TRANSPARENCY IN THE AWARD OF PUBLIC TENDERS IN KENYA

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

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DECLARATION

I certify that this is my original work done in partial fulfillment of the requirements of the Master of Laws degree and it has not been presented to any other institution for any qualification.

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Signature:……..…

Date: ……...……..…

This Thesis has been submitted to the University of Nairobi (UON) under my guidance.

Supervisor: Dr. Attiya Waris

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Date: ……..…

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I give my thanks to the almighty God for his enabling hand throughout my work.

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My sincere appreciations go to all the respondents who took time from their busy schedules to participate in the interviews. This research would not have been successful without your participation.

DEDICATION

To BJS

LIST OF ABBREVIATIONS

CTB	-	Central Tender Board
DTBs	-	District Tender Boards
DPP	-	Director of Public Prosecutions
EACC	-	Ethics and Anti-Corruption Commission
GPA	-	Agreement on Government Procurement of the World Trade Organisation
IMF	-	International Monetary Fund
ICT	-	Information and Communication Technology
MTBs	-	Ministerial Tender Boards
OECD	-	Organisation for Economic Co-operation and Development
PPARB	-	Public Procurement Appeals Review Board
PPDA	-	Public Procurement and Disposal Act No. 3 of 2005
PPDR	-	Public Procurement and Disposal Regulations, 2006
PPDGM	-	Public Procurement and Disposals Act General Manual
PPOAB	-	Public Procurement Oversight Advisory Board
PPOA	-	Public Procurement Oversight Authority
UNCITRAL	-	United Nations Convention on International Trade Law
UNCAC	-	United Nations Convention Against Corruption
UNDP	-	United Nations Development Programme
WTO	-	World Trade Organisation

LIST OF STATUTES

Constitution of Kenya, 2010

Anti-Corruption and Economic Crimes Act No. 3 of 2003

Exchequer and Audit (Public Procurement) Regulations, 2001

Ethics and Anti-Corruption Commission Act No 22 of 2011

Public Procurement and Disposal Act, No 3 of 2005,

Public Procurement and Disposals Regulations, 2006

Public Procurement & Disposal (Public Private Partnerships) Regulations, 2009

Public Officers Ethics Act No. 4 of 2003

ABSTRACT

Transparency is one of the key objectives of public procurement law in Kenya. The main legal framework governing public procurement is the Constitution of Kenya 2010, the Public Procurement and Disposal Act No. 3 of 2005 (PPDA), and the Public Procurement and Disposal Regulations, 2006 (PPDR). The PPDA and PPDR, stipulates the procedures to be followed in the public procurement process. They are expected to ensure that the objective of transparency in public procurement is realized. The law envisages transparency standards in all stages of public procurement from access to invitations to public bids, tender opening, evaluation of bids and disclosure of evaluation criteria, information on the results of specific procurement transactions and availability of review mechanisms for decisions involving tenders and prompt and impartial resolution of disputes. Although rules exist to guide the public procurement process, there are instances pointing to the lack of transparency in the tendering process due to among other reasons the wide discretionary powers in the process leading to award of public tenders. Such discretion is prone to abuse by procuring entities to the detriment of the bidders. This study is limited to the transparency standards in the public procurement process from access to invitations to public bids, tender specifications, tender opening, evaluation of bids and disclosure of evaluation criteria, information on the results of specific procurement transactions and availability of review mechanisms for decisions involving tenders and prompt and impartial resolution of disputes.

CHAPTER ONE: A BROAD OVERVIEW AND LAY OUT OF THE RESEARCH

1.0 Introduction

Ensuring transparency in the procurement procedures is an essential determinant of efficiency, as it enhances the competitiveness of public procurement. Opaque and discretionary procurement practices typically reduce incentives for firms to enter the market, and often engender controversy in the relationship between government officials and contractors.[1] Transparency is not simply about disclosure and openness but also the removal of discretion and subjectivity.[2] Evaluation of tenders for instance must be based on objective criteria that are known to bidders in advance.[3]Limiting discretion in the processes leading to the award of public tenders is one of the critical safeguards in ensuring transparency of the procurement processes.

The bidding process has been the focus of international efforts and is currently the most well-regulated and transparent phase of the procurement process. International best practice should therefore as much as possible be the benchmark for national laws. At the 2004 Organisation for Economic Co-operation and Development (OECD) forum countries called for specific attention to grey areas that are less subject to transparency requirements and therefore

[1] Hiroshi Ohashi (2006): *Effects of Transparency in Procurement Practices on Government Expenditure: A Case Study of Municipal Public Works*, available at http://www.ohashi.e.u-tokyo.ac.jp/trans.pdf accessed on 13/2/2013.

[2] Minawara Adam (2013) in Public Procurement Authority Ghana: Electronic Bulletin Jan-Feb Vol. 4 Issue 1, pg 5 Available at http://ppaghana.org/documents/Bulletins/PPAE Bulletin Jan-Feb 2013.pdf accessed on 13/2/2013

[3] Republic of Kenya(2005), *the Public Procurement and Disposal Act No. 3*, Government Printer, Nairobi (PPDA),Section 66.

potentially vulnerable to corruption.[4] Grey areas include the pre-bidding and post-bidding phases, needs assessment, contract management and payment phases.[5]

This study sought to understand the reason for the increased cases of non-transparent procurement processes in Kenya despite the various provisions in the Constitution of Kenya 2010(herein after the Constitution)[6] and the Public Procurement and Disposal Act No. 3 of 2005 (PPDA)[7] and the Public Procurement and Disposal Regulations, 2006 (PPDR).[8] Specific provisions of the PPDA governing the award of public tenders were examined. This was to establish the extent to which the realization of the objective of transparency under the PPDA has been attained. The provisions of the Constitution on transparency were also examined.

The procurement process covers many phases up to disposal of asset and obsolete items. However, this study was limited to assessing transparency from initiating the procurement to the award of the tender and any subsequent challenge of the tender award. Tender specifications, invitations to public bids, tender opening, tender evaluation and disclosure of evaluation criteria were constituted the stages under investigation.

[4] Organisation for Economic Co-operation and Development (2007): *Integrity in Public Procurement, Good Practice from A to Z* at 10, OECD Publishing, available at http://www.oecd.org/development/effectiveness/38588964.pdf accessed on 27/2/ 2013.
[5] Ibid
[6] Republic of Kenya (2010), *The Constitution of Kenya*, Government Printer, Nairobi, 27th August.
[7] The PPDA received presidential assent on 26th October, 2005. However it commenced application in 2007.
[8] Republic of Kenya (2006), *the Public Procurement and Disposal Regulations*, Government Printer, Nairobi.

1.1 Background of the study

The public procurement system in Kenya evolved to an orderly and legally regulated system governed by the Public Procurement and Disposal Act, 2005.[9] Prior to this, it was governed by Treasury Circulars from 1969, then the Supplies Manual of 1978, prior to enacting of the Exchequer and Audit (Public Procurement) Regulations, 2001. The legal framework governing public procurement in Kenya comprises the Constitution of Kenya, 2010[10] the PPDA,[11] PPDR[12] and the Public Procurement & Disposal (Public Private Partnerships) Regulations, 2009(PPPR).[13]The goal of the PPDA is to establish procedures for procurement and the disposal of unserviceable, obsolete or surplus stores and equipment by public entities.

The objectives of public procurement regulation are outlined in the PPDA[14]as to: First maximize economy and efficiency.[15] Secondly promote competition and ensure that competitors are treated fairly.[16] Thirdly promote integrity and fairness of procurement procedures.[17] Fourthly increase transparency and accountability in procurement processes.[18] Fifthly increase public confidence in procurement procedures.[19] Lastly facilitate the promotion of local industry and economic development.[20] In a nutshell enactment of the PPDA was to have a legal regime that weeds out inefficiencies in the procurement process,

[9] Juma Maurice (2010) in *The Kenya Procurement Journal*, *Quarterly PPOA Bulletin*, March, Issue No.5 pg 2 available at http://www.ppoa.go.ke/downloads/Procurement%20Journal/issue_no._5.pdf accessed on 3/3/2013
[10] Ibid note 6
[11] The PPDA received presidential assent on 26th October, 2005, its commencement was 2007
[12] The commencement date for the PPDR was on 1st January, 2007
[13]Subsequently the Public Private Partnership Act, 2013 was enacted to govern procurement in public-private partnerships
[14] Ibid note 3, Section 2
[15] Ibid , Section 2(a)
[16] Ibid , Section 2(b)
[17] Ibid , Section 2(c)
[18] Ibid , Section 2(d)
[19] Ibid , Section 2(e)
[20] Ibid , Section 2(f)

remove patterns of abuse, and the failure of the public purchaser to obtain adequate value in return for the expenditure of public funds.

Indeed transparency is a key pillar of the legal regime on public procurement and disposal. A transparent and openly competitive public procurement system with clear procedures and contract award criteria is a fundamental aspect of public procurement regulation. For instance, a procuring entity needs to ensure that it sets out clearly in the tender documents any evaluation criteria that it intends to use in the evaluation process that could have the effect of altering a bidder's approach to the preparation of the bid documents.

Legitimate concerns have been raised regarding the adequacy and effectiveness of some compliance provisions in the present public procurement legal regime. Often procuring entities are believed to wield too much discretion that is often abused to the detriment of bidders. For instance, there exist elaborate provisions in the PPDA and PPDR on the open-tendering procedure.[21] However, there is no requirement in the PPDA that an evaluation report prepared in terms of section 66(5) and regulation 51 should be available for scrutiny by the unsuccessful bidders. This contradicts tenets of transparency in the sense that the procuring entity can alter the report to the detriment of an applicant seeking for a review of its decision.

The Constitution requires public procurement to be done in accordance with a system that is fair, equitable, transparent, competitive and cost effective.[22] The Constitution also empowers parliament[23] to prescribe a framework within which policies relating to procurement and asset

[21] Ibid note 3, Sections 50 to71 and note 8 Regulations 35 to 54.
[22] Ibid note 6, Article 227(1)
[23] Ibid note 6, Article 227(2)

disposal shall be implemented. The framework contemplated in this regard comprises: First categories of preference in the allocation of contracts, the protection or advancement of persons.[24] Secondly, categories of persons or groups previously disadvantaged by unfair competition or discrimination.[25] Thirdly sanction against contractors that have not performed according to professionally regulated procedures, contractual agreements or legislation.[26] Lastly empowerment of parliament to issue sanctions against persons who have defaulted on their tax obligations, or have been guilty of corrupt practices or serious violations of fair employment laws and practices.[27]Promulgation of the 2010 Constitution has far reaching implications on the legal framework on public procurement regulation in Kenya. It is important to point out that at the time of this study the PPDA had not been amended to give effect to the Constitution.

1.2 Statement of the problem

This study sought to interrogate the extent to which the legal provisions governing the award of public tenders promote the objective of transparency as envisaged under the Constitution of Kenya 2010, the PPDA and PPDR. Transparency in the public procurement process safeguards its integrity and ensures accountability in the award of tenders. The PPDA and PPDR, stipulate the procedures to be followed in awarding public tenders to realize the objective of transparency.

The PPDA and PPDR seek to promote transparency standards in all stages of public procurement. This is from the point of determining the need for a particular procurement;

[24] Ibid
[25] Ibid
[26] Ibid
[27] Ibid

determination of tender specifications and the method of procurement; invitations to public tenders; tender submission and opening; disclosure of evaluation criteria and evaluation of tenders; information on the results of specific procurement transactions and availability of review mechanisms for prompt and impartial resolution of disputes.[28]

Although procurement laws were enacted to guide the public procurement process, concerns pointing to inadequacy of transparency provisions in the law and abuse of discretion by procuring entities emerge from time to time. The proliferation of both formal and informal complaints from tenderers underscores this position. It is importance to point out that in some instances there is genuine need to exercise discretion in public procurement. In such cases discretionary powers are intended to cater for and balance the ever changing realities in the procurement processes and more importantly to balance the larger and greater public interest is desirable. A good example is the cases of real and unforeseeable emergencies where exercise discretion is inevitable to either go for open tendering or direct tendering process.[29]Proper exercise of discretion requires that such discretion should advance public interest.

The promulgation of the Constitution of Kenya 2010 introduces a higher threshold for transparency in public sector management and has implications on the PPDA. The constitutional standard is therefore the minimum standard on which other laws must be anchored. This study was confined to investigating transparency levels in the phase between initiation of the procurement process up to the award of the tender and any complaints arising

[28] Ibid note 3, Part IV to V.
[29] Ibid note 3, Section 74 PPDA on direct procurement.

there from. This was in a bid to strengthen the integrity of the process of awarding public tenders to achieve the objective of transparency as envisaged under the PPDA, the Constitution and the international best practice.

