent was one of the two companies that responded and submitted a bid. The other was the third respondent, a foreign company based in India. By a letter dated 15th July, 2008, the 1st respondent was informed that its bid was unsuccessful.

[59] Ibid.

[60] [2009] eKLR

Aggrieved by that decision, the 1st respondent filed the Request for Review before the Public Procurement Administrative Review Board ("the Board"). Thereafter, the 1st respondent moved to the superior court seeking judicial review orders. The superior court granted the orders sought. The respondent appealed to the Court of Appeal. This case demonstrates that the decision of the High Court on judicial review matters can be appealed.

2.7 Normal Courts

Section 99 of the Public Procurement and Disposal Act provides that the right to request a review under the Act is in addition to any other legal remedy a person may enjoy. This provision allows for redress on various other causes of action.

Procurement contracts are just like normal contracts. Terms of engagement are drawn, parties sign them and are supposed to observe the terms. In case of any breach either party may seek redress from the courts.

2.8 Conclusion

Dispute resolution mechanism is crucial where parties are engaged in any economic activity. In public procurement, a case for an elaborate dispute resolution mechanism cannot be gainsaid because one of the parties or the procuring entity may misuse the process for certain interests. The supplier is normally at a weaker position in procurement process and there is need for a clear procedure to sort out any dispute.

The dispute mechanism established under the Act is commendable but runs short of meeting the expectation of all players. The Review Board simplifies and hastens the procedure of redress hence facilitating efficient and economic procurement in the country.

CHAPTER THREE

A CRITIQUE OF THE PUBLIC PROCUREMENT DISPUTE RESOLUTION MECHANISMS IN KENYA

3.1 Introduction

Public procurement procedures established in the Public Procurement Process are intended to achieve certain key objectives. There are several procedures established in the Act ranging from how the procurement process is carried out and how the disputes that may arise are solved. Any of the process as established including dispute resolution procedures should be steered towards maximizing economy and efficiency; promoting competition and ensuring that competitors are treated fairly; promoting the integrity and fairness of procurement procedures; increasing transparency and accountability; to increase public confidence and facilitating the promotion of local industry and economic development.[61]

As stated in the previous chapter, the Act establishes an elaborate dispute resolution mechanism which includes the Public Procurement Administrative Board, the High Courts and the ordinary courts. The dispute resolution mechanism as established in the Act poses several weaknesses and strengths, some of which are discussed in this chapter. This chapter highlights some of the benefits and shortcomings of the dispute resolution mechanism in the Act.

Regardless of how solid policies are, and how thorough procurement procedures are, there will be disputes that may be explained by the following reasons.[62] First, there are always more losers than winners, so the odds favor protests being initiated. Second, mistakes will occur, no matter how knowledgeable or well trained a procurement officer is. Suppliers will be aggrieved, and some of them will launch protests. Third, awarding contracts based on political reasons or on seemingly arbitrary criteria has become unacceptable. Awards based on arbitrary criteria generate protests.

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[61] Section 2 of the Public Procurement and Disposal Act No. 3 of 2005

[62] Michael Asner,(2005), The Request for Proposal Handbook, A Sourcebook of Guidelines , Best Practices, Examples, Laws, Regulations, and Checklists from Jurisdictions Throughout the United States and Canada, *McGraw-Hill.*

While a supplier can always seek relief in the courts, there should be some simple administrative process for resolving these differences. This remedy should not involve the courts; it should be fast, inexpensive and defensible. Furthermore, the administrative approach should be able to solve the problem quietly, without attracting the harsh glare of publicity.

3.2 Benefits of the Dispute Resolution

Efficiency, cost effective and simple

In Kenya, courts have been known to be slow in the discharge of justice. Cases drag for many years and make the interests of the parties wane. Further, these courts have a backlog of cases which slow down the justice process. Besides the slow pace of discharge of justice, the court process is complex for ordinary people who have not had proper learning in the law.

The many applications that are allowable by the system during trial enables unscrupulous litigants to make constitutional applications. These constitutional applications have been in the past used to throw out several potential cases that would have set remarkable precedence.

When cases are unduly delayed through the antics of accused persons, it is justice denied to the public. When a case drags on and on, the constitutional right to a fair trial within a reasonable time is undermined. Section 77 of the Constitution of Kenya stipulates that where a person is charged with a criminal offence, the case should be afforded a fair hearing within a reasonable time by an independent and impartial court.

In procurement where public projects have to be dispensed with for public interest, the law has provided a more efficient procedure. The first forum for resolution of procurement cases is the Review Board which resolves most of the cases. One can only seek judicial review from the Review Board if dissatisfied by the decision of the Board. Most cases are resolved at the Review Board level and only a few have proceeded to the High Court.

This Process has proved to be more efficient than the normal court process. Since the inception of the Public Procurement Administrative Review Board in 2005 together with its predecessor,

the Public Procurement Complaints, Review and Appeals Board in 2001[63], they had by 2006 settled the following disputes:

Year	No. of cases
2001	12
2002	44
2003	33
2004	46
2005	52
2006	58

Source: Public Procurement Oversight Authority Website.

In total 245 disputes were discharged which is much more efficient than the normal courts. The PPDA also stipulates time frames within which certain actions have to be taken further facilitating the efficiency of the dispute resolution mechanism. Section 106 provides that a request for a review may only be made within twenty-one days after the order was made. Section 96 provides that the Review Board should complete its review within thirty days after receiving the request for the review. A decision made by the Review Board shall, be final and binding on the parties unless judicial review thereof commences within fourteen days from the date of the Review Board's decision.[64]

Further, the administrative process of the disputes provided by the Act is simple and cost effective as compared to the highly complex and costly court process. Requests for review are made through a prescribed form which is filled by the parties requesting the review.[65] The Secretary of the Review Board shall then notify the parties and give reasonable notice for fixing the hearing dates.

[63] Established under the Exchequer and Audit (Public Procurement) Regulations, 2001.

[64] Section 100 of the Public Procurement and Disposal Act, no 3 of 2005.

[65] Regulation 73 of the Public Procurement Regulations, 2006.

