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Abstract

The paper sought to establish the influence of the public procurement law on the market economy in Kenya. The recurrent challenges in the practice of public procurement are not due to the absence of laws or regulations but the reading suggests that these may be related to capacity but most clearly too obvious dereliction of duty among decision makers managing the procurement processes and especially the contract management stages. This shows that the systematic weaknesses in the public procurement practice in Kenya cannot be fixed by further legislation as much but the strengthening of both negative and positive incentives for agents in the public sector to behave in the ways that are consistent with the interest of the public. The overall profligacy of the institutions of public procurement can be strengthened with better transparency, the adoption and enforcement of open contracting, creation of capacity and deployment of technology. However, the nugget of this study is not that Kenyan's public procurement systems are weak or that they have enormous potential for contributing to its market economy growth. The real policy lesson is that the dysfunction of the public procurement reflects the inability of institutions such as parliament to assert authority in ensuring that allocations are used effectively and that the managers of procurement throughout the entities in government have the incentive to apply public resources well. Thus, the ineffectiveness of Kenya's public procurement is an issue of the political economy in Kenya. In addition, solutions do not lie in new laws but ensuring that accountability for use of resources has real meaning. Sustaining Kenya's development depends on getting this right.

Keywords: *Public Procurement Law & Market Economy & Kenya.*

1.1 Introduction

Public procurement is the process of acquisition, normally through contractual arrangement of goods, services and works by the public sector from private sector (Thai, 2017). The procurement process scopes a cycle from identifying need, procurement planning, the selection of suppliers to post contract award management including disposal. In acquisition of these goods, services and works, it is paramount that this is done in a cost effective manner and that they are provided in the right quantities at the right quality from the right source in timely agreed delivery period at the lowest possible price. Governments mainly implement functions in form of programs and projects through purchase of goods, services and works (Thiankolu, 2019).

Overall, governments around the world spend \$9.5 trillion each year procuring goods and services by construction of schools, purchasing of hospital supplies, building roads, or securing computer systems in public buildings by public procurement. Developing countries alone spend \$820 billion per year in obtaining these goods and services from the private sector thus making the public procurement market a huge business opportunity for firms around the world. Effective public procurement systems thus help governments see better value for money, reduce pressure on public budgets, and leave agencies better prepared to invite private investments (Mukura, Shalle, Kanda, & Ngatia, 2016).

Globally and specifically for developing countries, public procurement has progressed from being purely a support supply function to the public sector to now being considered an important means in economic policy, and debatably the most detectable ideal for quality of governance (Thai, 2017). Efficient public procurement also has a direct impact on poverty reduction considering government programmes are implemented through procurement of goods, infrastructure and services which have a multiplier effect on the social economic situations in a country. As such, efficient public procurement is vital for achieving Sustainable Development Goal 1 of ending poverty and by extension, sound public investment, spending being unquestionably an important factor in attaining the other 16 Goals. Over the last two decades, countries have recognized the need to modernize the way they buy goods, services and works and further specifically closely regulate this very lucrative function of public service (Rustiarini, Sutrisno, Nurkholis & Andayani, 2019).

A composition of government expenditure and public expenditure reforms matter for economic growth. Government spending on health and education, for example, will increase productivity of labour and increase the growth of the economy while public expenditure on infrastructure such as roads, railway, power and telecommunications are expected to reduce the cost of production and doing business thus promoting private sector investment and profitability of firms which in effect fosters economic growth (Thai, 2017). However, prudent spending on these resources is critical, which import means transparency, accountability and value for money for the taxpayer is key at all stages of public finance management.