1.3 Justification of the study

This study was anchored on the Constitution of Kenya, 2010. The Constitution mandates the government through the executive and the legislature to come up with procurement laws which guarantee procurement processes that are fair, equitable, transparent, competitive and cost effective.[30] Under the fifth schedule to the Constitution, this specific legislation should be enacted within a period of four years. In the absence of any enactment within the said period means the existing law with specific conformity to the Constitution takes precedence.[31] With this in mind, this study forms an important piece of material in the legislation process. It highlights the past weaknesses of the existing legislation on procurement with specific regard to transparency in the tendering process so as to inform the future legislative amendments.

The PPDA and the PPDR were enacted prior to the promulgation of the 2010 Constitution. The Constitution places greater emphasis on transparency as one of the key aspects of integrity in management of public affairs. Therefore this study forms a basis for possible amendments to the PPDA and PPDR to conform to the constitutional threshold on transparency. The office of the Attorney General, the Kenya Law Reform Commission, the Commission on Implementation of the Constitution and National Assembly will towards this end find the study useful as a reference material. Further, the study will be beneficial to

[30] Ibid note 6, Article 227.
[31] Ibid note 6, the Sixth Schedule, Section 7.

procurement policy makers in government by providing information on the need to review the legislation and make policy adjustments to promote transparency in public procurement. To the procuring entities it will broaden their insights that transparency promotes good governance and increases public confidence in the procurement process. On the part of future researchers, the study will provide important literature for new research or improvement on the same subject.

1.4 Objectives of the study

1.4.0 Main objective

The main objective of the study was to interrogate the extent to which the objective of transparency as envisaged under the Constitution of Kenya 2010 and the PPDA is upheld in the public procurement process in Kenya.

1.4.2 Specific objectives

This study was to achieve three specific objectives. The first objective was to analyse the extent to which the laws governing public procurement in Kenya enhance transparency in the processes leading to award of tenders. The second objective was to assess the impact of discretion on the transparency in the public procurement process. The third objective was to assess the impact of the Constitution of Kenya 2010 on PPDA with specific reference to the objective of transparency in the process of awarding public tenders.

1.5 Hypothesis

The hypotheses for the study were as follows: Firstly, that procurement laws in Kenya are inadequate as far as ensuring transparency in the public tender procurement processes.

Secondly, that abuse of discretion by procuring entities leads the non-transparent processes in the award of public tenders.

1.6 The research questions

The following were the research questions for the study:

First to what extent do the Kenyan public procurement laws ensure transparency in the processes leading to the award of public tenders?

Secondly, is there abuse of discretion by procuring entities in the process of awarding public tenders?

Thirdly should the provisions of the Constitution of Kenya 2010 on transparency inform amendments to in the procurement laws in Kenya?

1.7 Conceptual framework

This study was underpinned by the concept of transparency which is a fundamental requirement in the public procurement processes. Transparency in this context postulates that things go better when processes are open.[32] Judicial processes work best when they are visible to the participants and the public. Governments work best when both inputs to decisions and the meetings in which decisions are made are public.[33] This is reinforced by the protection of the right to access to information under the Constitution of Kenya 2010.[34] Improper exercise of discretion by public officials affects the general public as it weakens the

[32] Hermalin Benjamin and Weisbach Michael (2005): *Transparency and Corporate Governance*, available at http://lsolum.typepad.com/legal_theory_lexicon/2003/12/legal_theory_le_1.html accessed on 14/1/ 2013.
[33] Ibid
[34] Ibid note 6, Article 35.

integrity of the system, and involves the loss of public trust and faith. The doctrine of public interest is real and captured under the Constitution of Kenya on leadership and integrity.[35]

For purposes of this research, conceptual clarification of the term "transparency" was necessary. There is no commonly agreed definition of transparency.[36] Some concepts focus on basic elements of public sector transparency – for example, the public and timely availability of information about legislation, regulation and other public measures that affect business behaviour. Others deal with the broader objective of transparency that is governments' openness to the public gaze or successful communication of policymakers' intentions.[37]Black's law dictionary defines transparency to mean openness; clarity; lack of guile and attempts to hide damaging information. The word is used of financial disclosures, organizational policies and practices, lawmaking, and other activities where organizations interact with the public.[38]

Transparency is also defined by United Nations Economic and Social Council as unfettered access to timely and reliable information on decisions and performance.[39] Transparent and honest public procurement means that government monies provided by the citizens or derived from natural resources are not wasted but instead are spent on the intended purposes for the

[35] Ibid note 6, Chapter. Six.
[36] OECD (2003): *Public sector transparency and the international investor,* a paper prepared by the OECD Committee on International Investment and Multinational Enterprises (CIME) on the issue of public sector transparency in international investment policy, pg 18 available at http://www.oecd.org/dataoecd/36/42/18546790.pdf accessed on 3/9/2013
[37] Ibid
[38] Bryan A. Garner, *Black's Law Dictionary,* Ninth Edition, West Publishing Co. USA pg 163
[39] United Nations Economic and Social Council (2006), Committee of Experts on Public Administration: Fifth session, New York, 27-31 March 2006, Agenda item 5 Compendium of basic terminology in governance and public administration, at pg. 10

benefit of the community.[40]In principle, the availability of, and easy access to, public procurement information is key to conducting successful tenders and developing and strengthening sound economies that maximize the use of public resources. Availability and access to information also reduce the opportunity for discretionary action by government officials and therefore the potential for corruption.[41]

OECD acknowledges transparency as a key input to effective governance and development as part of broader concepts of economic, social and environmental welfare. These include economic rights (especially property rights), political freedoms, transparency guarantees and protective security[42]. According to OECD, Public sector transparency results from policies, institutions and practices that channel information in ways that improve understanding of public policy, enhance the effectiveness of political processes and reduce policy uncertainty.[43] Transparency helps societies to enhance their governments' positive contributions while also helping to resolve the problems inherent in government activity. Transparency guarantees involve rights to certain types of information These rights help prevent potential abuses arising from information.[44]

[40] OSCE Strategic Plan 2009 at pg 3 available at http://www.osce.gob.pe/consucode/userfiles/image/Plan%20Estrategico.pdf. accessed on 3/9/2013

[41] Proética, Transparency International-USA (TI-USA) and the Center for International Private Enterprise (CIPE): APEC Procurement Transparency Standards in Peru- Strengthening the Culture of Integrity, Transparency International-USA and Center for International Private Enterprise (2011) pg 11 available at http://www.cipe.org/sites/default/files/publication-docs/TI-Report-Peru.pdf accessed on 3/9/2013

[42] Organisation for Economic Co-operation and Development (OECD) (2003): *Public Sector Transparency and the International Investor* pg 1 available at http://www.oecd.org/dataoecd/36/42/18546790.pdf pg 14-17 accessed on 3/9/2013

[43] OECD (2003): *Public sector transparency and the international investor,* a paper prepared by the OECD Committee on International Investment and Multinational Enterprises (CIME) on the issue of public sector transparency in international investment policy.p 13 available at http://www.oecd.org/dataoecd/36/42/18546790.pdf accessed on 3/9/2013

[44] OECD (2003): *Public sector transparency and the international investor,* a paper prepared by the OECD

The Constitution of Kenya 2010 underscores the importance of transparency in public service delivery. It takes cognizance of good governance, integrity, transparency and accountability as binding values on all state officers and institutions.[45]The Constitution has specific provisions on public procurement. It requires State organs or any other public entities to ensure that systems creating contracts for goods, services and works are fair, equitable, transparent, competitive and cost-effective.[46]

In this study, the concept of transparency was used within the context of availability of, and easy access to, public procurement information. This is key to conducting successful tenders. Indeed transparency in the public tender process provides equal opportunities to bidders who participate in the public bidding process.

1.8 The theoretical framework of the study

The concept of transparency is linked to several legal theories. However this study was premised on the theory of positivism. Positivism entails study of things as they are without regard to social, political and philosophical background.[47] Jeremy Bentham, a proponent of legal positivism argues that the law should be applied as it is. The existence of the law is different from its demerits or merits. Positive law is law properly and strictly so called, it is the command of the sovereign.[48] Therefore in the context of public procurement all the decision making processes should be anchored in law to promote transparency of processes.

Committee on International Investment and Multinational Enterprises (CIME) on the issue of public sector transparency in international investment policy.p 18 available at http://www.oecd.org/dataoecd/36/42/18546790.pdf accessed on 3/9/2013

[45] The Constitution of Kenya (2010), Government Printer, Nairobi, 27th August, 2010, section 10.

[46] The Constitution of Kenya (2010), Government Printer, Nairobi, 27th August, 2010, section 227.

[47]Omony Paul John: *Key issues in Jurisprudence: an in-depth discourse on jurisprudence problems*, Law Africa, 1st ed.

[48]ibid.

This strict application of the law gives rise to a further theory of the rule of law. The rule of law is a legal ideal emphasized by A. V. Dicey who associated the rule of law with the rights-based liberalism and judicial review of governmental action[49]. The rule of law postulates that the rights of individuals should be determined by legal rules and not the arbitrary behaviour of authorities.[50] It emphasizes that everyone, regardless of his position in society, is subject to the law. The critical feature to the rule of law is that individual liberties depend on it.[51] Its success depends on the role of trial by jury and the impartiality of judges. It also depends on prerogative orders; certiorari, and mandamus. In sum the theory postulates that the Government is obliged to obey the law and discharge all its statutory and legal obligations.

Rawls[52] theory of justice and fairness is also related to the concepts of the study. Rawl's theory argues in favour of fair equality of opportunity and as such relevant to transparency requirements in the public procurement process. Rawls identifies two principles of justice: the liberty principle which requires equal basic liberties for all and the principle of fair equality of opportunity and equal division of income and wealth[53]. According to Rawls the two principles of justice manifest in the basic structure of society, men's desire to treat one another not as means only but as ends in themselves. To support the two principles he adopts the conditions of publicity and finality and argues that for an agreement to be valid, the parties must be able to honor it under all relevant circumstances. The question of burden of commitment to the agreement qualifies the need for publicity. In other words parties will make informed choices and voluntarily commit to the consequences of agreements they enter

[49]Dicey, Albert Venn (1959), *Introduction to the Study of Law of the Constitution*, 181-205 2nd Ed.
[50] Ibid
[51] Ibid
[52]Rawls John (1971), *A theory of Justice*, Revised Edition, Havard University Press.
[53] Ibid at 130

into.[54] From the foregoing theoretical foundations the notion of transparency was represented and articulated.

1.9 Literature Review

Arrowsmith[55] explains the concept of transparency in the context of public procurement to be the general idea that procurement should be conducted in accordance with clear rules which are known to interested parties, and that some means of verification of those rules should be provided. Arrowsmith is one of the leading scholars on procurement. This research borrowed heavily from her thinking as regards the best practices in public procurement particularly on transparency requirements.

Kiawa[56] examines accountability in public sector procurement. She argues that procurement of public goods works and services has been shrouded with conflict of interest, discretion and secrecy raising concerns on transparency of the procurement process.[57] She concludes that the procurement process at the State law office falls short of the accountability threshold envisaged under the procurement laws. Her work is significant to this research to the extent that it emphasizes on promotion of accountability of officers participating in the public tender process. She recommends that recruitment and appointment of public officials to be involved in public procurement must be on the basis of their integrity and merit. She further recommends that consistent political commitment for accountable public procurement is

[54] Ibid at 153-156
[55] Arrowsmith Susan (1998): *The APEC document on principles of transparency in government procurement* Public Procurement Law review, CS 38-49 as quoted by Laguado Giraldo, Roberto. (2005): *A critic to the objectives of the global public procurement initiatives in the context of the WTO, International Law: Revista Colombiana de derecho Internacional*, (5), 217-241.
[56]Kiawa Florence Mumbi (2012):*Accountability in Public Sector Procurement: A case Study of the State Law Office*, LLM Thesis (unpublished) University of Nairobi School of Law Library
[57] Ibid at 3

critical.[58] Kiawa's work provided useful literature on accountability which is closely linked to transparency; these are among the key principles of public procurement. Her findings were useful to the current study in coming up with reform measures to enhance transparency in the award of public tenders. Indeed accountability in public tender process directly improves the desired transparency standards.

