Effects of the Public Procurement Oversight Authority Standard Tender Document on Procurement of Public Building Works in Kenya: A Case of Ministry of Public Works Managed Projects

* Gladys Wahome, George Wanyona & Njeri Wachira – Towey

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Abstract
Procurement of public construction projects among clients and other stakeholders continues to be a matter of concern all over the world. Over the years, the government has introduced and revised conditions of contract used in procuring projects in order to improve public projects procurement and lower building costs. The introduction of Public Procurement & Disposal (PP&D) Act, 2005 and regulations of 2006 which included the standard tender document (STD) for procurement of building and civil engineering works was one such measure. This study sought to find out the factors that impact the procurement of public projects and evaluate their relationship with conditions of tender application. The study was carried out on projects managed by the ministry of Public Works in the last five years and used content analysis which revealed nine underlying factors in the project procurement namely: delay in decision making; honoring payments; contractor performance; delays in preparation of certificates; clients’ interference; design changes; post election violence; disputes and importation of materials. Delay in decision making by those concerned and honoring of payments was ranked highest while importation of materials was of least significance. The study concluded that the identified factors arose as a result of the tender documents not adequately addressing issues affecting procurement of public projects and recommends that the standard tender document be revised to reflect the nature of the projects/works to be procured.

Keywords: public building projects, public procurement and disposal Act, standard tender document, Kenya

INTRODUCTION
The building and construction industry in Kenya is one of the fastest growing sectors of the economy. Currently, construction makes significant contribution to the national economy through job creation and spurs growth and development. The government being a key player in the industry aims at transforming Kenya into a newly industrializing middle income country and providing a high quality of life to its citizens by the year 2030. This among others involves economic development projects and in particular construction projects for service delivery at the county level in order to spur growth throughout the country in particular with the devolved government. The Ministry of Public Works (MOPW) being the technical Ministry of the government offers technical services to other government ministries, state corporations, government departments and institutions. They include providing project management in procuring government building projects which include preparation of designs and bills of quantities for procurement of contractors to put up the project at the pre-tender stage and supervision during post tender stage. Construction has many risks and uncertainties due to its intricate nature and so needs a document to guide the process.

The Standard Tender Documents provides guidance to the parties involved in the tender process. The PPOA Standard Tender Document for procurement of works is only applicable for projects in the public sector. In public buildings’ tender process, the STD is used by the MOPW in the procurement process which in this study commences at project initiation and ends with project completion and close out. This process has the parameters of time, cost, scope and quality (deliverables) set out in the tender document used to measure the success of the project procurement, and client/customer satisfaction.

When a project is successfully delivered, it means it has performed well within the time, scope, budget and quality parameters. Jagboro & Ogunsemi (2005) identified the direct relationship between the success of a project and the achievement of the above parameters. However, according to Shenhar et al., (1997) and Al Tmeeny et al., (2010), there are other factors to consider in defining project success, for example the efficiency of the project, its impact on customers, its business success and whether it has adequately prepared for the...
future. These other factors came up due to the dynamic nature of the construction industry. Moreover, in recent times technological changes and trade liberalizations have forced governments and public institutions to pursue innovative solutions to public procurement (Kim et al., 2010). Some of these solutions have been in the introduction of new procurement rules or revising of the existing rules, in order to ensure stakeholders get results from their investments and good outcomes (Ammons et al., 2011). Kenya introduced the Public Procurement & Disposal Act, 2005 and the regulations of 2006 in order to improve the procurement process which had been riddled with many challenges.

This paper addresses the concern that even after the introduction of this Act, public building procurement continues to perform poorly and questions have been raised on the application of the standard tender document for procurement of works of Public Procurement Oversight Authority (PPOA) used mainly for public projects funded by the Kenya Government. However, procurement of public construction projects has not been satisfactory and studies carried out revealed weakness in the procurement system with Gichunge (2000) recommending that public procurement procedures that existed then be overhauled. Earlier in 1997, a study sponsored by the World Bank had recommended the same and mechanisms were put in place to improve the procurement procedures, culminating with the introduction of the Public Procurement & Disposal Act, 2005 and the regulations of 2006. This Act became operational on 1st January, 2007 and it includes the standard tender document for the procurement of works, used to procure public building projects.