3.3 Shortcomings of the Dispute Resolution Mechanism

3.3.1 Parties to a Dispute

The Act expressly limits a person who can seek redress from the Public Procurement Administrative Board. Section 93 limits persons who can request administrative review to a candidate. A candidate is defined in section 3 of the Act as a person who has submitted a tender to a Procuring Entity. This definition excludes parties who could have been aggrieved in the procurement process immediately after the advertisement. A public spirited tax-payer who is not a bidder may not have *locus standi* to lodge an objection.

In *Uni-Impex (Importand Export) Ltd and the Ministry of Health (KEMSA)*[66] the respondent filed a preliminary objection on the ground that an applicant who had not submitted a bid was not competent to appeal. He argued that the applicant was not a candidate as per Regulations 2 of Public Procurement Regulations and cannot therefore seek review as per Regulation 40(1). The Review Board stated that for a candidate to have interest or locus standi to lodge a request under the Regulations, a person must be invited to bid. On its face, and by its general terms, an advertisement calls upon an invitee or interested person, to react in certain ways to it. These usually include the necessary step of obtaining or purchasing the tender or bid documents or such like. It is not enough that for the advertisement to be to the whole world, but that to become a candidate, he who reads it must react to it in one of the ways required by it. The third and final necessary ingredient of an invitation is in the return of the advertisers, in the required format and at specific time and place, of the tender or bid documents or such like. It is the effecting of this third step of returning tender documents that makes the invitee a candidate or in effect, an examinee. In procurement language, an invitee enters into the competition as one of the persons whose documents will be examined and evaluated for the purpose of the award. These are the necessary ingredients pursuant to which any person becomes transformed into a candidate under the Regulation. A person who does not satisfy all the foregoing criteria can be nothing more than a busybody without sufficient interest in the tender process in issue.

[66] Application No. 5/2004

In many countries, Kenya included, public procurement contributes to a significant proportion of Gross Domestic Product (GDP). It impacts on public national and international interests in the senses hereinstated below.

Firstly, tax payers and funding agencies are interested in the procurement process. The interest of the tax payer is that procurement secures the best possible value for their money and that they get the best services. Tax payers are the beneficiaries of goods and services that the government procures. They are therefore interested in getting the essential services like health, education and infrastructure. Public procurement system should therefore ensure that the capacity and performance of the contractors is of good standards to ensure uninterrupted supply of the essential goods and services. Funding agencies also are interested on how their money is used in procuring goods and services. Some of these agencies like World Bank lend the government with certain conditions which are geared towards achieving effective procurement procedures.

Secondly, economic, social, political and environmental interests also emerge in procurement process. Since public procurement is such a big market especially in developing countries, it has a direct impact on a country's economic development. Public procurement can also be used strategically to promote specific economic goals such as restructuring of industry or development of particular areas of the country. The specifications on the procurement documents may also be structured in manner that aims to achieve certain social and environmental ends. For example, the government may require that for a contractor to qualify must maintain certain environmental standards.

Thirdly, the international community is also interested. With globalization and free market public procurement is no longer national. Governments procure goods and services from contractors who are situated outside their geographical boundaries. To facilitate international public procurement the international community has struggled to negotiate international instruments to establish certain international standards in procurement.[67]

[67] Davis Landdon &Seah International, (2008), International Procurement, Davis Landdon & Seah International. Available at: http://www.davislangdon.com/upload/images/publications/USA/International%20Procurement%20Series%202_All%20Articles.pdf. Accessed on 21 September 2009.

Because of these wide ranging interests, procurement process may pose serious injuries to various interests. For example, the general public may be opposed to the manner in which their taxes are utilized by the procurement entity. Despite the fact that they are not directly involved in the procurement process, they should be recognized as potential parties to a dispute. The Act does not address issues of representative suits. Any public procurement process is done in public interest and the general public must have an avenue of seeking redress whenever their rights are injured or are likely to be injured. The Act should therefore contemplate public interest litigation. Public interest litigation means such suits as are filed in pursuit of the public interest. Such suits may be filed by a public-spirited individual or group of individuals or by a civil society organization whose mission covers the issue in relation to which the action is filed.[68]

In *Kenya Bankers Association 7 others v Minister for Finance &another (No 4)*[69] the applicants and the interested party, the Central Bank of Kenya, made a constitutional reference seeking declarations that the Central Bank (Amendment) Act No 4 of 2001 was null and void to the extent of its inconsistency with section 77(4) of the Constitution of Kenya, was incapable of implementation and had retrospective operation. At the hearing it was argued by the respondents that the applicants had no locus standi and that they had come to court prematurely merely in anticipation of what may happen in the implementation of the amendment Act. It was further argued that there was no general provision in the Constitution saying that any person who feels that an Act of Parliament is unconstitutional can come to seek a declaration that it is unconstitutional. It was also argued that Kenya Bankers Association had no right to litigate on behalf of its members. On the issues of locus standi the court held as follows:

a. The general principle relating to public interest litigation is that what gives locus standi is a minimal personal interest and such an interest gives a person a standing even though it is quite clear that he would not be more affected than other member of the population.

b. In cases dealing with human rights, public interest and those challenging the constitutionality of Acts of Parliament, procedural and technical objections cannot bar the jurisdiction of the court at the expense of justice.

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[68] Odhiambo, Michael Ochieng,N.D. Legal and Institutional Constraints to Public Interest Litigation as a Mechanism for the Enforcement of Environmental Rights and Duties in Kenya, Nakuru,Resources Conflict Institute.

[69] (2002) 1KLR

c. As part of reasonable, fair and just procedure to uphold the constitutional guarantees the right of access to justice entails a liberal approach to the question of locus standi. Courts must be goal oriented to vigilantly uphold the Constitution of Kenya, and do justice according to the law in the context socio-cultural environment and avoid paying undue attention to abstract technical strictures and procedural snares merely for the sake of technicality which may have the effect of restricting access to justice which is itself a constitutional right which cannot be abrogated or abridged by brazen or subtle schemes and maneuvers.

d. The paramount guides in deciding issues of standing or interest to sue or defend are good faith of the person bringing the suit and the culpable inaction of the public officials who are charged with responsibility of seeking judicial intervention in case of breach of the constitution or statutory provisions.