Meso[59] argues that transparency underpins the principle of open competition. She observes that the award of public tenders should not be decided from a pre-registered list or from expression of interest unless this is part of a rigorous process of prequalification based on full information, predetermined specifications, market research and prior assessment no less demanding than competitive tendering.[60] Meso concludes that there are shortcomings in the legal regulatory and policy framework in supporting the objectives of regulating public procurement in Kenya. She recommends among others the enactment of the Electronic Transactions Act and the Electronic Signatures Act. The foregoing entails use of Information and Communication Technology (ICT), which in her view, will create certainty and transparency around public procurement transactions. She also recommends amendment to the PPDA and PPDR to include e-procurement. Whereas Meso focused on e-procurement as a measure to enhance all the objectives of public procurement under the PPDA, the current study primarily focuses on how the objective of transparency under the PPDA can be enhanced in the award of public tenders. However her findings will be of great relevance to

[58] Ibid at 110-111
[59] Meso Beatrice (2012): *Public e-procurement in Kenya: a critical analysis of the legal, technological and governance challenges,* LLM Thesis (unpublished),University of Nairobi School of Law Library
[60] Ibid at 29

this study in determining the necessary reforms that enhance transparency in the public tender process.

Trepte[61] opines that there are three main parties in the procurement process: the government or public authority, the procurement agent (as the bureaucrat) and the tenderers. Procurement regulation applies overlapping transparency conditions for the benefit of all three. He states that among the objectives of transparency is control over the bureaucracy. Trepte's contribution was relevant to this research to the extent that he emphasizes the need for checks on the main players in the procurement process. This will limit discretion and enhance transparency of the process.

Migai[62] emphasizes that competition, publicity, use of commercial criteria and transparency are core principles for sound procurement.[63] He[64] points out that law seeks to protect individuals and groups thereof against the exercise of power by insisting that power should be democratic.[65] In the context of the process leading to the award of public tenders, it is critical that procuring entities should not have unfettered discretion. Rather procuring entities should act fairly by minimizing discretion and ultimately ensuring transparency in the procurement processes. To this end, his work is relevant to the extent that he seeks to use law

[61]Trepte Peter (2004): *Regulating Procurement,* Oxford University Press Inc. New York at 393.
[62] Migai Akech (2005):*Development Partners and Governance of Public Procurement in Kenya: Enhancing Democracy in the Administration of Aid;*Paper Prepared for the "Global Administrative Law: National and International Accountability Mechanisms for Global Regulatory Governance" Conference, New York University Journal School of Law, Institute for International Law and Justice, April 22-23, 2005, at 21-22.
[63] Ibid
[64] Migai Akech (2009):*Privatization and Democracy in East Africa: The Promise of Administrative Law,* East African Educational Publishers Ltd at pg 35.
[65] Ibid at pg 35.

as the tool to protect individuals and groups among them those participating in the public tender process.

OECD recognizes transparency as a key input to effective governance and development as part of broader concepts of economic, social and environmental welfare. These include economic rights (especially property rights), political freedoms, transparency guarantees and protective security.[66] For OECD public procurement provides the major intersection between the public and the private sector.[67] Transparency and accountability have been recognised as key conditions for promoting integrity and preventing corruption in public procurement. However, they must be balanced with other good governance imperatives, such as ensuring an efficient management of public resources - "administrative efficiency" - or providing guarantees for fair competition.[68]

In order to ensure overall value for money, the challenge for decision makers is to define an appropriate degree of transparency and accountability to reduce risks to integrity in public procurement while pursuing other aims of public procurement.[69]OECD has researched extensively on the on public procurement particularly across its member countries; as such its findings formed an invaluable source reference for the study.

[66] Organisation for Economic Co-Operation and Development (OECD) (2003): *Public Sector Transparency and the International Investor* pg 1 available at http://www.oecd.org/dataoecd/36/42/18546790.pdf pg 14-17 accessed on 9/1/2013.
[67] OECD (2004), Report on *The Global Forum on Governance-fighting corruption and promoting integrity in public procurement*, 29-30 November, 2004 Paris, available at http://www.oecd.org/dataoecd/11/18/34340364.pdf, accessed on 25/2/ 2013.
[68] Ibid.
[69] OECD (2003) op. cit. at pg 10

International organizations have recognized how intertwined public procurement is with corruption, but the fight against it is not the only aim fostered by strategic implementation of transparent practices in public procurement.[70]Corruption thrives on secrecy.[71] Arguably transparency is among the key dimensions of good governance. Some distinct aspects of transparency obligations in the context of public procurement can be derived from the PPDA and PPDR. They include advertising contract opportunities, disclosure of the evaluation criteria, communication to both the winner and unsuccessful bidders and opportunity for review of tender awards to determine the impartiality of procurement procedures.

According to the World Bank, good governance entails sound public sector management (efficiency, effectiveness and economy), accountability, exchange and free flow of information (transparency), and a legal framework for development (justice, respect for human rights and liberties).[72] Bodies governed by public law such as those overseeing public procurement must be established for the specific purpose of meeting the needs in the general public interest.[73]

The United Nations Economic Council[74] indicates that towards the end of the twentieth century, the term governance gained the prominent attention of donor agencies, social scientists, philanthropists and civil society. This popularity stems from the fact that it can be

[70] Giraldo Roberto Laguado: *A critic to the objectives of the global public procurement initiatives in the context of WTO* at 233 available at www:javeriana.edu.co/juridicas/pub_rev/international_law/revista_5/7.pdf accessed on 13/2/ 2013.
[71] Ibid note 37
[72] United Nations Economic and Social Council (2006), Committee of Experts on Public Administration: Fifth session, New York, 27-31 March 2006, Agenda item 5 Compendium of basic terminology in governance and public administration at 4
[73] Bovis Christopher (2007): *EU Public Procurement Law*, Edward Elgar Publishing Limited at 63
[74]United Nations Economic and Social Council (2006), Committee of Experts on Public Administration: Fifth session, New York, 27-31 March 2006, Agenda item 5 Compendium of basic terminology in governance and public administration, at 3

applied to a wide range of issues, relationships and institutions involved in the process of managing public and private affairs. The term governance enlarges and better illustrates what Governments should be focusing on. In addition, at the end of the cold war, the usage of the term was revitalized as donor agencies, notably the World Bank and International Monetary Fund, and Western countries urged the countries of the former Union of Soviet Socialist Republics and the countries of the developing world to undertake political, economic and administrative reforms and to practice good governance.[75]

Volmink[76] states that the 'right to reasons' and the 'right of access to information' are sometimes referred to collectively as the 'right to know'. He argues that both rights enable a person adversely affected by a tender decision to ascertain whether the decision was taken lawfully or not. He argues that reasons provide an explanation or justification for a decision, enabling one to determine whether it was rational and consistent. The right of access to information on the other hand, entitles a person to be granted access to any record in possession of an organ of state or a private party, such as the scoring methodology and score sheets used by a tender evaluation committee.[77] The contribution of Volmink is relevant to this study as it will be useful in analyzing the extent to which the procurements laws facilitate access to crucial information pertaining to public tenders for instance evaluation reports. His discussion on availability and access to information is useful to the current study to enable greater understanding on the link between accesses to information and transparency.

[75]United Nations Economic and Social Council (2006), Committee of Experts on Public Administration: Fifth session, New York, 27-31 March 2006, Agenda item 5 Compendium of basic terminology in governance and public administration at 3

[76]Volmink Peter, (2010), *Enhancing Transparency within Public Sector Procurement*: The South African experience.4th International Public Procurement Conference. Seoul, Republic of Korea, 26-28 August 2010. A paper published in the Supplement to the 2011 Annual Statistical Report on United Nations Procurement: Transparency and Public Procurement at 15

[77] Ibid

Transparency International, argues that greater access to information on public procurements increases predictability for the private sector, permits public oversight, and provides greater assurance of the effective use of public resources. It also leads to greater government accountability, thereby enhancing public trust.[78]Availability of information on public procurement is thus critical in enhancing transparency standards in the public procurement process. Opaque procurement practices may result from legal lacunas, administrative inefficiencies, the absence of hard budget constraints and oversight by the authorities or personal rent-seeking and corruption.[79] Incorporation of transparency therefore requires drafting of new legal frameworks and new policy measures.[80]Against this backdrop, the study will analyse the legal regime on public procurement to establish the extent to which transparency is promoted in the legislation governing public procurement.

1.10 Methodology

The study employed the descriptive research design where both primary and secondary data was collected. Primary data on transparency was collected from respondents through interviews. An interview guide comprising questions that were relevant to the research objectives, questions and hypotheses was prepared and used to guide the interviews.[81] Data from secondary sources was drawn from the Constitution of Kenya 2010, statutes, international legal instruments, law textbooks, scholarly articles, journals and reports on the subject.

[78]Proetica,Transparency International-USA (TI-USA) and the Center for International Private Enterprise (CIPE). (2011):*APEC Procurement Transparency Standards in Peru: Strengthening the Culture of Integrity* at pg 8 available at http://www.cipe.org/sites/default/files/publication-docs/TI-Report-Peru.pd 9/2/2013.
[79]Giraldo op.cit at 234
[80] Ibid at 235
[81] The interview guide questions are attached as appendix B

The target population constituted individuals with expert knowledge in public procurement and those who had prior experience by virtue of their interaction with the public procurement process. The respondents were selected using purposive sampling method, which enabled identification of only the respondents with most information. The determining factor was expert knowledge in public procurement matters and interaction with the procurement process. Interviews were be conducted with twenty respondents comprising officials from the Public Procurement Oversight Authority, public officials and suppliers to procuring entities, and procurement experts including consultants and procurement lawyers. Officers and suppliers in the water sector were interviewed. This is because the sector had in the recent years experienced challenges arising from compliance with the public procurement law. This gave first hand opinions for the study and provided better insights on perceptions regarding transparency in award of public tenders.

Data was analysed qualitatively to bringing out personal views of the respondents. This was from the interviews which is the tool for data collection. Analysis of data for this study comprised the different themes represented in the various questions paused to the respondents.

1.11 Limitations of the study

The limitation in this method of study was that some interviewees were unwilling to divulge the relevant information due to perceived fear of being victimized by their employer or procuring entities.

1.12 Profile of the study

In this chapter, I have given a broad overview and outlay of the study. Chapter Two outlines transparency in Kenya's legal framework. It gives a brief history on the development of procurement law in Kenya and discusses the objective of transparency under the Constitution of Kenya 2010, the PPDA and PPDR. Chapter three addresses the international standards on transparency in public procurement. It discusses the transparency requirements under international instruments namely the UNCITRAL Model Law on Procurement of Goods, Construction and Services (hereinafter referred to as the 'Model Law') and the Agreement on Government Procurement of the World Trade Organisation (hereinafter referred to as the GPA). This is to illustrate international best practice on transparency in public procurement processes. Chapter four presents the data collection and analysis. The findings on perception of transparency levels as deduced from the interviews are presented. Chapter five covers conclusions and suggestions for reform.

CHAPTER TWO: THE LEGAL FRAMEWORK ON TRANSPARENCY ON PUBLIC PROCUREMENT IN KENYA

2.0 Introduction

This chapter gives a brief history on the development of procurement law in Kenya. Constitutional provisions on transparency in public procurement and other relevant statutes are discussed. It further discusses the objective of transparency under the PPDA and PPDR and highlights the institutional mechanisms in public procurement regulation.

2.1 History of public procurement regulation

Migai[82] traces the background of public procurement in Kenya. He states that until the early 1970s, public procurement in Kenya was largely undertaken by the British firm Crown Agents. He points out that there was no uniform law governing public procurement in Kenya.[83] It was after 1970 that the government established supplies offices within its ministries and departments, and appointed supplies officers to take charge of procurement.[84] These supplies offices procured for their ministries and departments. At the same time, the government established a Central Tender Board, which was in charge of procurements beyond a certain amount.[85]

[82] Akech Migai (2005):*Development Partners and Governance of Public Procurement in Kenya: Enhancing Democracy in the Administration of Aid; A* Paper Prepared for the "Global Administrative Law: National and International Accountability Mechanisms for Global Regulatory Governance" Conference, NYU School of Law, Institute for International Law and Justice, April 22-23, 2005.at 17-20
[83] Ibid
[84] Ibid
[85] Ibid

The Ministry of Finance was given overall responsibility for regulating public procurement. In exercising this responsibility, it issued regulations and guidelines in the form of circulars to the ministries and other public agencies from time to time.[86] Thus there was no uniform law governing public procurement in Kenya. The principal regulations at the time were the Ministry of Finance's Government Financial Regulations and Procedures (hereinafter Financial Regulations), which dealt with administration of government finances. The Financial Regulations established the Central Tender Board (CTB) as an inter-ministerial body, comprising members appointed by the permanent secretaries of the ministries they represented. The CTB was chaired by a person appointed by the permanent secretary to the Ministry of Finance.[87] It was responsible for procurement of goods and services valued at Kenya shillings two million and above. Under the regulations, the Ministerial Tender Boards (MTBs) were responsible for procurement of goods and services whose value was below Kenya shillings two million.