Procurement of public buildings: The procurement of public projects first considers the contract formed when the contractor offers to deliver a project within the time, cost, and deliverables as stated and the client accepts. The clauses in the contract document spell out how parties are to conduct themselves. It is therefore important that these clauses be in line with the construction environment and the players involved. The study set out to find out how these clauses and other significant factors impact the delivery. To verify this, research was conducted on projects files for projects handled by the Ministry of Public Works head office and various types of public works building projects were identified. These were mainly administrative, agricultural, education, finance, judiciary, health, institutional, and security projects.

THEORY

Standard forms of contract

The standard forms defines the contractual relationship between the parties and their agents, identifies their roles and responsibilities (Brook, 2004) and allocates the risks associated with the project between the parties making them law. The MOPW using the STD conditions aims to manage risks in the project procurement by making more informed decisions to ensure the project objectives are achieved (Loosemore et al., 2008) and stakeholders are satisfied. When two parties, an employer and a contractor, agree in a contract form, they adopt it as if it were to be a written law defining the relationship between them. Standard forms save a lot of writing and drafting work, but are more costly.
First, they are not subject to the urgent pressures of an imminent project, so may be crafted with care. Secondly, as they remain the same for reasonably long periods of time, any uncertainties of meaning are likely to be ironed out, either by decisions of courts or by revisions of the text. As a consequence, the parties to a standard form contract can be reasonably confident that it will be predictable and will deal sensibly with most of the contingencies that one might experience (Allan, 2001). Rules and procedures are imposed to provide a harmonious way of life and prevent chaos. (Owen, 1998).

In Public building projects procurement, there are many players and uncertainties and due to the intricate nature of construction process there is need for solid agreement; prior to commencement of production. A contract comes into existence when an offer has been accepted and in construction, the offer is the tender and the letter from the client accepting the contractor to carry out the works at the amount stated (Brook, 2004) fulfilling an essential feature of a contract, that is, there must be a consideration. This means, client is responsible for making payments and the contractor must complete the construction according to Brook (2004) while the process of acquiring the contractor (tendering) must be unbiased. The tendering process is essential in order to find a contractor who can supply the product (finished project) at a competitive price and has capacity to deliver according to the specifications and conditions set in the contract. Both the clients and contractors have a chance to communicate better, besides improving business performance (Brook, 2004) and establishing long term relationships.

RESEARCH METHODS
A sample size of 91 projects was selected randomly from a population frame of 120 projects using a computer programme (Bryman, 2012). Content analysis generated information for 82 projects on effects of the use of the conditions of tender on public building projects procurement and the clauses that ought to mitigate these effects. A documents review guide helped identify the projects and their procurement status including all communication regarding the project. Payment files indicated the amounts paid, the contract sums and variations in time or cost which helped identify projects with time and cost overruns. Information on how projects were tendered, claims arising from the procurement process, as well as the clauses which guide such processes were also available.

Data Analysis
The conditions of tender are expected to cushion the project procurement against the many challenges encountered in the process and content analysis revealed that this was not the case. The conditions of contract were found not to exhaustively address the challenges in public building projects' procurement and some were lacking all together (Table 1).