Public procurement is the means through which government and state-owned enterprises delivers goods, services and programmes to the citizens through spending. A good portion of government revenue, which is tax payers' money, is spent through public procurement which during the fiscal year 2018 accounted for 26 percent of Kenya's GDP. During the fiscal year 2018, spending on public procurement constituted about 45 percent of Ministries, Departments and Agencies budgets

(World Bank, 2020). Public procurement being a key economic activity, even though plays a central role in driving socio-economic development, is prone to risks and loss of public funds, especially where procurement procedures and systems are not efficient to support the process in implementing government programmes, projects and activities. The Kenyan procurement system is also considered a high risk area for investors. The Global Competitiveness Report 2011-2012 indicates that corruption remains prevalent in procurement processes with widespread practice of favouritism towards well connected firms and individuals when deciding upon contracts and policies being a main area of concern (World Bank, 2020).

It is worth to noting however, that public procurement offers rare opportunity for the different socio-economic sectors of the society to not only be empowered but also contribute to inclusive economic growth of the country. It is on this understanding that the Kenya is implementing Access to Government Opportunity (AGPO) Program, which seeks to facilitate enterprises owned by women, youth and persons with disability to access government opportunities through public procurement. By law, procuring entities are required to set aside 30 percent of their procurement opportunities to enterprises owned by these groups. The program is founded on Article 227 of the Kenya Constitution 2010 on the fair, equitable, transparent and cost-effective procurement of goods and services, Article 55 on affirmative action and section 7 (2) (i), 157 (14) of the Public Procurement and Asset Disposal Act, 2015 which mandates public procurement entities to prepare and submit to Parliament every six (6) months a report on contracts awarded to youth, women and persons living with disabilities (PPAD, 2016).

This direction is implemented through performance contracting in public service where government agencies are awarded points on meeting this affirmative action target which is not only a matter of policy but now a legal requirement.

In 2013, the country saw the enactment of the Public Private Partnership Act. This legislation was informed by the need to spur private sector participation in the development of infrastructure in the country. With private sector involvement, it was envisaged that provision of public services and works would be accelerated at affordable rates. This approach has deviated from the traditional public procurement process as it incorporates the element of risk sharing between the parties, with private sector bearing a large portion of the risk including financial, operational and management responsibilities. Further, with this model, private sector is provided with an opportunity to not only grow but also provide jobs for Kenyans and subsequently contribute towards economic expansion for the country.

On government to government procurement and contracting with foreign entities, it is now a requirement of law for foreign entities to not only source locally for raw materials, but to also employ a prescribed percent of Kenyans in their firms and transfer ensure requisite transfer of technology to locals.

1.2 Problem Statement

The procurement legal framework is the guide book for public procurement. Ideally, it should be further developed into policies and procedures, procurement and contract administration manuals and guidelines, including standard solicitation documents that are used to call for offers from contractors, suppliers and service providers. These subsidiary documents must align with what is established in the public procurement legal framework, which is anchored on the Constitution.

Adherence to the public procurement law is obligatory; any infraction is punishable by law. The procurement legal and institutional frameworks, which may be referred to as procurement rules govern everything from the identification of a requirement through to the closing out of a contract; sometimes including disposal, reutilization and destruction of goods. Therefore, this paper sought to establish the influence of the public procurement law on the market economy in Kenya.

1.3 Objectives of the Study

- i. To establish the influence of the public procurement law on the market economy in Kenya.
- ii. To identify the challenges affecting procurement law adoption in Kenya

1.4 Research Question

- i. What is the influence of the public procurement law on the market economy in Kenya?
- ii. What are the challenges affecting procurement law adoption in Kenya.

2.2 Literature Review

2.2.1. Domestic Law

The Constitution under Article 10 provides for national values and principles of governance, which include rule of law, good governance, integrity, transparency and accountability. Chapter Six provides an elaborate framework for leadership and integrity. Article 232 prescribes the values and principles of public service. Article 75(1) (a) and (b) provide that a state (and public) officer shall behave, whether in public or official life, in private life, or in association with other persons, in a manner that avoids any conflict between personal interests and (public) official duties, or compromising any public or official interest in favour of a personal interest. Articles 76 and 77 further provide for financial probity and restrictions of certain activities. These provisions of the Constitution establish thresholds within which public officials should behave in exercising official duty.