Some government departments, such as the Department of Defence, were also allowed to have their own tender boards, which operated on the ceilings and powers of the MTBs. District Tender Boards (DTBs) were also established to cater for procurement at the lower levels of government administration.[88] DTBs were also inter-ministerial and were made up by the representatives of government ministries in the districts. They had the same powers as MTBs. In addition, the Financial Regulations applied to the tender boards of local authorities, public enterprises, public universities and other institutions of learning and cooperative

[86] Ibid
[87] Ibid
[88] Ibid

societies.[89] The Financial Regulations also provided for an appeals process. Appeals against the decisions of the DTBs lay to the CTB, those against the MTBs lay to the relevant permanent secretaries, while appeals against the CTB and Department of Defence tender board lay to the permanent secretary to the Ministry of Finance. The Ministry of Finance (or Treasury) issued circulars from time to time setting out the details of public procurement procedures and policies.[90]

The public procurement reform in Kenya was jointly initiated in 1997 by the Kenya Government and the World Bank.[91] The procurement audits carried out on Kenya's public procurement system disclosed serious shortcomings ranging from inefficiency to lack of sound and transparent legal framework.[92] The government decided to review and reform the existing procurement system with a view to enhancing efficiency, economy, accountability and transparency in public procurement.[93]A public procurement reform through enactment of a legal framework was a conditionality under the Economic Recovery Strategy Assistance.[94] Development partners and other stakeholders interpreted the commitment by Government to reform public procurement as commitment to good governance.[95]

In 2001, the government enacted the Exchequer and Audit (Public Procurement) Regulations, 2001 which harmonized all the treasury circulars and manuals governing procurement in the public sector. The regulations were published as Legal Notice No. 51 dated 30th March,

[89] Ibid
[90] Ibid
[91] See www.siteresources.worldbank.org/INTKENYA/Resources/public_pro_Dis_Bill.pdf accessed on 7/5/2013
[92] Ibid
[93] Ibid
[94] Ibid
[95] Ibid

2001 and subsequent amendment of the same in 2002.[96]Subsequently the Public Procurement and Disposal Act, No. 3 of 2005 Public Procurement and Disposal Regulations 2006 were enacted.

2.2 The legal and institutional framework

The expectation of every public procurement system, law, policy, regulation designed to ensure integrity and corruption prevention is that it ensures transparency. Hence, a conscious effort must be made in the promulgation of every public procurement law to make provisions that will ensure that procurement processes and systems are transparent.[97] Public procurement in Kenya is anchored in legislation comprising the Constitution of Kenya 2010, the PPDA and the PPDR.[98]

2.3 Procurement under the Constitution of Kenya, 2010

The Constitution of Kenya 2010 introduces a constitutional approach to public procurement. It expressly requires public procurement to be done in accordance with a system that is fair, equitable, transparent, competitive and cost effective.[99]It also empowers parliament to prescribe a framework within which policies relating to procurement and asset disposal shall be implemented.[100] The framework for regulation may cover the following areas: First categories of preference in the allocation of contracts.[101] The second comprises the protection or advancement of persons, categories of persons or groups previously disadvantaged by

[96] Ibid
[97] Osei-Afoakwa Kofi (2012), *How the Ghanaian Public Procurement Law Ensures Transparency: The Reminisces from an Empirical Research,* Vol 2 No. 11, 2012 available at http://www.iiste.org/Journals/index.php/DCS/article/download/3560/3609 1/5/ 2013
[98] Other supporting legislation are discussed at 2.4
[99] The Constitution of Kenya (2010), Government Printer, Nairobi, 27th August, Article 227(1)
[100] Ibid note 6, Article 227(2)
[101] Ibid, Article 227(2) (a)

unfair competition or discrimination.[102] Thirdly policies could be made to provide for sanctions against contractors that have not performed according to professionally regulated procedures, contractual agreements or legislation.[103] Lastly parliament is empowered to issue sanctions against persons who have defaulted on their tax obligations, or have been guilty of corrupt practices or serious violations of fair employment laws and practices.[104] The foregoing provisions anchor the public procurement process within the Constitution. Thus, the practice of public procurement is protected by the supreme law of Kenya.

Other provisions in the Constitution touching on transparency relate to national values and principles of governance. The national values and principles of good governance include among others the rule of law, equity, social justice, human rights, non-discrimination, good governance, integrity, transparency and accountability.[105] The national values are binding to all State organs, State officers, public officers and all persons whenever they implement public policy decisions.[106] The 2010 Constitution entrenches further provisions on leadership and integrity.[107] It is a requirement for any public official to uphold the highest levels of integrity. In this regard, the Constitution provides checks and balances that will ensure public officials involved in all processes including public procurement uphold the constitutional standard on matters of integrity.

[102] Ibid, Article 227(2) (b)
[103] Ibid, Article 227(2) (c)
[104] Ibid, Article 227(2) (d)
[105] Ibid, Article 10(2)
[106] Ibid, Article 10(1)
[107] Ibid, chapter six

2.4 Other Statutes

The PPDA which is the substitutive statute on public procurement in Kenya is reinforced directly by other statutes. The Anti-Corruption and Economic Crimes Act[108] defines corruption and economic crimes including abuse of public office, rigging of government tenders, grabbing land, bribery, fraud, embezzlement, breach of trust and offences involving dishonesty. Considering that some of the economic crimes arise from public procurement, the Ethics and Anti-Corruption Commission (EACC) has a role in investigations arising from breach of procurement laws. The Kenya Anti-Corruption Commission was transformed to EACC which is established under section 3 of the Ethics and Anti-Corruption Commission Act[109]and pursuant to Article 79 of the 2010 Constitution. The Public Officers Ethics Act[110] provides for mechanisms to monitor the integrity of public servants by requiring them to declare their wealth followed by government audits. This has helped to prevent practices relating to conflict of interest, gifts and solicitation of money through fund raising. This statute is important in investigation and prosecution of economic crimes which may also arise from public procurement.

2.5 The structure of public procurement institutions in Kenya

The PPDA establishes the Public Procurement Oversight Authority (PPOA).[111]PPOA is an independent regulatory agency in charge of implementing public procurement laws and is responsible for the overall development, operation and supervision of Kenya's public procurement system. Other institutions are the Public Procurement Oversight Advisory

[108] Anti-Corruption and Economic Crimes Act No 3 of 2003
[109] Act No. 22 of 2011
[110] Public Officers Ethics Act No 4 of 2003
[111]The Authority is established under section 8 of the PPDA

Board[112] (PPOAB) and the Public Procurement Administrative Review Board[113] (PPARB).[114] PPOAB's mandate is to advise the PPOA on the exercise of its powers and the performance of its functions.

The PPARB is a quasi –judicial body competent to review administrative decisions issued by procuring entities with regard to the conduct of procurement procedures, and to review appeals from tenderers under the review procedure. It was established as continuation of the Public Procurement Complaints, Review and Appeals Board which was established under the Exchequer and Audit (Public Procurement) Regulations, 2001.[115]The PPARB was established to promote and uphold fairness in the public procurement system through judicious and impartial adjudication of disputes arising from public procurement. The PPARB being a quasi-judicial body, its decisions can be challenged at the High Court.[116]

The Ethics and Anti-Corruption Commission (EACC) is another institution involved in, among other areas, ensuring compliance with the PPDA and PPDR on matters of public procurement. The PPDA bestows upon the Director General of the PPOA powers to order an investigation of procurement proceedings for the purpose of determining whether there has been a breach of the PPDA, the PPDR or any directions of the PPOA.[117] Where the Director-General orders an investigation of procurement proceedings, he will consider the report of the investigator and if satisfied that there has been a breach of the PPDA, PPDR or any directions

[112]The PPOAB is established under Section 21 of the PPDA
[113] The Review Board is established under section 25 of the PPD Act, 2005 as a continuation the Public Procurement Complaints, Review and Appeal Board which was established under the Exchequer and Audit (Public Procurement) Regulations, 2001.
[114] Ibid note 8, regulation 68
[115] Ibid note 6, Section 25
[116] Ibid, Section 123
[117]Ibid , Section 102

of the PPOA, he may make the following decisions: First direct the procuring entity to take remedial action. Secondly terminate the procurement contract, and terminate the procurement proceedings or lastly submit a summary of the report to the procuring entity or the Ethics and Anti-Corruption Commission under the Anti-Corruption and Economic Crimes Act 2003.

The office of the Director of Public Prosecutions (DPP) is part and parcel of the institutional framework. This office has constitutional powers to prosecute all offences including corruption.[118]In this case, corruption offences arising from the public procurement process are also prosecuted by the DPP. The DPP receives reports from the EACC for purposes of prosecuting and he can direct the Inspector General of the National Police Service Commission to investigate any reports.[119]

2.6 Transparency requirements under the Public Procurement and Disposal Act and the Public Procurement and Disposal Regulations

The objective of the PPDA is to streamline public procurement in Kenya and ensure transparency hence reducing cases of corruption within the public sector. The PPDA and PPDR contain provisions relating to transparency practices among them: provisions against splitting of tenders or inflating procurement[120]to deliberately bring the split tenders under the low value category; provisions prohibiting inappropriate influence on evaluation and

[118] Ibid note 3, Article 157(6)
[119] Ibid, Article 157(4)
[120] Ibid note 6, Section 30

unsolicited communications,[121]fraudulent practices,[122]collusion,[123] conflict of interest[124] and those against any corrupt practice in any procurement proceedings.[125]

The PPDR[126]makes it mandatory for all procuring entities to develop an annual plan for procurements. In the event of unforeseen procurements, the procurement plans should be updated to accommodate changes during the year. Procurement planning is a measure that brings transparency to the extent that it ensures that only necessary procurements are made. Competitive bidding will ensure transparency in the procurement process. The main elements in a competitive bidding process include: Public notification of bidding opportunities[127], documents that clearly set out the needs describe the bidding process, contract terms, conditions, and the criteria for choosing the winner, opening of sealed bids in the presence of bidders are all geared to enhancing transparency.[128]The PPDA requires publication of all of the information such as tender specifications[129] of the product or service to be procured, quantity, time frame for delivery, closing times and dates, and where and how to submit a bid.

Procuring entities are required to formulate in advance criteria and rules on how the award of the contract will be made. This must be done prior to the submission of their tenders. Disclosure of this information to the tenders prior to the submission of tenders is

[121] Ibid, Section 38
[122] Ibid, Section 41
[123] Ibid, Section 42
[124]Ibid, Section 43
[125] Ibid, Section 40
[126] Ibid note 8, Regulation 20
[127] Ibid note 6, Section 54
[128] Ibid, Section 52
[129] Ibid, Section 34

mandatory[130] This requirement is a safeguard against abuse of discretion.[131] The evaluation of bids and awarding contracts is expected to be in accordance with the pre-determined criteria. Evaluation of bids is arguably the most complex and significant part of any procurement process and central to evaluation is the formulation and application of suitable award criteria. Contracting authorities face a delicate balancing act when weighing up the need to ensure legal compliance, particularly the requirements of transparency and non-discrimination, with the need to retain sufficient discretion to achieve the best outcome for their organization.[132]The evaluation criteria must treat all bidders in an equal manner. They must seek to foster transparency and efficiency.

Objectivity of evaluation criteria is key to attain the foregoing.[133]Under the PPDA, the evaluation criteria must, to the extent possible be objective and quantifiable.[134] The case of *Plethico Africa Limited v the Kenya Medical Supplies Agency*[135]is one of the litigation cases adjudicated upon by the PPARB. The PPARB was faced with the question whether the evaluation criteria was objective and quantifiable as envisaged under the PPDA. In this review the technical evaluation was on the basis of an "organoleptic" test. The procuring entity rejected a contraceptive allegedly forming sediments after vigorous shaking instead of a homogeneous suspension. The issue was whether the allegation of formation of sediments was scientifically tenable. The PPARB held inter alia that the tender evaluation criteria, which consisted exclusively of "organoleptic" tests, was very subjective. Accordingly, the

[130] Ibid, Section 52
[131]Procurement Lawyers' Association (2010) *"Issues in evaluating public sector tenders"* available at www.naspaa.org/jpaemessenger/Article/...2/07_SniderRendon.pdf accessed on 14/6/2013
[132]Ibid
[133]Center for International Private Enterprise (2012):*Improving Transparency and Governance of Public Funds-Public Procurement Process in Kosovo,* Eds. Alban Hashani, *et al* Riinvest Institute August, 2012, pg 29
[134] Ibid note 6, Section 66(2)(a)
[135] PPARB Application No 1 of 2010 of 5th January, 2010

technical evaluation process was flawed. The request for review was allowed and procuring entity ordered to retender for injectable contraceptive. This decision illustrates that the transparency requirement under the PPDA which demands that tender evaluation criteria must be objective.