The reasons proffered by the ruling in this case indicate that locus standi should be available to the public generally if the issues complained of may cause injury to the public. Public procurement is an activity of public interest and any lawful act injures the public generally. The issue of locus standi as limited by the Act should be enlarged to appreciate public interest litigation.

3.3.2 Ouster of Court's jurisdiction

Section 36 and 100 are the ouster clauses in the Act. These two sections were discussed in the case of the Republic vs. Public Procurement Administrative Review Board & another Exparte Selex Sistemi Integrati[70] where the bone of contention was whether section 36 and 100 ousts the High Court's judicial review jurisdiction. In his decision Nyamu J addresses the question, whether the Public Procurement and Disposal Act, 2005 s 100(4) ousts the jurisdiction of the court in judicial review? To address this question the judge scrutinized section 36(6) which provides that a termination under this section shall not be reviewed by the Review Board or a court. In the literal sense, section 36(6) purports to oust the jurisdiction of the court but High

[70] [2008] eKLR

Court's jurisdiction in judicial review matters inheres from the Law Reform Act and also sections 65(2) and 123(8) of the Constitution. Section 100 of the Public Procurement and Disposal Act, 2005 submits the decisions of the Review Board to judicial review by the High Court but imposes a time bar of 14 days contrary to the provision of the Law Reform Act and the Constitution.

The Law Reform Act provides for 30 days but the Constitution encompasses the doctrine of reasonable time.

Section 77(9) of the Constitution states a court or other adjudicating authority prescribed by law for determination of the existence or extent of a civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by a person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time. The constitution envisages a reasonable time and reasonable time would depend on the circumstances of the case and other relevant factors that the court must consider. Section 9 and order LII of the Civil Procedure Act provides that judicial review should be sought within 6 months.

The ouster sections in the Public Procurement and Disposal Act are designed in the context of ensuring fairness, transparency and accountability in the procurement procedure. They were also designed to accelerate finality of Public Projects. The intention of efficiency is noble and must be appreciated if the development agenda is to be achieved. The Court while interpreting the section cannot ignore that objective because it is meant for a wider public good as opposed to an individual who may be dissatisfied with the procuring entity. However the Court must put all public interest considerations in the scales and not only the finality consideration.

It is also arguable that whenever, a party comes to court for redress in public Procurement Cases, finality cannot outweigh judicial adjudication as there may be other issues such as integrity, transparency and accountability which are also in public interest and if adjudicated upon by the court, may maximize economy and increase public confidence in the procurement procedures. The 14 days provided in the Act may therefore arguably be considered as unconstitutional and impractical in certain circumstances.

3.3.3 Period for Application of Review

Regulation 66 (2) provides that the procuring entity should provide, within 14 days, written reasons as to why the tender, proposal or application was unsuccessful to the unsuccessful tenderer. On the other hand regulation 73 (1) of the Public Procurement Regulations provides that a request for review by the Review Board should be made within 14 days since the occurrence of the breach complained of where the request is made before the making of an award.

The days given exceed the time available for the candidates to seek for the review as the request for the reasons can only be named after notification. These two provisions are therefore impractical and can prejudice the applicant's pursuit of redress.

3.3.4 **Board's Sitting Hours**

Regulation 78 provides that the Review Board meetings should be between 8.00a.m to 5. 00 p.m. This Regulation is so stringent that it makes it difficult for the Board out of its own volition, to extend the sitting hours. Such a provision should not be in the regulations and let the hearing times be regulated by the circumstances surrounding the meeting.

3.3.5 **Costs of the Review**

Section 83 provides that a request for review may be withdrawn at any time before or during the hearing by notice in writing to the Secretary signed by the applicant and upon such notice being received the request for review shall be deemed to have been withdrawn. When such a request for review is withdrawn, the Secretary shall forthwith inform the Review Board and all parties to the review of the withdrawal. The section is not clear as to who bears the costs incurred so far.

Section 27 of the Civil Procedure Act provides that,

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions

for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

In *Mariga V. Musila*[71] the respondent was a passenger in the appellant's motorcar when he was injured in an accident involving it and the vehicle of one Kamau. He sued both the appellant and Kamau in negligence. It was not disputed that the appellant was entitled to damages. The issues that remained to be decided were the apportionment of liability, the quantum of damages and costs. On costs the court emphasized it is well established that the costs incident to all suits are in the discretion of the court or judge and the court or judge has full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for those purposes. The judge or magistrate has jurisdiction to exercise the discretion in awarding the costs but that jurisdiction should be exercised judiciously e.g. has awarded so high or so low costs as to amount to injustice to one party or has acted on wrong principles.

In **Essential Mountain Links Limited v. Securities Nominees Limited and another**[72] Justice Mary Kasango emphasized that the discretion afforded by section 27 of the Civil Procedure Act must be a judicial discretion. In exercise of that discretion, the court should consider the conduct of the parties and also the matters that may have led to the filing of the action in court. The procedures should therefore be clear as to how the costs have to be apportioned in case of withdrawal of request by either party. The Regulations should be clear that the Review Board should have the discretion to decide on costs.

3.3.6 **Appeals**

Section 100(2) allows for appeal against the decision of the Board to the High Court. Appealing to the High Court may open up hearing a fresh. This may prolong procurement

[71] [1984] KLR

[72] (2006) eKLR

process as compared to Judicial Review. The use of the phrase appeal to the High Court is confusing because normal practice is to seek judicial review and not an appeal. Judicial review and appeals are two completely different procedures. In the English case of *Chief Constable of* ***The North Wales Police v. Evans***[73] Lord Brightman explained the scope of judicial review. He said that Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made. The court sits in judgment on the correctness of the decision-making process. Where Parliament has entrusted to an administrative authority the duty of making a decision which affects the rights of an individual, the court's supervisory function on a judicial review of that decision is limited. The court cannot be expected to possess knowledge of the reasons of policy which lie behind the administrative decision nor is it desirable that evidence should be called before the court of the implications of such policy. It follows that the court ought not to attempt to weigh the merits of the particular decision but should confine its function to a consideration of the manner in which the decision was reached. An appeal on the other hand concerns itself with the merits of the decision made. It is clear therefore that the use of the word appeal in section 100(2) is not accurate and leads to confusion.