The Constitution further provides under Article 227, broad compliance standards for public procurement. These standards are anchored on Article (9) of UNCAC in respect to a procurement system that is fair, equitable, transparent, competitive and cost effective. The Constitutional Article further broadly prescribes thresholds upon which legislation on public procurement must be developed, specifically placing responsibilities on both the agencies within the procurement system and contractors, to share opportunities equitably, protect disadvantaged groups and abide by contractual and legal obligations respectively. The Constitution perceives parties in the procurement space to be to be persons of good ethical standing in their various capacities as stakeholders.

The Public Procurement of Assets and Disposals Act of 2015 (PPAD) and attendant Regulations is the main law that governs public procurement and disposal of goods, services and works in governments and government entities respectively at both national and county levels. This legislation is customized from the UNCITRAL Public Procurement Model Law, this being a global standard legislation for A Diagnosis of the Public Procurement System in Kenya public procurement.

This specific procurement legislation is also complemented by guidelines from both Treasury and the Public Procurement Regulatory Authority. The preamble to the Public Procurement and Asset Disposal Act, 2015 states that the overarching objective of the law is to give effect to Article 227 of The Constitution; to provide procedures for efficient public procurement and for assets disposal by public entities; and for connected purposes. The legislation, including the regulation is very prescriptive with the specific procurement processes well-articulated.

The PPDA provides for the roles of the treasuries and both levels of government, establishes the various organs to oversee and regulate the procurement entities which also have within them specific committees with specific functions in the procurement process. This process is regulated through regulation of procurement methods, timelines, standards and grounds for debarment. Members of the various committees within the procurement entities are established to provide the necessary checks and balances and are individually liable for actions that offend the Act. The PPADA has since the promulgation of the Constitution undergone amendments to provide for reduction time of requests to advertise tenders, removal of tender security for certain cadre involving Youth, Women and Persons living with Disability and setting aside 30% of public tender for disadvantaged groups. The number of days for the pre-qualification process has been reduced from 14 to 7 days and submission of restricted tenders also reduced from 14 to 7 days. Days allowed for tender evaluation has been reduced from 30 to 15 days with accounting officer given discretion to increase this to a maximum of 30 days. This are just a few of the reforms brought about by the amendments of the PPAD Act in its present form.

Key changes introduced by the newly gazetted The Public Procurement and Disposals Regulations, 2020 that came into effect on 2nd July 2020 have introduced key changes that need the attention of private parties participating in public procurement.

Pursuant to Section 4(2) (f) of the PPADA, Government-to-government procurements are exempt from the provisions of the Act which provides that procurements and disposal of assets under bilateral or multilateral agreements between the Government of Kenya and any other foreign government, agency, entity or multilateral agency are not procurements or asset disposals with respect to which the Act applies. This does not however remove said procurement from application of Article 227 of the Constitution of Kenya which requires that all procurements be undertaken in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. It is based on this provision that projects such as the Standard Gauge Railway financed through a concessional loan are undertaken with little visibility. Subject to section 42 mentioned above, details of the Standard Gauge Railway Project have been shrouded in secrecy. Nothing is known on the details of the award, let alone what method of procurement was used. Bits and pieces of information have been shared on social media with one of the daily newspapers running an article on it. However, details of the project are yet to be availed to the public, this being a concessional loan used for establishment of a public utility, a debt on the people of Kenya.

2.2.2 Public Service Commission Human Resource Policies and Procedures Manual for the Public Service, 2016

Based on Constitutional prescriptions on National values and public service values, The Public Service Commission reviewed the Manual in 2016; it has provisions on management of conflict of interest. Regulation J13 defines a “conflict of interest” to mean a conflict between the public duty and the private interests of a public officer in which the officer’s private capacity interests would improperly influence the performance of their official duties and responsibilities.