The PPDR[136] make preliminary evaluation a mandatory requirement. This is aimed at determining, *inter alia* whether: The tender has been submitted in the required format; any tender security submitted is in the required form, amount and validity period; the tender has been signed by the person lawfully authorised to do so; the required number of copies of the tender have been submitted; the tender is valid for the period required; all required documents and information have been submitted; and any required samples have been submitted. Evaluation takes place at two levels. The first level is the technical evaluation followed by the financial evaluation. The evaluation of technical proposals is normally carried out immediately taking into account several criteria as indicated in the tender documents. Once the score for the technical proposal has been completed, final evaluation of cost is undertaken. This later activity is undertaken to determine the evaluated price of each tender. Procuring entities mainly award on the basis of the lowest evaluated price.[137]

In order to enhance transparency in evaluation and awards of tenders, the PPDA and PPDR establish procurement committees,[138] tender committees[139] and the tender evaluation

[136] Ibid note 8, Regulation 47
[137] Ibid note 6, section 66(4)
[138] Ibid note 8, Regulation 13
[139] Ibid Regulation 10

committees.[140]The PPDA, PPDR and the Public Procurement and Disposals Act General Manual (PPDGM) clearly outline the functions of these committees. The tender committee is required to hold regular meetings with minutes that conform to regulation 12 of the PPDR; approvals by the tender committee must conform to regulation 11. The procurement committee is similarly expected to hold regular meetings with minutes that conform to regulation 15.The evaluation committees are required to undertake technical and financial evaluation of tenders or proposals strictly in accordance with the compliance and evaluation criteria set out in the tender documents. The PPDA prohibits the appointment to serve in the evaluation committee a person who is a member of the procurement or tender committee of the procuring entity.

The PPDR require an approved standing list of registered suppliers to be developed for certain duration.[141] Procuring entities are required to ensure a fair and equal rotation amongst the persons on the standing list of registered suppliers in respect of requests for quotations.[142]Transparency is also entrenched in the PPDR to the extent that procuring entities must report to PPOA any as termination of procurement proceedings, use of direct procurement method; and all awards of contracts valued at Kenya shillings five million.

The Public Officer Ethics Act[143] and the PPDA contain provisions relating to conflict of interest rules. A public officer is expected to use his best efforts to avoid being in a position which puts him in conflict between his personal interests and public duties and is not allowed

[140] Ibid, Regulation 16
[141] Ibid, Regulation 8(3)(a)
[142] Ibid, Regulation 59 (2) (c)
[143] Ibid note 110, Section 12 (1)

to take part in the procurement proceedings.[144]However, it is questionable whether the conflict of interest rules are being enforced when it relates to politicians.[145]In addition, in a bid to enhance transparency, public officers are required to disclose any personal interests they have and declare their wealth status prior to taking public office. Another aspect of the rules is to forbid the receiving of gifts by public officers from potential or current contractors.

The PPDA provides for procurement using the open tender procedures (national or international) or any other alternative procurement procedure allowed in the PPDA.[146]The alternative procurement procedures include: restricted tendering, direct procurement, request for proposals, and request for quotations, low value procurement and specifically permitted procurement procedure. Public private partnership is also a new and developing method of acquisition of works and services. In the context of transparency, the choice of the method of procurement must be with due regard to all the objectives of the PPDA. This directly affect the transparency standards envisaged under the PPDA.

2.7 Conclusion

In this chapter, I have examined the constitutional and the statutory threshold as regards transparency in the public procurement process. This will be the bench mark for assessment of the transparency levels in the actual procurement processes from the data analysis and findings in chapters four and five.

[144] Ibid note6, Section 43 (1) (a)
[145] In 2005, the minister of Co-operative Development, Njeru Ndwiga was granted stamp duty exemption of KShs 6m in respect of his firm Kinondo Holdings Limited to purchase land in his home. The land was used to secure a loan of KShs 40m from Co-operative Bank. The minister's company won a tender to insure the Kenya Co-operative Creameries which falls under his ministry of co-operative development.
[146] Ibid note6, Section 29, Part V and Part VI

CHAPTER THREE: INTERNATIONAL STANDARDS ON TRANSPARENCY IN PUBLIC PROCUREMENT

3.0 Introduction

This chapter discusses the transparency requirements under International instruments namely: the United Nations Commission on International Trade Law (UNCITRAL)[147] Model Law on Procurement of Goods, Construction and Services[148] (hereinafter the 'Model Law') and the Agreement on Government Procurement of the World Trade Organisation (WTO)[149] (hereinafter GPA). International best practice serves as the bench mark for the transparency standards in public procurement process at the national level. These international standards are well entrenched in UNCITRAL Model law and the GPA. The GPA addresses the harmonization of procurement law with the express aim of opening up markets to international competition by preventing States parties from discriminating against suppliers from other States parties, and applying rules of transparency and open competition in procurement.[150]

Although both UNCITRAL and the WTO have mandates addressing the rules governing international trade, their scope is rather different.[151] The WTO addresses State-to-State relations, whereas UNCITRAL's texts relate mainly to private law commercial transactions in

[147] United Nations Commission on International Trade Law (UNCITRAL) is the main legal body of the United Nations system in the field of international trade law, with a general mandate to further the progressive harmonization and unification of the law of international trade, through the issue of conventions and model laws, cooperation with other international organizations, and technical assistance.
[148] United Nations Commission on International Trade Law (UNCITRAL), Model Law on Procurement of Goods, Construction and Services, 2011
[149] World Trade Organisation (WTO), Agreement on Government Procurement, 15 April 1994.
[150] Caroline Nicholas (2011):*"24 - Work of UNCITRAL on government procurement: purpose, objectives and complementarity with the work of the WTO"* pp. 746-772, Cambridge University Press available at http://ebooks.cambridge.org/chapter.jsf?bid=CBO9780511977015&cid=CBO9780511977015A042 accessed 29.5.2013
[151] Ibid

individual States.[152] As regards procurement, the GPA addresses the harmonization of procurement law with the express aim of opening up markets to international competition by preventing States parties from discriminating against suppliers from other States parties, and applying rules of transparency and open competition in procurement.[153] Both the UNCITRAL and WTO regimes place a great deal of emphasis on improving transparency in government procurement. All procedures are subject to rigorous transparency mechanisms and requirements to promote competition and objectivity.[154] These instruments therefore provide minimum standards regarding national procurement processes. Meaning that Parties may set higher standards but not lower than those contemplated under these instruments as the best practice. It is however worth noting that the GPA is a plurilateral agreement, meaning that not all members of the WTO are bound by it.[155]For instance, Kenya is not a signatory to the GPA.[156]

The UNICITRAL Model Law is used widely around the world primarily in developing nations as a benchmark for sound procurement practices.[157] The Model Law was also prepared with a view to supporting the harmonization of international standards in public procurement, and takes account of the provisions of the GPA, the European Union Directives (on procurement and remedies), the United Nations Convention Against Corruption

[152] Ibid
[153] Ibid
[154] http://www.uncitral.org/uncitral/uncitral_texts/procurement_infrastructure/2011Model.html accessed on 1/5/2013
[155] Robert Anderson (2010): *The WTO Agreement on Government Procurement (GPA- An Emerging Tool of Global Integration and Good Governance*, 19 August 2010 pg 3
[156] See the list of signatories to GPA at http://www.wto.org/english/docs_e/legal_e/gpr-94_e.pdf accessed on 17/7/2013
[157] Christopher Yukins (2008), Addressing Conflicts of Interest in Procurement: First Steps on the World Stage, following the Convention against Corruption.

(UNCAC) and the Procurement Guidelines and Consultant Guidelines of the World Bank[158]. UNCITRAL's work on the Model Law was undertaken in response to the fact that in a number of countries the existing legislation governing procurement was perceived to be inadequate or outdated. This resulted in inefficiency and ineffectiveness in the procurement process, abuse, and the failure of the public purchaser to obtain adequate value in return for the expenditure of public funds.[159] UNCITRAL adopted a new Model Law on Public Procurement on 1st July 2011. This replaced the 1994 UNCITRAL Model Law on Procurement of Goods, Construction and Services.[160]

3.1 Transparency under the Agreement on Government Procurement (GPA) of the World Trade Organisation (WTO)

The WTO's initial text on government procurement was negotiated in the Tokyo Round of trade negotiations. The aim was to address the trade-restrictive effects of discriminatory procurement policies and to fill gaps in the trading system. The negotiations culminated in the 1979 Agreement on Government Procurement that entered into force in 1981, and an amended version came into effect in 1988. This agreement included an undertaking to continue negotiations to expand its limited coverage (in terms of both entities and types of procurement). The negotiations continued through the WTO Committee on Government Procurement, culminating in the 1994 Government Procurement Agreement (GPA).[161]

[158] http://www.uncitral.org/uncitral/uncitral_texts/procurement_infrastructure/2011Model.html accessed on 1/6/2013

[159] Caroline Nicholas (2011): "*24 - Work of UNCITRAL on government procurement: purpose, objectives and complementarity with the work of the WTO"* pp. 746-772, Cambridge University Press at http://ebooks.cambridge.org/chapter.jsf?bid=CBO9780511977015&cid=CBO9780511977015A042 accessed 29/3/2013

[160] European Bank for Reconstruction and Development (2011): *Public Procurement,* available at http://www.ppi-ebrd-uncitral.com/index.php/en/uncitral-model-law accessed on 29/3/2013

[161] Ibid note 159

The first WTO Ministerial Conference held in December 1996 at Singapore gave a mandate to seek a multilateral agreement on transparency in government procurement.[162]Accordingly, WTO set up a Working Group on Transparency in Government Procurement. The Doha Ministerial Conference took the decision to build on the progress made in the Working Group on Transparency in Government Procurement by that time and to take into account participants' development priorities, especially those of least-developed country participants. Negotiations were limited to the transparency aspects and were not meant to restrict the scope for countries to give preferences to domestic supplies and suppliers.[163]

The principle of transparency is expressly reflected in the provisions of the GPA.[164] In order to enhance transparency, the GPA requires those countries that are not bound by it to create transparency in their own contract awards. This is through disclosure of the terms and conditions, including any deviations from competitive tendering procedures or access to challenge procedures.[165] The transparency requirements entail: First applying the guidelines on technical specifications;[166] secondly publishing the procurement notices containing information on the subject matter of the contract, the time-limits set for the submission of tenders and lastly the addresses from which documents relating to the contracts may be requested.[167]The notice must be published in an official language of the WTO.[168] The final requirement is an indication of the terms and conditions under which tenders shall be

[162] B Bhattacharyya Dean, Indian Institute of Foreign Trade March 2003:*Transparency In Government Procurement In The Context Of The Doha Development Agenda*New Delhi at 1-2 available at *www.networkideas.org/feathm/sep2003/gov_proc.pdf*
[163] Ibid
[164] Ibid note 149, Article XVII.
[165] Ibid Article XVII(1)
[166] Ibid Article V
[167] Ibid Article IX(8)
[168] Ibid Article IX(8)

entertained from suppliers situated in countries Parties to this Agreement. The transparency clause further calls for commitment from the Governments that are not Parties to the GPA to ensure that their procurement regulations are predictable.[169]

Further transparency elements are reflected in other provisions governing different processes under the GPA. The first provision relates to tender documentation. The GPA stipulates that tender documentation must in general contain all information necessary to permit suppliers to submit responsive tenders.[170] Secondly in order to be considered for the award of a contract, the GPA requirement is that the tender must, at the time of opening, conform to the essential requirements of the notices or tender documentation and be from a supplier that complies with the conditions for participation.[171] Thirdly, the award is supposed to be to the tenderer who has been determined to be fully capable of undertaking the contract. The tenderer should either be the lowest tender or the most advantageous tender that complies with the terms of the specific criteria set forth in the notices or tender documentation.[172] The GPA emphasizes that awards must be made in accordance with the criteria and essential requirements specified in the tender documentation.[173]

A redress mechanism is part and parcel of a transparent public procurement system. The GPA makes provision for a mechanism for firms to use if they consider that there has been a breach of its provisions.[174] The GPA requires each party to establish a procedure whereby a supplier

[169] Ibid Article XV(1) (c)
[170] Ibid Article XII (2)
[171] Ibid Article XIII (4)(a)
[172] Ibid Article XII (4)(b)
[173] Ibid Article XIII (4)(c)
[174] Ibid Article XX

has a right of challenge to an independent domestic tribunal.[175] The challenge procedures should be non-discriminatory, timely, transparent and effective and should be available to suppliers who have, or have had, an interest.[176]

To secure the principle of transparency, the GPA sets out the fundamental principle of non-discrimination.[177]In the context of GPA, non-discrimination ensures that access to procurement is available to foreign products, services and suppliers. First, a GPA Party must provide "no less favourable" treatment to products, services and suppliers of other GPA Parties than the treatment it provides to domestic products, services or suppliers. In addition, a GPA party must treat the products, services or suppliers of a fellow GPA Party no less favourably than the treatment accorded to any other GPA Party (non-discrimination as between foreign GPA Parties).[178]This provision is particularly unpopular to developing countries that seek to protect their local suppliers. For example the PPDA specifies the threshold below which exclusive preference shall be given to citizens of Kenya.[179]

Furthermore, the GPA compels the Parties to ensure that the governmental entities do not discriminate between local suppliers due to foreign ownership or affiliation. Further, discrimination between local entities on the basis of country of production or the goods or services being supplied is prohibited.[180] This provision gives the principle of non-

[175] Ibid Article XX(6)
[176] Ibid Article XX(2)
[177] Ibid Article III
[178] Ibid Article III(2)
[179] Ibid note 8 Regulation 28
[180] Ibid Article IV

discrimination a more effective application, as it targets the individual actions of the governmental entities, and precludes indirect discrimination.