3.3.7 **Matters to Subject to Judicial Review**

The Director-General's enforcement and debarment orders are not made a subject of judicial review by the Act. Judicial review plays an important role in our society which is to check excesses, omnipotence, arbitrariness, abuse of power by public bodies or officials or private bodies performing public duties like the Director-General and also accountability and maintenance of constitutionalism and the rule of law. As Chief Justice Marshall powerfully argued in the Case of *MARBURY v MADISON,*[74] judicial review provides the best means of enforcing peoples will as declared in the written Constitution, without resort to the drastic remedy of revolution.

Judicial review is a tool used by the High Court to ensure that public institutions or officers exercise power in accordance with the law. It is still within the jurisdiction of the High Court to

[73] (1982) 1WLR 1155

[74] 5 US 137 (1803)

review legislation in order to establish whether it complies with the Constitution. Judicial review also enables the High Court to review acts, decisions and omissions of public authorities in order to establish whether they have exceeded or abused their power.

Professor Sir William Wade argues that the powers of public authorities are essentially different from those of private persons. A man making his will may be subject to any right of his dependant's dispose of his property just as he may wish. He may act out of malice or a spirit of revenge but in law this does not affect his exercise of power. In the same way a private person has absolute power to allow whom he likes to use his land regardless of his motives. This is unfettered discretion. But a public body may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. The whole conception of unfettered discretion is inappropriate to a public authority which possess powers solely in order that it may use them for the public good.[75]

Michael Fordham has argued that judicial review allows the High Court to supervise the activities of public bodies. It brings to the judicial forum a wide range of subject-matter and enjoys an increasing prominence.[76]

3.3.8 **Provisions of Procedure**

The Public Procurement procedures do not provide on how parties should make presentations in the hearing. Elaborate procedures regarding witnesses, examinations and among other issues have not been provided for in the Act or Regulations.

3.3.9 **Admissibility of requests for review**

The Act and Regulations provide that a candidate who claims to have suffered or risk suffering , loss or damage due to breach of a duty imposed on the procuring entity under the Act or Regulations made thereunder may seek administrative review of such act or omission. For a review application to be accepted, which means that for an applicant to have locus standi, an

[75] Wade HWR. (2000), Administrative Law, Oxford University Press

[76] Michael Fordham, Judicial Review Handbook, Hart Publishing

applicant must show that it is a candidate within the meaning of the Act and the Regulations to be able to properly invoke the jurisdiction of the board. Further, under the 2001 Regulations it is clear that the Board will only entertain applications where there is a breach of duty imposed on the Procuring Entity imposed by the Regulations.[77]

In the application No. 15 of 2005, ***Mohammed & Mugai Advocates v. Nairobi Water Services***, the board held that its mandate arises only where it is entitled to deal with complaints submitted by candidates pursuant and in accordance with the Regulations. The Board further opined that for a bidder to have standing before the Board and for the Board to be entitled to conduct a review of a complaint, there must be alleged breach of duty imposed on the procuring entity by the regulations. Where no duty is imposed by the Regulations, there can neither be a proper complaint nor a right to lodge a review.

3.3.10 **Powers of the Review Board**

A very important aspect of Public Procurement is the sense of fairness that is promoted through the facilitation by law of an appeals and Procurement Review Board. Such a clause is subject to abuse and can be rendered impractical if clauses pertaining to the appeals process are not cognizant of the possibility of frivolous appeals, the possibility of the number of appeals being so overwhelming to the Appeals Board that it is unable to review all of them in any meaningful time frame, and that it may threaten the procurement process completely.[78]

In practice there have been a number of frivolous appeals that have led to unacceptable delays and have threatened to undermine the procurement process. The main reason why this has arisen is that:

a. The Law permits the Review Board to substitute any decision of the procuring entity including the selection of winning bidder. In doing so the Review Board undermines its independence and becomes a de facto Tender Committee, and one that vendors are happy to exploit since if nothing at all the possibility of submitting a bid a second time to higher Tender Committee increases the chances of winning a bid. Section 98 (c) empowers the

[77] Mohammed Nyaoga and Crispine Odhiambo, (2008), Public Procurement: An Overview of regulation, Global Competition Review.

[78] Kenya's Independent Procurement Review, Provisional Report prepared in May 2005.

Review Board to substitute the decision of the Review Board for any decision of the procuring entity in the procurement proceedings

b. The Law does not go far enough to restrict frivolous appeals, and merely states that a bid should not be frivolous. Of course one man's frivolous is another man's serious and so it is unlikely that such a clause can be consistently or meaningfully be interpreted.

3.3.11 **Lack of Electronic Dispute Resolution**

Electronic Government Procurement (e-GP) is the use of information technology (especially the Internet) by governments in conducting their procurement relationships with suppliers and contractors for the procurement of works, goods, and services required by the public sector. E-GP breaks down the physical barriers of space and time and allows a more transparent and efficient information flow and wider access to information and services. The use of electronic means to enhance the management of the procurement process is one of the central components of public sector reform due to its potential impact on Public Sector efficiency and effectiveness, on the institutional reorganization process, on businesses' productivity and competition levels and on the level of trust from the public.[79]

Electronic dispute resolution in public procurement is a key process in the entire reform agenda of any nation. The Public Procurement and Disposal Act does not in any way incorporate electronic dispute resolution. Therefore, electronic filing of request by the person making the application can achieve greater efficiency.

3.3.12 **No Board jurisdiction where contract is hurriedly signed**

The Board has no jurisdiction to entertain a dispute where a procurer executes a contract within 21 days of the award of the tender and before an objection is lodged. The Act is silent on what remedy is available to aggrieved parties where the procuring entity rushes to sign the contract even before the unsuccessful bidders are notified.

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[79] Electronic Government Procurement-Roadmap. Available at: http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=645469. Accessed on 21 September 2009.

3.3.13 **Rejection of frivolous bids**

The Registrar of the Board may reject a frivolous request. However, the act fails to state what constitutes to a frivolous request. Lack of criteria to determine frivolous cases may cause injustice to parties with meritorious cases.

3.3.14 **Limited reliefs**

The Review Board is bestowed with several powers amongst which are:

(v) To annul anything the procuring entity has done in the procurement proceedings, including annulling the procurement proceedings in their entirety.