<table>
<thead>
<tr>
<th>TABLE 1</th>
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<tbody>
<tr>
<td>Effects of PPOA STD on procurement of public building projects</td>
<td></td>
</tr>
<tr>
<td>1. Delay in decision making</td>
<td>79.3</td>
</tr>
<tr>
<td>Delay in procuring subcontractors for services</td>
<td></td>
</tr>
<tr>
<td>2. Delay in honoring Payments</td>
<td>68.3</td>
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<td>3. Contractor’s performance</td>
<td>20.7</td>
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<td>4. Delayed certification of payments</td>
<td>17.1</td>
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<td>5. Client interference</td>
<td>15.9</td>
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<tr>
<td>6. Changes in designs/scope i.e. variations</td>
<td>14.6</td>
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<tr>
<td>7. Post election violence</td>
<td>9.8</td>
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<tr>
<td>8. Nema / Plot disputes</td>
<td>4.9</td>
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<tr>
<td>9. Imported materials</td>
<td>3.7</td>
</tr>
</tbody>
</table>

Source: Field survey 2012
RESULTS

Delay in Decision Making

Procuring contractors: It takes 104 days or 3 1/2 months from the invitation for a tender to the award of contract (DN Aug. 2012). The conditions of tender provide for open tender for projects over Kshs. 20 million with the tender advertised, returned and opened after 21 days. The procuring entity appoints an evaluation committee soon after but given the bureaucracy in government administration; it takes up to two weeks to get the evaluation team assembled. Once the tender evaluation report is ready,

TABLE 2
Tendering process

<table>
<thead>
<tr>
<th>Step Description</th>
<th>Time (days)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Tender Invitation</td>
<td>21</td>
</tr>
<tr>
<td>2. Tender evaluation including composing the evaluation team</td>
<td>30</td>
</tr>
<tr>
<td>3. Tender award</td>
<td>24</td>
</tr>
<tr>
<td>4. Appeals</td>
<td>14</td>
</tr>
<tr>
<td>5. Performance bond &amp; programme provision</td>
<td>14</td>
</tr>
<tr>
<td>6. Signing of Contract by Contractor</td>
<td>immediately after provision of above</td>
</tr>
<tr>
<td>7. Signing of Contract by Client</td>
<td>can take up to 14 days</td>
</tr>
</tbody>
</table>

Source: Field survey 2012

The procurement in the above reference is for the main contractor. The subcontractors are procured separately as the tender document is silent on this issue. Work commences but stops or slows down at some point to await the services subcontractor to be procured, again through open tendering which faces the same challenges. The conditions in the standard tender document have set the time frame for each stage as indicated in Table 2 and the public bodies follow them to the letter. This has resulted in slow progress of works and period extensions which result in extra costs with a prolonged delay in procuring of subcontractors leading to inflation and in the process, invoking the fluctuations clause and at times termination by either party. The long period taken to get contractors means the client's need is not met as envisioned and the asset gap in the organization remains. The lack of any reference for services works has left a gap whereby the procuring entity assumes that works are inclusive of services while the MOPW treats them as separate contracts resulting with acrimony between the clients and the consultants and time lost as the latter being the project manager tries to convince the clients.

Issuing of instructions: This refers to the delay in; issuing site instructions, giving estimates, making changes in designs and delay in issuing drawings for the diligent progress of the works during the implementation process. Projects experiencing these factors are not completed on time. Changes in designs have brought about variations which require time to carry out and extra costs, and the contractors have invoked the compensation clause for claims due to failure of the project manager to make decisions on time. Further, delay in the issuance of an approved extension of time has resulted in damages for late completion being recovered from the contractors as per the contract, which has the effect of withholding funds from the project and so affecting its implementation. The time clause extension has left it open for the project manager to award time extensions when deemed fit. This has been abused and projects are not being given extensions of time even when necessary, resulting in projects being implemented out of contract and final accounts delayed sometimes for years.

Delay in honoring payments: For any project to be successfully procured money is a requirement and payments need to be prompt. The payment clause gives 30 days to clients to honor payments. The bureaucratic system in government results in the client waiting until the 30th day to honor payment, arguing it's still within contract. At other times the project funds are not available and so the payments remain pending beyond the contract stipulation. Delayed payments result in the contractor having cash flow problems,
which leads to poor progress of the project leading to time/cost overruns and termination. The conditions of contract compensation for delayed payments is interest for the period the payment remains unpaid which is expected to be included in the next interim payment, raising the costs of procuring the projects. The conditions allow the contractor to terminate works if payments are not honored within 30 days without a reasonable cause. However with the many projects out of time for long periods, it looks like this clause is not utilized by contractors.