The GPA further places considerable emphasis on procedures for providing transparency of laws, regulations, procedures and practices regarding government procurement. There is a general requirement to publish laws, regulations, judicial decisions, administrative rulings of general application and any procedures regarding government procurement covered by the Agreement.[181]

3.2 Transparency under the UNCITRAL Model Law on Procurement of Goods, Construction and Services.

Achieving transparency in the procedures relating to public procurement is one of the key objectives of the UNCITRAL Model Law.[182]UNCITRAL initiated reforms on the 1994 UNCITRAL Model Law on Public Procurement; however the reform was not intended to be a wholesale review.[183] This was intended to harmonise the model law to be consistent with the United Nations Convention against Corruption (UNCAC) and the GPA. For instance use of terminologies. The emphasis was given on transparency, competition and objectivity.[184] The reform resulted in the 2011 UNCITRAL Model Law on Public Procurement, which was adopted on July 1st 2011.[185] The Model Law embodies various provisions aimed at enhancing transparency in public procurement. The provisions comprise for instance rules concerning

[181] Ibid Article III (2)
[182] See the preamble to the 2011 UNCITRAL Model Law on Procurement of Goods, Construction and Services
[183] Caroline Nicholas UNCITRAL Secretariat February 2013, presentation on *"Recent developments in the context of the UNCITRAL Model Law on Public Procurement"* at OECD Meeting of Leading Practitioners on Public Procurement Paris, 11-12 February available at http://www.oecd.org/gov/ethics/Session%206_%20Caroline%20Nicholas_UNCITRAL%20OECD%202013%20%282%29.pdf accessed on 17/7/2013
[184] Ibid
[185] European Bank for Reconstruction and Development (2011): *Public Procurement,* available at http://www.ppi-ebrd-uncitral.com/index.php/en/uncitral-model-law accessed on 29/3/2013

description of the subject matter of the procurement and the terms and conditions of the procurement contract or framework agreement.[186]

The Model Law requires the pre-qualification or pre-selection documents to set out a description of the subject matter of the procurement.[187]The description of the subject matter of the procurement may include specifications, plans, drawings, designs, requirements, testing and test methods, packaging, marking or labeling or conformity certification, and symbols and terminology.[188]To the extent practicable, the description of the subject matter of the procurement shall be objective, functional and generic.[189] It shall set out the relevant technical, quality and performance characteristics of that subject matter. There shall be no requirement for or reference to a particular trademark or trade name, patent, design or type, specific origin or producer unless there is no sufficiently precise or intelligible way of describing the characteristics of the subject matter of the procurement and provided that words such as "or equivalent" are included.[190]

The Model Law requires the procuring entity to set out in the solicitation documents the detailed description of the subject matter of the procurement that it will use in the examination of submissions, including the minimum requirements that submissions must meet in order to be considered responsive and the manner in which those minimum requirements are to be applied.[191]Rules concerning evaluation criteria and procedures demonstrate the high

[186] Ibid note 148 Article 10(1)
[187] Ibid Article 10(1)(a)
[188] Ibid Article 10(3)
[189] Ibid Article 10 (4)
[190] Ibid
[191] Ibid Article 10(1)(b)

transparency standards in the model law. It is a requirement that evaluation criteria shall relate to the subject matter of the procurement.[192] To the extent practicable, all non-price evaluation criteria shall be objective, quantifiable and expressed in monetary terms.[193] The tender documents are supposed to set out: Firstly whether the successful submission will be ascertained on the basis of price or price and other criteria; secondly all evaluation criteria including price as modified by any preference; thirdly the relative weights of all evaluation criteria, except where the procurement is conducted by request for proposals with dialogue, in which case the procuring entity may list all evaluation criteria in descending order of importance; lastly the manner of application of the criteria in the evaluation procedure.

In evaluating submissions and determining the successful submission, the procuring entity shall use only those criteria and procedures that have been set out in the solicitation documents and shall apply those criteria and procedures in the manner that has been disclosed in those solicitation documents.[194] The effect of the foregoing provision is that no criterion or procedure can be used if it has not been disclosed in the tender document.

Further transparency provisions are on the rules concerning the manner, place and deadline for presenting applications to pre-qualify or applications for pre-selection or for presenting submissions.[195]Others relate to exclusions of a supplier or contractor from the procurement proceedings on the grounds of inducements from the supplier or contractor, an unfair

[192]Ibid Article 11 (1)
[193]Ibid Article 11 (4)
[194] Ibid Article 10 (6)
[195] Ibid Article 14

competitive advantage or conflicts of interest.[196]In addition, there are rules on the methods of procurement.[197]The methods include open tendering,[198] restricted tendering request for quotations, request for proposals without negotiation, two-stage tendering, request for proposals with dialogue, request for proposals with consecutive negotiations, competitive negotiations, electronic reverse auction and single-source procurement. The model law also provides for dispute resolution by way of application for review before an independent body. A supplier or contractor may apply to the independent body for review of a decision or an action taken by the procuring entity in the procurement proceedings, or of the failure of the procuring entity to issue a decision under the law within the time limits prescribed in that article.[199]

3.3 Conclusion

As discussed in this chapter, both the GPA and the Model law provides for minimum standards regarding national procurement processes. These are intended to ensure that the Parties' procurements are carried out in a transparent and competitive manner that does not discriminate against the suppliers of other Parties. The Government of Kenya undertook legal reforms in public procurement regulation which culminated to the enactment of the Public Procurement and Disposals Act no. 3 of 2005 and the Public Procurement and Disposals Regulations, 2006. These legal reforms were largely guided by international standards of regulation under the UNCITRAL Model Law and the GPA. Subsequent legislative reforms have been undertaken through promulgation of the Constitution of Kenya, 2010. The Kenya

[196] Ibid Article 21
[197] Ibid Article 27
[198] It is worth noting however that except as otherwise provided for in articles 29 to 31 of the Model Law, a procuring entity shall conduct procurement by means of open tendering.
[199] Ibid Article 67

government has adopted a constitutional approach to public procurement. This is evident through incorporation of express provisions on public procurement[200]in the Constitution of Kenya, 2010. Other reinforcing provisions in Constitution were discussed in chapter two. An example is the right of access to information.[201] Amendments to the PPDA and PPDR to align with the 2010 Constitution will enhance greater transparency in the public tender process and give effect to the provisions on international best practice envisaged under the Model Law and the GPA.

[200] Ibid note 6 Article 227
[201] Ibid Article 35

CHAPTER FOUR: DATA ANALYSIS AND FINDINGS

4.0 Introduction

This chapter presents the qualitative data analysis, discusses the findings and draws conclusions. The perception of transparency levels in the public procurement was deduced from primary data collected from interviews. The interviews were conducted with officials at the Public Procurement Oversight Authority, officers of procuring entities in the water sector, procurement consultants, procurement lawyers and suppliers to public procuring entities. The findings are categorized under different themes relating to the process of awarding public tenders. The findings will inform the verification of the research hypotheses.

For purposes of presentation of the data, respondents have been classified into three broad categories. The first one is for public officials, the second is for suppliers and the third one is for procurement experts. This is because the response from the respondents on different questions was largely informed by their respective backgrounds and the point of interaction with the public tender process.

4.1 Tender specifications

This category concerns determination of tender specifications and how it impacts on the transparency levels in awarding public tenders. The question posed to the respondents was to establish how tender specifications are determined in practice within public institutions and who is entrusted with the responsibility to determine such tender specifications. From the data, a majority of the interviewees felt that there is room for manipulation and discretion in determining tender specification to suit a particular tenderer. However some were of the view

that tender specifications will not necessarily affect transparency levels, they expressed satisfaction that the law is adequate on this aspect. Majority of the respondents expressed their concerns that discretion in designing tender specifications hampers transparency in the tender process.

Some of the responses were as follows: Procuring entities always prepare the tender specifications, however tender specifications are skewed to suit a particular bidder.[202] It is the responsibility of user departments to prepare specifications.[203] Tender specifications can be manipulated to favour a specific tenderer despite the laws being in place.[204]Users do not necessarily determine specifications to suit any tenders, the law provides other requirements that enable the most suitable tenderer to be awarded the tender.[205]The Model Law requires that to the extent practicable, the description of the subject matter of the procurement shall be objective, functional and generic.[206] This is geared towards ensuring clarity and removing ambiguity. In addition this provision serves to promote fair competition among bidders.

4.2 Method of procurement

This category concerns the choice of method of procurement. The respondents were required to share their experiences as to who determines the method of procurement and how the choice impacts on the transparency levels in awarding public tenders. From the data, majority of the respondents felt that there is discretion within the law to the extent that a procuring entity has the liberty to choose the available methods of procurement. To them this creates

[202] Anonymous(2013), opinion of a supplier in public to a public institution during interview.
[203] Anonymous(2013), opinion of a supplier in public to a public institution during interview.
[204] Anonymous(2013), opinion by a procurement expert during interview during interview.
[205] Anonymous(2013), opinion of a public official during interview.
[206] Ibid note 148 Article 10 (4)

opaqueness and elimination of competition. Respondents from the regulator were however categorical that open tender is the primary method of procurement and those other methods for example direct procurement and restricted tender are secondary. Some respondents were of the view that there is discretion in the law itself when it gives other options on methods of procurement. Consequently a procuring entity will not commit an offence by using any of the methods since they are provided for in the law.[207]

Other responses on the method of procurement were as follows: Where suppliers are prequalified, a minimum of three quotations are required however there is no way of ascertaining how the three were arrived at. Procuring entity officials have discretion.[208]Open tender is the preferred method of procurement; it is more transparent as there is minimal discretion.[209] The method of procurement is also determined by the class of the procuring entity and the threshold matrix under the PPDA.[210]The views of the respondents pointed out that there is discretion in the law itself on choice of the method of procurement. This discretion is likely to be abused to manipulate the public tender process. On the other hand, however flexibility in choosing alternative methods of procurement is to cater for special circumstances like emergency situations. To this end there is need for proper checks to ensure that the decision to use alternative methods of procurement is not to avoid competition.

[207] Anonymous (2013), opinion by a procurement expert during interview during interview
[208] Anonymous(2013), opinion of a supplier in public to a public institution during interview.
[209] Anonymous(2013), opinion of a public official during interview.
[210] Anonymous(2013), opinion of a public official during interview.

The Model Law contains general rules applicable to the selection of a procurement method.[211] Under this law, open tendering is the preferred method of procurement.[212] However procuring entities may use a method of procurement other than open tendering only in accordance with its provisions.[213]This is to accommodate the circumstances of the procurement concerned and must seek to maximize competition to the extent practicable.[214]The Model Law makes it mandatory for the procuring entity that uses an alternative method of procurement, to include a statement of the reasons and circumstances upon which it relied to justify the use of that method.[215]

4.3 Availability of information required to prepare bids

Under this category, respondents were asked whether the information given to prospective tenderers is sufficient for them to prepare and submit responsive bids. All respondents indicated that the information in the tender documents was adequate to enable submission of responsive bids. However some concerns emerged on access to the tender documents where some expressed concern that it was unfair to purchase the tender documents before making the decision to participate in the tender. To them, the tender documents should be available free of charge for perusal to enhance transparency.