(vi) To give directions to the procuring entity with respect to anything to be done or redone in the procurement proceedings.

(vii) To substitute the decision of the Review Board for any decision of the procuring entity in the procurement proceedings; and

(viii) To order the payment of costs as between parties to the review. However, these reliefs are insufficient.

The above reliefs are limited and inadequate to enable the Board to completely and effectually determine all the issues to various disputes. The Board lacks enforcement powers in respect of its decisions.

3.4 **Conclusion**

Despite the fact that the public procurement dispute resolution process is more efficient than normal courts, it still suffers from various deficiencies which need to be addressed. The deficiencies discussed need to be reformed in order to improve the public procurement dispute resolution procedure.

CHAPTER FOUR

4. CONCLUSION AND RECOMMENDATIONS

4.1 Conclusion

Public procurement often constitutes the largest domestic market in developing countries like Kenya. Depending on how it is managed, the public procurement system can thus contribute to the economic development of these countries. Indeed, public procurement is the principal means through which governments meet developmental needs such as the provision of physical infrastructure and the supply of essential healthcare. Again, many governments use public procurement to support the development of domestic industries, overcome regional economic imbalances, and support minority or disadvantaged communities.

Because the deployment of the public procurement system to pursue these developmental goals entails governmental exercise of enormous discretion, public procurement is often an extremely controversial subject. This is especially the case in a country like Kenya where the ability to exercise discretion in the award of government contracts has been a source of valued political patronage and procurement has often been like a means for illicit transfer of funds from governmental to private hands. But all these notwithstanding, public procurement is an important mechanism of securing economic stability if well utilized by the government and the respective procuring entities.[80]

Thus, strong procurement management in the public sector is a tool for achieving political, economic and social goals. In the era of diminishing resources and increased demand for accountability and transparency in government, the "stakeholders / shareholders" of the public sector are demanding more effective and efficient use of public resources and hence the need for a reliable dispute resolution mechanism to address key issues that are raised by aggrieved bidders.

[80] J.M Migai Akech, (2005), Developing Partners and Governance of Public Procurement In Kenya: Enhancing Democracy in the Administration of Aid, International Law and Politics, Vol37. Pp 829-868.

Public procurement being a system, the Kenyan government has on its part through the help of the stakeholders/shareholders enacted legislation to ensure maximum input of the procurement system in the economic growth of the country. This legislation has put in place several mechanisms geared at achieving the key goal intended by the government when enacting the legislation[81]. Some of the mechanisms put in place include the dispute resolution mechanism managed by the Administrative Review Board with the appeals to the High Court which has been our main area of interest in this research. This mechanism however has not met all the expectations of many Kenyan citizens (the public who are tax payers), suppliers and even aggrieved bidders/candidates' whose interest championed its establishment.

The public procurement system requires transparency in its operations, to achieve its goals through good economic governance and management, democracy and good political governance, corporate governance and socio-economic development which should be featured and or reflected in its institutions. This to a large extent has not been achieved in our country due to the constitution of the various institutions which govern, oversee and manage public procurement. We however, cannot underscore the development made by the Kenyan government by enacting legislation to govern public procurement after decades of reliance on cephalous legislations. The PPDA which came into force in January 2007 was a sign of commitment by the government to matters of transparent public procurement making Kenya one of the developing countries with reliable and comprehensive legislation in the area of public procurement.

The method of dispute resolution which is envisaged in the legislation referred to herein above, and which has been our main focus in this discourse has been hampered by several factors discussed in the previous chapters and which has to be dealt with forthwith to enhance its efficacy in discharge of justice in the public procurement.

The alternative dispute resolution mechanism provided for by the Act (PPDA,2005) was instituted with a view of making justice in public procurement easily accessible, affordable and efficient. This to some degree has been achieved but a lot has to be done if the ultimate goal of transparent, efficient, cost-effective public procurement has to be achieved.

[81] Public procurement and Disposal Act 2005 (PPDA, 2005) with its corresponding regulations 2006.

The discharge of justice by the Administrative Review Board which is mandated to discharge justice to the aggrieved bidders has been hampered by many factors some of which are briefly discussed below, which include inter alia:

a) Corruption

Corruption in our country has become a menace affecting each and every sector in our country and almost perpetrated by each and every individual in Kenya. Within the public offices for instance, corruption has become the order of the day and this does not preclude the dispute resolution mechanism system envisaged in the PPDA 2005. The perpetrators of corruption in the public procurement system are the very own persons who ought to ensure its efficiency.

Since corruption is vice which has bedeviled the public sectors and a form of underground kind of crime, it is hard to prove. For one to prove corruption will take decades to investigate the persons allegedly involved. In public procurement, the persons having the requisite knowledge in it and the laws, regulations and guidelines in process are the very persons who manipulate procuring entities to approve a particular bidder and disprove another. For such individuals sitting the board, its hard for them to step down for they already have an interest.

Though the Act provides for several organizations to propose names of persons they think are capable of becoming members of the Board, the discretion is solely left to the Minister of Finance who appoints the members. The Act further does not require the Minister to give reasons for acceptance of one person and refusal of another. The Minister, being a member of Parliament, cannot escape influence by the rest of members of parliament and more often than not ends up choosing persons who to him seem favorable and who the members tend to incline to. Most of the times the persons suggested end up being people who can be manipulated by the members of Parliament and who end up approving bidders who are linked to a particular member of Parliament and can give them a token of the tender money. This does not preclude the dispute resolution mechanism hence justice cannot be achieved in such kind of setting.

Corruption undermines development in multiple ways like reducing competitiveness and economic growth, diminishing social values and ultimately decaying integrity and credibility of

institutions and the state at large. When it comes to justice system, corruption paralyses it completely and compromises the integrity of the judicial system and the judicial officers.

b) **Stringent rules in the constituting Act (PPDA)**

The PPDA is the constituting Act for the Administrative Review Board. The Board's jurisdiction is clearly set out in the Act which stipulations the Board has to follow to the letter. Deviation from the Act can be seen as acting ultra vires by the Board. This Act however, has such stringent rules that it waters down the establishment and composition of the Board. This affects the effective discharge of justice to the aggrieved bidder and other interested parties.