Contractor's performance: The contractors performance is essential for the successful delivery of projects, yet the study findings revealed there are projects which are paid on time, have no variations or even if they have, site instructions have been dealt with quickly and yet some contractors fail to deliver. Such contractors as it was revealed through various communications in the files, have many projects both private and public hence experience management and cash flow problems. For the new projects, raising performance bond for these contractors becomes a problem and the projects take long to commence. The contractor is acquired through the application of the standard tender document and is expected to be competent and deliver the project to satisfaction of the stakeholders. The termination clause allows the contract to be terminated by either party but this clause is not commonly used due to fear of the parties to shoulder the consequences of termination.

Delay in preparing of payment certificates by consultants: The contractor applies for payment and according to the contract conditions the certificate is expected to be ready within 14 days. However, preparation of certificates and certification takes longer before forwarding to the client for settlement. As a result, there were many complaint letters from the contractors and even threats of withdrawal of personnel from the project and termination. This factor manifested itself in projects where private consultants were involved and the certificates had to be countersigned by the head office consultants. Meanwhile for those directly supervised from the head office, the circulation for payments and corrections or amendments to the certificates where needed, delayed release of such certificates, with some officers involved in many projects, some outside Nairobi, all these was evidenced in the files. It seems the 14 days for a certificate to be ready is not adhered to and the conditions have not given any punitive measures for failure to certify works within the given time.

Client Interference: Client interference manifested itself in projects being stopped by client without following the laid down procedures, changing scope of works without involving the project manager, withholding payments without a just cause or even altering payments to what was felt should be paid. Letters inviting project team members including clients and contractors for consultative meetings to resolve the issues were evident in the files and resulted in minutes for the meetings. The area under construction led to the contractor's work being executed at particular times and other areas were restricted preventing the contractors from carrying out the work with due diligence. This applied mainly to police projects, schools and rehabilitation works in buildings where normal services were ongoing. The reason given for the failure to give the contractor access to the whole site as required by the conditions of tender was lack of space for the affected workers of the organization to move into in order to allow the construction works to proceed. These projects have taken long to be completed with the police projects being mainly retender projects having previously stalled. The conditions of contract need to take into account such projects and allow for the client to source for alternative accommodation without the rigorous tendering process to acquire such accommodation.

Changes in designs/drawings: This includes changes in scope which necessitated new designs and drawings or procured projects were without adequate or complete designs. So when works commenced, those designs did not reflect works in the tender document. The explanation given was that the approval of the designs especially structural was taking too long and works had to be tendered hence were measured provisionally. Unforeseen ground conditions were another cause of change in designs and it was evident that there was no feasibility studies carried out before documentation took place. The conditions of tender have no provision for feasibility studies and assumes these have already been done before tender or are not necessary. This is a grave omission and has resulted in many designs. Changing once works have commenced and many variations with cost implications. It emerged that funding of feasibility studies is an issue as it is required before documentation for tendering is done. The conditions of contract need to be explicit on feasibility studies for all projects before documentation for tender purposes can be done and give the client's responsibility to finance them before approving documents for tender.

Post Election Violence: A factor that was unique to some projects in violence prone areas was the post election violence that came as a result of the disputed 2007 elections. It brought about claims from contractors either due to stoppage of works or the inflation that followed, or both. In addition shortage of goods was experienced, forcing prices of goods to go up resulting in compensation claims by contractors due
the disturbances. However, the analysis of such claims took too long as the post election violence was seen not to be covered by the contract conditions with clients’ asserting that they were not the cause of the violence and would not pay for the losses suffered by the contractor. Eventually, some of the claims were paid, some are yet to be assessed while some were rejected yet the same conditions are applicable to all the projects. Disputes then arose from failure to settle these claims; some led to arbitration while others led to termination of works. Findings of the study revealed that the compensation clause in the tender document did not provide for such eventualities, hence the reluctance of the clients to compensate contractors for losses incurred.