Some respondents proposed that there should be disclosure of the budget to enable tenderers to submit reasonable bids.[216] The Model Law embodies rules concerning estimation of the value of procurement. It requires that in estimating the value of procurement, the procuring

[211] Ibid note 148 Article 28
[212] Ibid Article 28(1)
[213] Ibid Articles 29 to 31
[214] Ibid
[215] Ibid note 148 Article 28(3)
[216] Anonymous(2013), opinion of a supplier in public to a public institution during interview.

entity should include the estimated maximum total value of all procurement contracts envisaged under a framework agreement. The estimation should be over the entire duration of the agreement, taking into account all forms of remuneration.[217]

The following responses were received: For the sake of transparency, prospective bidders should be allowed to interrogate the tender documents to know the requirements before they buy the tender documents; the tenderer must buy the document to know the requirements only the tenderers who eventually submit their bids ought to pay.[218]Tender documents contain adequate information to enable a prospective tenderer to participate in the tender process.[219] The law adequately provides for information required to prepare responsive bids.[220] The Model Law requires the procuring entity to set out in the solicitation documents the detailed description of the subject matter of the procurement that it will use in the examination of submissions, including the minimum requirements that submissions must meet in order to be considered responsive and the manner in which those minimum requirements are to be applied.[221]

4.4 Transparency and objectivity of tender evaluation criteria

This category sought to determine transparency and objectivity of tender evaluation criteria. Concerns emerged from respondents that the tender process is solely managed by the procuring entity right from determining tender specifications. Further that the tender evaluation report is an internal document of the procuring entity hence there was no

[217] Ibid note 148 Article 12 (2)
[218] Anonymous(2013), opinion of a supplier in public to a public institution during interview.
[219] Anonymous(2013), views of suppliers, public officials and procurement experts during interview.
[220] Anonymous(2013), opinion of a public official during interview.
[221] Ibid note 148 Article 10(1)(b)

transparency.[222]. This in their view was opaqueness as there was no room for independent input as to what the evaluation criteria should be. From the study it emerged that several complaints pointing to lack of objectivity of the tender evaluation criteria are filed at the PPOA and that request for reviews emanating from this aspect are filed at the PPARB.[223] The respondents therefore felt that the evaluation criteria are not always transparent and objective. Thus there is lack of transparency attributable to non-objective evaluation criteria. The respondents proposed that the evaluation report should be made available to loosing tenderers for scrutiny.[224] The Model law requires that to the extent practicable, the description of the subject matter of the procurement shall be objective, functional and generic.[225]

4.5 Compliance with tender evaluation criteria

In order to determine transparency standards in terms of compliance with tender evaluation criteria, respondents were asked whether the pre-determined tender evaluation criteria are strictly adhered to during tender evaluation. Some respondents felt that generally the evaluation criteria are not always applied. Others indicated that it was not possible to establish whether evaluation was done as per the predetermined criteria since the evaluation reports are never availed to tenders for perusal. Some expressed concern that some evaluators are not competent and may not understand what they are expected to do also that tenderers on the other hand may be ignorant and may not make this assessment. Interviewees particularly consultants and officials from PPOA pointed out that the procurement audits undertaken PPOA have established that instances of deviation from the predetermined evaluation criteria are rampant. Some of the views are as follows: One cannot establish whether evaluation was

[222] Anonymous(2013), opinions of a suppliers and procurement experts.
[223] Anonymous(2013), opinions of procurement experts and public officials.
[224] Anonymous(2013), opinions of a suppliers and procurement experts.
[225] Ibid note 148 Article 10 (4)

done as per the predetermined criteria since the evaluation report is never availed for perusal.[226] Where the criteria for evaluation are not objective it is impossible to gauge compliance since tenderers and even some evaluators may not understand what they are expected to do. From the procurement audits PPOA has established that there is some level of deviation from the predetermined evaluation criteria.[227] The Model law makes it mandatory that during tender evaluation, a procuring entity must use only those criteria and procedures that have been set out in the solicitation documents.[228] Those criteria and procedures must be applied in the manner that has been disclosed in those solicitation documents.[229]

4.6 Discretionary rejection or acceptance of bids

The question as to whether there are instances of discretionary rejection of bids below a threshold, or the discretionary acceptance of a bid which fails to meet a threshold during both the evaluation stage or tender committee stage was answered in the affirmative. The respondents however pointed out that this occurrence was attributable to corruption and conflict of interest situations but not the inadequacy of the procurement laws which in their view provides adequate checks. Some of the views were as follows:

There are instances where tender evaluators and tender committees exercise discretion not necessarily supported by law to reject tenders that would have qualified or accept tenders that do not qualify; this is because of vested interest. The procurement laws that govern the public tender process must be strictly complied with to avoid discretion that is not anchored in

[226] Anonymous(2013), opinion of a supplier in public to a public institution during interview.
[227] Anonymous(2013), opinion of a procurement expert during interview.
[228] Ibid note 148 Article 10 (6)
[229] Ibid

law.[230] Provisions of the Model law compelling procuring entities to use pre-determined criteria and procedures that have been set out in the solicitation documents[231]are aimed at eliminating discretion.

4.7 Exercise of discretion in a non-transparent manner by officers of procuring entities

Under this category the question paused was whether there are instances where there is discretionary rejection of bids below a threshold, or the discretionary acceptance of a bid which fails to meet a threshold. Respondents pointed out instances of abuse of discretion by officers of procuring entities. For instance they said that some procuring entity officers exercise discretion in a non-transparent manner in choosing the method of procurement especially direct procurement.[232] Some split tenders to benefit from discretion under low value procurements.[233] Some respondents were of the view that there was a loophole in the law allowing abuse of discretion. This arises where chief executive officers personally appoint members of tender committees and evaluation committees, there is no guarantee that he will not appoint people to advance his/her interests within the committees.[234]The Model Law requires a code of conduct for officers or employees of procuring entities to be enacted.[235] The code of conduct shall address, inter alia, the prevention of conflicts of interest in procurement and, where appropriate, measures to regulate matters regarding personnel responsible for procurement, such as declarations of interest in particular procurements,

[230] Anonymous(2013), opinions of public officials.
[231] Ibid note 148, Article 10 (6)
[232] Anonymous(2013), opinion of a supplier in public to a public institution during interview.
[233] Anonymous(2013), opinions of public officials.
[234] Anonymous(2013), opinion of public officials and a procurement expert during interview.
[235]Ibid note 148, Article 26

screening procedures and training requirements. The code of conduct so enacted shall be promptly made accessible to the public and systematically maintained.[236]

4.8 Bid rigging

The question as to whether there was bid rigging was generally answered in the affirmative by all respondents. They felt that the law does not offer stiff penalties to deter public officials and suppliers who engage in corruption through bid-rigging. They called for punitive sentences to be meted against corrupt individuals. Public officers and suppliers alike perpetrate bid rigging through soliciting bribes and giving bribes or to even sneaking in documents after the deadlines.[237]Pre-bid rigging happens where public officers divulge information that will favour a specific supplier to win the tender like specifications tailor made to suit a certain supplier.[238] The Model Law already includes an anti-corruption provision, which describe how the procurement process itself should expunge any corruption. The provision covers exclusion of a supplier or contractor from the procurement proceedings on the grounds of inducements from the supplier or contractor, an unfair competitive advantage or conflicts of interest.[239]

The Model law provides that a procuring entity shall exclude a supplier or contractor from the procurement proceedings if: First the supplier or contractor offers, gives to any current or former employee of the procuring entity or other governmental authority a gratuity in any form. This includes an offer of employment or any other thing of service or value, so as to

[236] Ibid
[237] Anonymous(2013), opinion of procurement experts during interview.
[238] Anonymous(2013), opinion of procurement experts during interview.
[239] Ibid note 148, Article 21

influence the procuring entity in connection with the procurement proceedings.[240]Secondly the supplier or contractor has an unfair competitive advantage or a conflict of interest in violation of provisions of law of this State.[241]Any decision to exclude a supplier or contractor from the procurement proceedings under and the reasons there for shall be included in the record of the procurement proceedings and promptly communicated to the supplier or contractor concerned.[242]

4.9 Compliance with the law governing the public tender process

Under this category respondents were asked to give their opinion as to whether the law governing the public tender process strictly complied with and to state reasons for their response. Majority of the respondents observed that there were challenges with enforcement of the procurement law due to diverse reasons among them corruption, conflict of interest, political interference and poor planning among others.[243] Some pointed out non-compliance with the procurement law on the strength of the number of complaints forwarded cases filed for review, at the PPARB. Respondents from PPOA indicated that from the authority's website, an average of 60 reviews were filed every year between 2007 and the time of the interview. Some pointed out that from the number of complaints forwarded to PPOA and cases filed for review; it was discernible that the law is not strictly complied with. From the PPOA website, an average of 60 reviews are file every year since 2007.[244] Further, from the PPOA procurement audits most of the procuring entities score 65% and below, this is an

[240] Ibid note 148, Article 21(1)(a)
[241] Ibid, Article 21(1)(b)
[242] Ibid, Article 21(2)
[243] Anonymous(2013), opinion of public officials and procurement experts during interview.
[244] Anonymous(2013), opinion of public officials and procurement experts during interview.

indicator of non-compliance with the procurement law.[245]Strict enforcement of the law will enhance transparency in public procurement; the regulator must enforce this requirement.[246]

4.10 How can transparency in the process leading to award of public tenders be enhanced?

Respondents were asked to give proposals on enhancing transparency in the award of public tenders. They were to bear in mind the importance of transparency to ensuring fairness in public procurement. Some respondents proposed the strengthening of institutional structures to provide checks and balances to ensure compliance with procurement laws is a must particularly the auditor and legal advisors with good knowledge in procurement law and practices.[247] Some proposed regular training of public officers and suppliers to create awareness on the transparency requirements under the law. Others felt that prequalification of suppliers should be public such that procuring entities should publish their lists of prequalified suppliers. To others, enforcement of the law on debarment of suppliers was unsatisfactory. In this regard, they recommended strict enforcement of debarment provisions to deter errand suppliers. They proposed that the law should allow for debarment at the procuring entity level.

Proposals for stiff penalties to be imposed on public officers and suppliers who fail to comply with the procurement laws were made including imprisonment not just fines. Some respondents proposed partnership with professional institutions like Kenya Institute of

[245] Anonymous(2013), opinion of a public official during interview.
[246] Anonymous(2013), a procurement expert's view that oversight within institutions should be strengthened.
[247] Anonymous(2013), views of a pprocurement expert during interview.

Supplies Management (KISM) for procurement professionals to enforce professional codes of conduct to promote integrity of procurement officers.

4.11 Conclusion

This chapter has presented the data analysis and findings based on specific categories and themes in a bid to answer the research questions of the study. It has been established that the general features and the contents of the PPDA and PPDR are fairly consistent with internationally accepted standard legislative framework designed to promote public procurement transparency. Generally the PPDA and PPDR contain majority of the specific elements of such laws covering such essential elements on transparency including: Procurement method; advertising rules and time limit; tender documentation and technical specifications; tender evaluation and award criteria; submission, receipt and opening of tenders; and complaints. However, there is the need to review the legal framework on certain public procurement processes to include some missing transparency-enhancing provisions so as to make the law more transparency assuring.

CHAPTER FIVE: CONCLUSION AND SUGGESTIONS FOR REFORM

5.0 Introduction

This chapter concludes the study and makes suggestions for reform of the legal framework governing the process leading to the award of public tenders. Verification of the research hypothesis is covered in this chapter. A summary of the scope covered by preceding chapters is as follows: Chapter one outlined two hypothesis of the study as follows: the first hypothesis was that procurement laws in Kenya are inadequate in ensuring transparency in the public tender procurement processes. The second hypothesis of the study was that abuse of discretion by procuring entities is a kin to the non-transparent processes in the award of public tenders. Chapter two gave an outline of the legal framework on transparency in procurement in Kenya while chapter three addressed transparency under two international instruments namely the UNCITRAL Model Law on Procurement of goods, construction and services and the WTO's Agreement on Government Procurement. In chapter four the data collected from respondents was analysed and findings of the research were made.

This chapter makes conclusions based on the research findings and makes proposals for reforms needed to enhance transparency in the process leading to the award of public tenders in Kenya. The recommendations on reform are largely informed by proposals made by respondents as well as literature from other researchers on the subject under study. The recommendations are based on the various themes subjected to investigation in the study to address specific elements that will subsequently give rise to greater transparency and predictability of the legal framework governing the public tender process.