Rules stipulating who is a party in public procurement are so stringent that they fail to take into account the general public who are directly affected by substandard public utilities. Other rules include those stipulating the sitting hours of the Board. Prescription of sitting hours by the Act ties the Board capacity to sit for long hours. This is lobe-sided since every case has its intricacies and most of them need many sitting hours if the Board is to decide on the cases presented to it within the prescribed period of the Act.

The Board's autonomy ought to be reflected in its capacity to make its own governing rules as it deems fit depending on the circumstance of each case. The Board ought to have its own rules of procedure when it comes to hearing of cases. Thus though the Act kind of provides it does not fully encapsulates all rules of procedure.

c) Lack of monitoring and evaluation mechanisms

There are inadequate monitoring and evaluation mechanisms in particular lack of comprehensive statistics on the value of goods and services and on the procurement process. When the value of goods and services is not known by the persons within the Board, then decision on who the right bidder is will not be made from an informed point of view.

Fluctuation of prices in the market is common especially in the current era of global economic crises and the Board needs constant update of the value of goods and services all over the world. This helps them in making informed decision when dealing with international bidders.

d) Resource constraints

Resources have become scarce both natural and artificial ones. This scarcity has affected everyone and all spheres of human living. Convening of the Board to hear any case requires resources which many a times the parties to the case bear the burden of the Boards sitting. The Act does not clearly state who bears the burden of the Boards sitting but from the point of view of alternative dispute resolution mechanism, the parties bear the burden at every forum.

Lack of resources affects the Board and the parties. Evaluation and monitoring of the value of goods and services requires deployment of persons with the requisite knowledge to various parts of the country and the world which demand resource input to get the required information which is crucial to the Board when deciding on diverse cases. Investigations should be carried out by persons appointed by the Board. These investigations may be done through aggrieved bidder who ought to present all the information pertaining his complain and evidence which the Board can rely on. But if he /she has presented all the available information and yet the Board is not satisfied, it can order for further investigation.

Many times aggrieved bidders opt to settle for the decision of the procuring entity due to the resource consuming-dispute resolution mechanism provided for by the Act. Resources include money, time and knowledge. Mostly the financial bit is what holds them back. In this era of scarcity of resources, parties who cannot meet the Board's expenses settle for what the procuring entity decides. Alternative dispute resolution mechanisms may be affordable to aggrieved parties.

e) Deeply vested interests and lack of political will

The members of the Board are appointed to it by the Minister of Finance. These members represent different interests in the Board. Public procurement being one of the most important

economic system in our country, the Legislature which is charged with the mandate of making laws even those on public procurement have been complacent in amending clauses which affect the Boards mandate and the remedies it can give to the aggrieved party. Also the Legislature has been guilty of enacting substandard laws or Acts with many loopholes where personal interests can be accommodated. These legislations have been subject to manipulation and abuse.

Though the Board carrying on from its predecessor ought to be autonomous in its operations, cases of political interest end up being decided in their favor since the persons sitting on the Board are answerable to the Minister of Finance who has powers to dismiss or influence their sacking.

Lack of political will by the Legislature to have Acts which fully envisage the interest of the public in public procurement process has affected the administration of justice by the Board which h as to adhere to the provisions of the Act and are subject to the political influence.

f) Paucity of technical knowledge and capacity

The Board though comprised of diverse people in terms of knowledge and professionalism, does not reflect the requisite technical knowledge and capacity it ought to. The persons comprising the Administrative Board do not have the technical knowledge and capacity in many fields. They need not be on the ground themselves or need to know the nitty grities in every tender; nevertheless they should be well versed in technical knowledge.

For instance, in construction tenders and electronic supplies, if a bidder is aggrieved or risk loss or damage, the Board ought to have the technical knowledge to know which bidder possesses the required knowledge in that particular technical field. But the Board members mainly possess theoretical knowledge as opposed to technical knowledge.

g) The complexity of substantive issues involved

Public procurement involves very complex issues in terms of specificity of goods and value. Complexity is encountered especially in technical fields where the Board ought to make a

decision based on the quality of services rendered previously by a particular bidder. For example in construction of infrastructure, an aggrieved bidder may raise issues on construction details which the bidder awarded failed to take into account ending up with poor workmanship and the infrastructure failing after a short time. Such substantive issues if not within the knowledge of the Board, it may end approving a bidder who does not have the quality of services required at the expense of another.

The dispute resolution mechanism provided by the PPDA with its shortcomings has had impact on public procurement and cannot be holistically dismissed. Despite the above issues hampering discharge of justice, nevertheless the Board has managed to discharge justice to aggrieved bidders.

The alternative dispute resolution is a justice system which must constantly be fed, continuously updated, never allowed to become static. Static systems are dying systems thus the recommendation to make the dispute resolution system more effective for stable systems contain the elements of their own renewal.

4.2 Recommendations

Public procurement has greatly improved in our country following the enactment of the PPDA 2005 which came into force in January 2007. This Act has established bodies and institutions to enhance efficiency in public procurement. This includes the incorporation of the dispute resolution mechanism by way of establishing the Administrative Review Board. However, a lot has to be done if we as a country will be able to match up with developed countries. Some of the recommendations include inter alia:

a) Anti-corruption initiatives

Corruption is a menace which has bedeviled Kenya and has penetrated deep into our society paralyzing our economy in many ways. The need to curb it cannot be over emphasized in this country which is experiencing corruption at its peak. Corruption has compromised institutions integrity and individual's integrity too. In the judicial system both in courts and the alternative

dispute resolution, corruption is experienced on a daily basis and this as discussed herein above does not exclude the Administrative Review Board.

Complete eradication of corruption may take a while but initiatives for its ultimate eradication ought to be put in place. Checks and balances affecting the discharge of justice by the Board ought to be put in place. Influence by politicians ought to be discouraged. Their influence compromises the integrity and autonomy of the Board.

b) Public interest litigation

The Act provides for persons who can apply to the Board for redress as candidates. Candidates in the Act are bidders aggrieved or at risk of suffering loss and damage. The Act fails to take into account the general public who are the tax payers and who are directly affected by the services and goods in the public sphere. Poor infrastructure and poor healthcare directly affect the public.