NEMA / Plot disputes: This included NEMA stopping works which did not have a NEMA license and where this was the case, the works resumed once the necessary licensing was done. In other cases, it was discovered during the site handing over, that the plot did not belong to the client as it had been allocated to others. Records indicated that two projects failed to take off due to land having been illegally allocated to others while another project had designs amended to reflect a smaller size of building as the adjacent plot had another owner, yet the client had all along thought it was part of the whole parcel under construction and had given a brief to that effect. Yet another project had to move to a new site which had not been intended for that project, delaying the start of the project with design changes made to accommodate the new site. In another, the client had managed to reclaim the land and the works commenced after a long delay with the contractor awarded new rates to cover for the delay, resulting in a higher contract sum. Further, it was revealed that in two projects the client was in court trying to recover the land and so the works though awarded and commenced for a while, were stopped until the land dispute was resolved. The law requires that buildings be put up on land with clear titles and prove of ownership is mandatory. Titles are expected to be prove of ownership but this is no longer the case in Kenya as we have many instances where more than one title for the same land have been produced by different people claiming ownership. The conditions of contract do not cover these scenarios and assumes the land where the project is to be put up is the government’s affecting the procurement of projects with losses incurred by all the parties.

Importation of Materials: This factor was in projects that required materials to be imported and the importation process took long affecting contract period and sometimes contract sum. Mechanical and electrical works which required importation of items like lifts, laundry machines, laboratory machines and other highly specialized items were the most affected. The reasons given for the delay was shipment and clearing at the port taking long. This factor was found in big projects which span many years, for example, two projects started in 2007 and are yet to be completed and have a time overrun as a result of the importation process taking too long. The conditions of tender do not consider the difficulties encountered in importation of construction materials other than variation in exchange rates and so other claims like delay in shipment, port clearance and inland movement to the sites are not taken into account and compensation allowed for. Contractors must put in place measures to avoid issues of late importation of materials to be used in construction and so this factor has more to do with the contractor’s management than the conditions of contract.

CONCLUSION AND RECOMMENDATIONS

Procurement of public construction projects is fundamental in a country in spurring growth and development. Kenya’s Vision 2030, aims among other things to spur economic growth in the country through various development projects, mostly construction projects in the counties. The devolved government will generate a lot of contracts for goods and services needed to start off the county governments and to ensure their smooth running in order to grow and develop. To achieve the expected growth and development, it is essential that the projects be successfully procured, and therefore it is necessary to put in place the right mechanisms. The standard tender document for procurement of works sets the conditions to be followed in public projects procurement and it is important that these conditions be amended in order to have a more successful procurement of public projects which will transit to a more successful devolved government. The study also revealed the many players in the building industry, who must work together to deliver projects successfully need a single source of authority with necessary powers to coordinate them by putting measures in place to improve and maintain their relations. All parties must be aware of their obligations and be ready and willing to meet them and stringent different measures should be incorporated in the conditions of contract to ensure each party carries out their role with diligence to avoid unsatisfactory procurement. These measures should be followed whenever a situation affecting the project procurement is seen to occur. As seen from the projects under study, procurement of projects is faced with real challenges, which need to be addressed in
the tender document and adhered to in the project procurement process. Early caution should be done for any occurrence seen to affect the procurement.

All the above are risks and uncertainties that address the challenges experienced in public procurement of building projects, and promote project procurement in the country. There should be a systematic development and utilization of risks and uncertainties management, knowledge, skills and techniques particularly from those projects already procured. The many lessons learnt along the way as projects are procured are not factored in the procuring process. This is what the standard tender document for procurement of works should address exhaustively to enhance the success of procurement of public building projects in order to spur growth all over the country and ensure successful devolution of the government.

CITED REFERENCES