5.1 Suggestions for reform

Ensuring the relative stability, transparency, predictability and certainty of the regulatory framework applicable to public procurement is one of the goals of the public procurement law reform[248]. The regulatory framework and implementing measures should promote competition and public confidence in the procurement process and foster and encourage participation of the private sector as well as the public sector in procurement proceedings. This study has identified areas of weakness and lacunas in law and in practice and this has informed the following suggestions for reform:

5.1.0 Alignment of the PPDA with the Constitution of Kenya 2010 and law enforcement

This study revealed that there are very well prepared specific laws and rules on public procurement. However, they are frequently not complied largely due to poor enforcement. It was noted earlier on that at the time of this study the PPDA and PPDR had not been amended to embrace the provisions of the 2010 Constitution. The Constitution of Kenya is the supreme law of the Republic of Kenya that binds all persons and all State organs at all levels and requires every person to act in accordance with it.[249] This study recommends a review of the PPDA and the PPDR to align the public procurement function with the Constitution. This will ensure that all players in the public procurement act in accordance with the Constitutional threshold.

[248]Reform of public procurement in transition economies and UNCITRAL Model Law: a permanent cycle. Expert opinion by Samira Musayeva at http://www.ppi-ebrd-uncitral.com
[249] Ibid note 6, Article 2.

The study also examined the institutional structure of public procurement in terms of dispute resolution. It was established that the Public Procurement Appeals Review Board is currently based in Nairobi, this means that the dispute resolution forum is not accessible by aggrieved bidders across the country. The Kenyan Constitution guarantees every person's right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body,[250] The Constitution further imposes responsibility on the national government to ensure reasonable access to its services in all parts of the Republic, so far as it is appropriate to do so having regard to the nature of the service.[251] This study recommends that in line with this Constitutional requirement the PPDA and PPDR should be amended to create review boards within all the forty seven county governments. This will ensure the services of the review board are accessed at the grass-root levels. Consequently transparency will be enhanced to the extent that dissatisfied tenders affected by opaque processes will seek for redress within reasonable distances.

This study further recommends that strict enforcement of the Constitution, the PPDA, PPDR and all other legislation related to procurement for instance the Anti-Corruption and Economic Crimes Act, Public Officer Ethics Act and the Penal Code should be done by all institutions, authorities and public officers. The enforcement of these rules will ensure integrity in the procurement process and make it easier for public officials to renounce corruption. Indeed the Constitution of Kenya 2010 Article introduces principles on leadership

[250] Ibid note 6, Article 50 (1)
[251] Ibid Article (6) (3)

and integrity, which bind all holders of public office.[252] In particular, it establishes the principle that the authority assigned to a state officer is a public trust that must be exercised in a manner that is consistent with the purposes and objects of the Constitution and promotes public confidence in the integrity of the office. A step in that direction would be to include ethical standards in the legal framework specifically codes of conduct in procurement. Such codes of conduct will serve as an obstacle for private interests to interfere with those of the government.

5.1.2 E-procurement

For public procurement to be acceptable to all stakeholders it should be seen to be public, transparent and objective. The law should promote the extensive use of e-procurement as one of the methods to prevent collusion with tenderers[253]. In order to enhance transparency in the entire procurement process and also specifically to address concerns on accessibility of tender documents, the PPDA should be amended to incorporate provisions to make the public procurement process to be in real-time recorded, preferably through electronic means, accessible to the public free of charge. There should be appropriate provisions designed to encourage the use of e-Procurement methods. A procuring entity should whenever possible publish tender documents free of charge on the procuring entity's website, instead of supplying the same by request only and for a fee. The system should be user friendly and

[252] Ibid,Article 73 (1) (a)

[253]The Public Procurement legislative framework should provide an adequate level of transparency at http://www.ppi-ebrd-uncitral.com/index.php/en/ebrd-core-principles/transparency

should be accompanied by constant trainings for both procurement practitioners and bidders alike.

5.1.3 Standard procedures for preparation of specifications

The study sought to establish the perception on implementation and enforcement of the procurement laws. From the findings, it is apparent that there is general non-compliance with the law by procuring entities and suppliers. To deal with issues regarding implementation of the legal framework, PPOA should develop standard procedures for preparation of specifications for goods/service requirements, evaluation criteria and terms of reference for open tenders and direct procurements.

5.1.4 Method of procurement

The study has established that the law allows procuring entities to exercise discretion in choosing the method of procurement. On this aspect of regulation, interviewees submitted that the freedom of choice as regards the method of procurement hampers the objective of transparency and that the safeguards provided by law were inadequate. This study recommends amendment of the law to include additional legal requirements that alternative methods of procurement such as direct procurement and restricted tendering can be adopted only where justified, fully explained, documented and available for public review. This will further enhance transparency and provide the much needed checks against discretion by procuring entities that seek to adopt alternative methods of procurement in order to avoid competition.

5.1.5 Competency of evaluation teams

The study revealed that in some instances tender evaluators do not possess the requisite skills. Evaluation of tenders must be carried out by a suitably competent evaluation panel and in accordance with the PPDA, the PPDR and above all the Constitution to ensure equal treatment, non-discrimination, and transparency among all bidders. This will ensure that the PPDA and PPDR requirements to be met at evaluation of tenders are adhered to. The study has however established that in some cases tender evaluation teams may not be competent enough to undertake specific tender evaluations. It is recommended that capacity building for tender evaluators should be enhanced through extensive trainings on various tender evaluations. Due to the enormous resources required, it is recommended that the law should be amended to empower the PPOA to establish a central training institute for evaluation of diverse tenders. The trained evaluators should then be utilized by all procuring entities to enhance tender evaluation capacity.

Further it is also recommended that the law should be amended to allow technically competent independent experts and observers to be involved in the evaluation process for huge procurements of Kenya Shillings five hundred million and over, to ensure transparency and accountability for public resources.

5.1.6 Accessibility to evaluation reports

Transparency is built on the free flow of information. Processes, institutions and information are directly accessible to those concerned with them, and enough information is provided to understand and monitor them. The study revealed that the law does not make it mandatory for

bidders to be furnished with the evaluation report upon request. This lowers the transparency threshold making it difficult for unsuccessful bidders to make informed decisions whether or not to file reviews against procuring entities.

The Constitution of Kenya 2010 guarantees the right of every person to freedom of expression, which includes freedom to seek, receives or imparts information or ideas.[254]Every citizen has the right of access to information held by the State and by another person and required for the exercise or protection of any right or fundamental freedom.[255]This study therefore recommends that the law should be amended to make it mandatory for procuring entities to furnish unsuccessful tenders with the tender evaluation reports for scrutiny. This will go a long way to enhance transparency in evaluation of public tenders.

5.1.7 Conflict of interest

The study has established that award of public tenders is prone to conflict of interest and corruption resulting because of financial gains in the form of bribes. This is as a result of solicitation by public officials or suppliers who decide to give bribes. On this aspect, some of the respondents indicated that there is need for stiffer penalties against the individuals soliciting, receiving or those giving bribes. The Constitution of Kenya, 2010 stipulates that services provided by public officers need to be selfless and based solely on the public interest, demonstrated and remain accountable to the public for their decisions and actions as well as disciplined and committed to serve the people.[256] This study recommends imposing of more deterrent penalties against public officials and suppliers who engage in corruption in

[254] Ibid note 6, Articles 35 (1)and 33 (1)
[255] Ibid, Article 35 (1)
[256] Ibid Article 73(2)

the course of awarding public tenders. In the case of suppliers, decisions of debarment proceedings must be published in newspapers with countrywide circulation and also on the PPOA website. The law should provide that once debarred, a supplier, contractor or service provider is not allowed to participate in procurement processes with any other public entities during the subsistence of the debarment order.

A further recommendation is that the PPDA should be amended to include enacting procurement codes of conduct. Enactment of procurement codes of conduct is an international best practice; however the PPDA does not make provision for procurement codes of conduct. The Model Law requires a code of conduct for officers or employees of procuring entities to be enacted.[257] The code of conduct shall address, inter alia, the prevention of conflicts of interest in procurement and, where appropriate, measures to regulate matters regarding personnel responsible for procurement, such as declarations of interest in particular procurements, screening procedures and training requirements. The codes of conduct will enhance integrity of officials in procuring entities and curb corruption.

5.1.8 Public awareness

The study particularly procurement audits revealed that procuring entities are opague to the extent that bidders are not facilitated by the law to track public tender process particularly after tender opening. This study recommends amendment of the law to allow bidders to understand administrative processes; and have the right to track administrative procedures that involve them, and have insight into the rationale behind decisions that could affect them.

[257] Ibid note 148, Article 26

5.1.9 Debriefing

The study has established that evaluation of public tenders is opaque to the extent that there is no requirement in law for reports on evaluation of tenders to be availed to unsuccessful bidders, thus the law does not make express provision for debriefing. On this aspect, it is recommended that debriefing should be incorporated under government procurement policy and the procurement laws. Debriefings should be provided to suppliers, upon request to promote fairness, openness and transparency in the procurement process. Debriefing is the process by which suppliers are given the results of the evaluation of their bid on competitive procurements. This is in line with the Constitutional requirement on the right to access to information under Article 35 of the Constitution of Kenya.

5.2 Conclusion

This study was based on the assumption that procurement laws in Kenya are inadequate as far as ensuring transparency in the public tender procurement processes is concerned. The second assumption of the study was that abuse of discretion by procuring entities has led the non-transparent processes in the award of public tenders. The study has reflected on the progress that has been made towards more transparent and competitive public procurement through the PPDA and the PPDR. From a historical view point, the enactment of a specific statute and regulations to govern public procurement was a big milestone in the history of public procurement regulation in Kenya. The gains that will flow from the subsequent promulgation of the Constitution of Kenya 2010 which embraces a constitutional approach to public procurement cannot be overemphasized. Apart from the gap in provisions on procurement codes of conduct, the Kenyan legal framework is generally in line with

international best practice. This is as set out in the UNCITRAL model law and the WTO's Agreement on Government Procurement. This is with specific reference to transparency in the public tender process. Regarding the hypotheses of this study, it has been established that whereas transparency requirements are well embedded within the provisions of the PPDA and PPDR, in practice compliance to the law and guidelines is often not strictly adhered to by the various players in the process leading to the award of public tenders. Thus the PPDA and PPDR have not yet been fully implemented. It is to be noted however that extra legislative measures have nevertheless been recommended to realize greater transparency in the public tender process. This is particularly to align the procurement processes with the constitutional provisions.

As regards discretion, the study revealed that there is generally discretion within the law and in practice. The very nature of discretion has the underlying opaqueness in the procurement process hence compromising on the transparency standards envisaged under the PPDA and PPDR. One of the research questions was whether the provisions of the Constitution of Kenya 2010 on transparency should inform amendments to in the procurement laws in Kenya? Throughout this study, the question has been answered in the affirmative. It has been demonstrated that the Constitutional threshold for transparency in government operations including public procurement is high. This means that laws on award of public tenders must be reviewed to embrace the transparency standards envisaged by the Constitution. This study will hopefully serve as a reference material for policy makers in an attempt to strategize to improve the overall compliance level with the public procurement law with regard to the objective of promoting transparency.

APPENDIX A– RESEARCH AUTHORIZATION

APPENDIX B– INTERVIEW GUIDE

In order to measure transparency, the research will entail interviewing public officials in procuring entities, the Public Procurement Oversight Authority, suppliers to procuring entities, and procurement experts comprising consultants and procurement lawyers.

The interview will take between fifteen to twenty minutes per person. This will be sufficient to obtain the necessary information to answer the research questions and eventually prove or disprove the hypothesis.

The following open ended questions will form the basis of the interview:

Part A:

What is your occupation?

Are you in any way involved in the public procurement process?

Part B

1. How are tender specifications determined in your institution and whose responsibility is it to determine such tender specifications?
2. How is the method of procurement determined? How does the choice of method impact on transparency?
3. Who determines the method of procurement, there is any discretion on choice?
4. Do you think that procuring entities make available to all suppliers all the information required to prepare a responsive bid i.e publication of all of the information relating to specifications of the product or service to be procured, quantity, time frame for delivery, closing times and dates, where and how to submit a bid and the evaluation

criteria). Given the importance of transparency to ensuring fairness in public procurement, what information in your view should be disclosed?

5. Are evaluation criteria for different procurements transparent and objective?
6. Is tender evaluation and awarding of contracts done strictly in accordance with the criteria?
7. Are there instances where there is discretionary rejection of bids below a threshold, or the discretionary acceptance of a bid which fails to meet a threshold during both the evaluation stage or tender committee stage?
8. Are there stages in the process leading to award of public tenders that you believe allow procuring officials and procuring entities to exercise their discretion in a non-transparent manner?
9. Are you aware of any incidences where bidders have complained of bid –rigging? What were the particulars of the complaints? OR If you are a supplier, have you ever filed a complaint against a particular award? If so what were the particulars?
10. In your view is the law governing the public tender process strictly complied with? If not what are your reasons for stating so?
11. How can transparency in the process leading to award of public tenders be enhanced?
12. Is there any other information you would like to disclose that I have not covered?

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