The public who have interest in public procurement processes are not covered by the Act. Representative suits ought to be provided for in the Act and the issues of parties provided for to include the public who are interested persons in such suits.

It is discouraging to note that out of an average of 10,000 concluded contracts in Kenya, only about 50 reviews are lodged annually. This means that many more irregular contracts go unchallenged leading to loss of billions of shillings by taxpayers.

c) Publication of regulations, guidelines and standard bidding documents

The law should be complemented by regulations, guidelines, forms codes of conduct and standard bidding documentation. These serve to assist the procuring entities and disposing entities and providers of services and goods and works to carry out procurement and disposal process according to the law and good practice. This will avoid unnecessary applications to the Administrative Review Board based on ignorance of bidding procedures, rules and good practice.

Many procuring entities bar parties who lodged review requests against them from succeeding in their bids. To encourage people to lodge a review, participants in a procurement process should be given a rider or waiver to indemnify them from victimization, intimidation, blackmail and or unfair treatment during subsequent procurement processes based on their previous request for review.

d) Amendment of the PPDA 2005

Some sections of this Act will have to done away with to achieve the desired efficiency in the administration of justice. These sections includes inter alia section 93, 3, 106,100 among others. These sections stipulating who can request for review of procuring entity's decision, describing who a candidate is among others do not perpetrate the interest of the public who are the main beneficiaries and other times financiers of most of the procured goods and services.

The amendments should scrap off the Regulation on sitting time by the Board. This should be decided by the Board depending on the circumstance of each case. It should also clarify who bears the cost of review. Section 83 which provides for withdrawal of a request for review does not provide for who the costs of withdrawal nor is there a section dealing with who bears the burden of convening the Board even though the Board members are salaried. Further amendments to the Act are recommended as hereunder.

i.) **Ouster of Court's jurisdiction should be removed**

Section 36 and 100 are the ouster clauses in the Act. The Act provides for 30 days but the Constitution encompasses the doctrine of reasonable time. Section 77(9) of the Constitution states a court or other adjudicating authority prescribed by law for determination of the existence or extent of a civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by a person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time. The constitution envisages a reasonable time and reasonable time would depend on the circumstances of the case and other relevant factors that the court must consider. Section 9 and

order LII of the Civil Procedure Act provides that judicial review should be sought within 6 months.

The ouster sections in the Public Procurement and Disposal Act are designed in the context of ensuring fairness, transparency and accountability in the procurement procedure. They were also designed to accelerate finality of Public Projects. The intention of efficiency is noble and must be appreciated if the development agenda is to be achieved. The Court while interpreting the section cannot ignore that objective because it is meant for a wider public good as opposed to an individual who may be dissatisfied with the procuring entity. However the Court must put all public interest considerations in the scales and not only the finality consideration.

ii.) **Extension Period for Application of Review**

Regulation 66 (2) provides that the procuring entity should provide, within 14 days, written reasons as to why the tender, proposal or application for prequalification was unsuccessful to the unsuccessful bidder. On the other hand regulation 73 (1) of the Public Procurement Regulations provides that a request for review by the Review Board should be made within 14 days since the occurrence of the breach complained of where the request is made before the making of an award.

The days given exceed the time available for the candidates to seek for the review as the request for the reasons can only be made after notification thereof. These two provisions are therefore impractical and can prejudice the applicant's pursuit of redress. It is suggested that the request for review be made within 14 days after notification thereof.

iii.) **Board's Sitting Hours should be enlarged**

Regulation 78 provides that the Review Board meetings should be between 8.00a.m to 5. 00 p.m. This regulation is so stringent that it makes it difficult for the Board out of its own volition, to extend the sitting hours. Such a provision should be amended and allow the hearing times to be extended upon reasons and circumstances, to be recorded, surrounding each case.

iv.) **Costs of the Review should follow events**

Section 83 provides that a request for review may be withdrawn at any time before or during the hearing by notice in writing to the Secretary signed by the applicant and upon such notice being received the request for review shall be deemed to have been withdrawn. When such a request for review is withdrawn, the Secretary shall forthwith inform the Review Board and all parties to the review of the withdrawal.

The procedures should therefore be clear as to how the costs have to be apportioned in case of withdrawal of a request by either party. The Regulations should be clear that the Review Board should have the discretion to decide on costs. The section is not be clear as to who bears the costs incurred so far. It is suggested that the successful party should be awarded costs.

v.) **Appeals should be Defined**

Section 100(2) allows for appeal against the decision of the Board to the High Court. Appealing to the High Court may open up hearing a fresh. This may prolong procurement process as compared to Judicial Review. The use of the phrase appeal to the High Court is confusing because normal practice is to seek judicial review and not a normal appeal. It is clear therefore that the use of the word appeal in section 100(2) is not accurate and leads to confusion. It is suggested that the section be amended to define the meaning of appeal-whether it is a judicial review or normal appeal to the High court. This will ensure certainty, clarity and efficient procedure of judicial appeal.

vi.) **The Act to provide for Judicial Review**

The Director General's enforcement and debarment orders are not made a subject of judicial review by the Act. Judicial review plays an important role in our society which is to check excesses, omnipotence, arbitrariness abuse of power by public bodies or officials or private bodies performing public duties like the Director-General and also accountability and maintenance of constitutionalism and the rule of law. It is suggested that the Act should categorically state that the Board's decisions are amenable to Judicial Review.

vii.) **Powers of the Review Board**

A very important aspect of public procurement is the sense of fairness that is promoted through the facilitation by law of an appeals and procurement review board.

In practice there have been a number of frivolous appeals that have led to unacceptable delays and have threatened to undermine the procurement process. The main reasons why this has arisen are that:

c. The Law permits the Review Board to substitute any decision of the procuring entity including the selection of winning bidder. Consequently, the Review Board undermines its independence and becomes a de facto Tender Committee. Some parties are happy to exploit this procedure to increases the chances of winning a bid. Section 98 (c) empowers the Review Board to substitute the decision of the Review Board for any decision of the procuring entity in the procurement proceedings.
d. The Law does not go far enough to restrict frivolous appeals, and merely states that a bid should not be frivolous. Of course one man's frivolous is another man's serious and so it is unlikely that such a clause can be consistently or meaningfully be interpreted.

The Registrar of the Board may reject a frivolous request. However, the act fails to state what constitutes to a frivolous request. Lack of criteria to determine frivolous cases may cause injustice to parties with meritorious cases. The Act should be amended to outline what constitutes a frivolous request.

ix) **Board jurisdiction where contract is hurriedly signed**

The Board has no jurisdiction to entertain a dispute where a procurer executes a contract within 21 days of the award of the tender and before an objection is lodged. The Act is silent on what remedy is available to aggrieved parties where the procuring entity rushes to sign the contract even before the unsuccessful bidders are notified.

x.) **Increase Remedies**

The Review Board is bestowed with several powers amongst of which are:

(i) To annul anything the procuring entity has done in the procurement proceedings, including annulling the procurement proceedings in their entirety.

(ii) To give directions to the procuring entity with respect to anything to be done or redone in the procurement proceedings.

(iii) To substitute the decision of the Review Board for any decision of the procuring entity in the procurement proceedings; and

(iv) To order the payment of costs as between parties to the review.

However, these reliefs are insufficient. It is suggested that the above remedies by the Board be expanded to include many others such as temporary, perpetual and mandatory injunctions to reverse decisions of procuring entities that sign contracts before the review requests are lodged. The Board should have enforcement powers to facilitate compliance with its decisions by parties to the dispute. This will enable the Board to entertain and determine applications for contempt and enforcement of its orders.

xi) **Amendment of the Exchequer and Audit (Procurement) Regulations 2001**

Section 3 (2) of the Exchequer and Audit (Procurement) Regulations 2001 gives the Minister for Finance power to remove public procurements in respect of any entity from the public procurement procedures when it is in the interest of national security, economy and efficiency. The purpose of this rule is to protect the entire public procurement to public scrutiny thus threatening state security and interests. The Minister for Finance has constitutional mandate to control the national budget.

It is suggested that the Minister should be obligated to consult the relevant logistical experts to make evaluation of various tenders. Further, the Minister should invite at least 2 bidders to tender. This will reduce corrupt deals especially in respect of defence procurement.

e) Electronic dispute resolution

Kenya is embracing E-Goverment and the same is outlined in Vision 2030. Electronic government procurement breaks down the barrier of space and time and allows more transparent and efficient information flow and wider access to information and services. The use of electronic means enhances of the procurement process and is one of the central components the public sector reform is yet to fully implement to ensure efficiency and effectiveness on the institutional reorganization process on business' productivity and competition levels.

Electronic dispute resolution in public procurement is a key process in the entire reform agenda of many nations especially developing nations. The Public Procurement and Disposal Act does not in any way incorporate electronic dispute resolution. Therefore, for more efficient and effective dispute resolution in this age of information technology, the act should provide for electronic dispute resolution.

f) Decentralization of the boards powers

The Board's powers should not be centralized on it given the vastness of our country and the diversity of procurement. The Board should be able to constitute mini-boards all over the country such that it does not have to travel to different parts of the country nor the parties to travel to Nairobi. This would save on resources and ensure more efficient discharge of justice.

Pending cases would be efficiently dealt with. Also the fact that incase of a tie the proposal favored by the Chairman is the proposal to prevail is difficult task and undermines justice. Reason should prevail in such times and more scrutiny given to the particular goods or services being procured and the public interest being considered.

An instance like a bidder aggrieved under the Constituency Development Fund procurement, should be provided for to be dealt by body within the constituency and not the Administrative Review Board. Therefore decentralization of its powers and operational functions should be done.

g) The Board should be autonomous and strengthened

The current Board is semi-autonomous. The same is under the Ministry of Finance. Members of the Board operate on part-time basis while they devote more time in their other professional duties. Some members should be engaged on full time basis with competitive remuneration.

The board should have autonomy. The members should be independent and have security of tenure for at least 5 years. Appointment of Board members should be competitive and streamlined. This will improve the decision making process.

h) Alternative Dispute Resolution should be adopted

Finally, it is suggested that other dispute resolution mechanisms be encouraged and entrenched in the Act. The Alternative Dispute Resolution Mechanism may include the following.

(i). Arbitration

Arbitration is a process in which a third party neutral, or an odd number panel of neutrals render a decision based on the merits of the case. The Hybrid of mediation or the hybrid between mediation and arbitration which is a very rare sort of scenario is that the third party neutral commences the process in the role of a mediator and if that does not yield or result in a resolutions the mediation ceases and the mediator assumes or becomes an arbitrator who then makes a binding decision. In the Arbitration Mediation Hybrid (ARBMED) the disputants present their respective cases to the third party neutral who prepares or makes a decision.

(ii). Negotiation

Negotiation is any form of communication between two or more people for the purpose of arriving at a mutually agreeable solution. In a negotiation the disputants may represent themselves or they may be represented by agents and whatever the case, whether they are represented or not represented, they have control over the negotiation process. When attempts are made to settle matters out of court it involves negotiations with a view to reach an amicable

settlement. Parties sit down and try and arrive at a conflict resolution without the help of a third party.

(iii). Mediation

Mediation is a non-binding process in which an impartial third party facilitates the negotiations process between the disputants and it is that impartial third party who is called the mediator. The mediator has no decision making power making power and the parties maintain the control over the substantive outcome of the mediation.

However, the mediator with the assistance of the parties will control the process and he will with the consent of the parties set and enforce the ground rules for the mediation process.The mediator gets an overview from both parties as to what their contentions are. He will then agree with the parties that each party will be given an opportunity to state their case, they could also agree that when one party is stating their case, the other party shall not interrupt. The role of the mediator is not to impose his own solutions and not to even suggest solutions but that the solutions should be suggested and agreed upon by the parties themselves.

(iv). Dispute Prevention

One mechanism for preventing disputes is by providing dispute resolution training. Training provides people with skills to prevent unnecessary disputes. The second method of dispute resolution is partnering. This requires disputants involved in a project to meet to discuss how to resolve any conflict which may arise. The other form of dispute prevention is systems design which involves determining in advance what process would be used for handling conflicts which arise.

(v). The parties to the dispute may adopt a hybrid between mediation and arbitration (MEDARB).

(vi). The parties to the dispute may adopt a hybrid between arbitration and mediation (ARBMED).

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