It provides that a public officer shall use the best efforts to avoid being in a situation where personal interests conflict or appear to conflict with the public officer’s official duties. Further, an officer shall not hold shares or have any other interest in a corporation, partnership or other body, directly or through another person, if holding those shares or having that interest would result in the public officer’s personal interests conflicting with his official duties. An officer whose personal interests’ conflict with his official duties is required to declare the personal interests to his supervisor or other appropriate body and refrain from participating in any deliberations with respect to the matter.

The Manual further states that a public official shall not award a contract, or influence the award of a contract to oneself, spouse or relative, a business associate, or to a corporation, partnership or other body in which the officer has an interest. Further, an officer who is serving on a full time basis shall not participate in any other restricted gainful employment.

Lastly, an officer shall not be engaged by or act for a person or entity in a matter in which the officer was originally engaged in as a public officer, for at least two years after leaving public office. The Manual defines “personal interest” to include the interest of a spouse, relative, or business associate. The Manual applies only to public officers in respect of whom the Public Service Commission exercises supervisory control.

2.2.3 Public procurement institutional framework

The Public Procurement Assets and Disposal Act, 2015 has established institutional framework to support the country’s procurement system.

The National Treasury has a responsible for public developing the Public Procurement Assets and Disposals National Policy. Other responsibilities include formulate, evaluate and research on public procurement policy and standards for the country. National Treasury is also mandate to design an efficient procurement management system, provide technical assistance, facilitate affirmative action for disadvantaged groups and issue guidelines with respect to procurement matters, National Treasury may present a national framework to support procurement administration and management of common user items for National Government.

Public Procurement Regulatory Authority (PPRA)

Section 8 of the Public Procurement Assets and Disposals Act 2015 establishes the PPRA, which is a body corporate. The Authority’s management rests on a Board. The PPRA is a renamed regulatory authority from its former function mainly as an advisory body.

The mandate of the Authority is to enforce the Act through monitoring procurement entities for compliance for the procurement law. It also has a mandate to ensure enforcement of preferences and implementation of national values and principles in respect to procurement. Monitoring is done through training, inspections and reports for a better functioning of the procurement system. The Authority also

has a mandate to investigate and act on complaints received on procurement and assets disposals from stakeholders, research and create a central repository or data base for public procurement amongst other functions.

The Authority may seek information from public entities, investigate and debar an entity from participating in public procurement.

Sections 27 of the PPAD Act establishes the Public Procurement Administration Review Board. The Review Board is the central independent Appeals Board. This unincorporated Board comprising 15 members has a mandate to access its services across the country.

The role of the County Treasury is similar to that of the National treasury but is limited to County level.

Internal Organization of public entities

Section 45 (1) mandates Accounting Officers (AO) to establish systems and procedures to facilitate decisions for procurement and disposal of assets. The AO is directly responsible for the public procurement and disposal processes and appointing of ad hoc committees for each procurement. The Act prescribes for qualification for appointment of members to the various procurement committees. The Act under section 49 provides for establishment of a procuring agency at national or county for purposes of procurement and distribution of sector specific goods, services or works. On behalf the procurement entities. This is to enable consortium buying.

2.2.4 Regulatory Compliance

Compliance to Procurement Procedures

Compliance to procurement procedures is the most important factor in ensuring optimum utilization of the scarce budgetary resources in order to ensure value for money is achieved. Section 9 of the PPAD Act mandates the Authority to guarantee compliance with procurement procedures under the Act. Broadly, compliance monitoring includes: review of annual procurement plans; review of mandatory reports; procurement assessments; procurement reviews; follow-ups on action plans; procurement inspections; and audit of procurement contracts. This is an onerous task to the Authority in monitoring and reporting the overall functioning of the public procurement system considering the numerous procuring entities to be covered is estimated at about 40,000.

Analysis of the Annual Reports for the period 2008/2009 to 2017/2018 indicates mixed results. On procurement assessments, the compliance level for the assessed procuring entities was only 12 percent during the Fiscal Year 2008/2009. When the Authority evaluated the level of compliance with the Act by the procuring entities against pre-set criteria in the Compliance Monitoring Manual, the compliance rating improved to 55.5 percent by Fiscal Year 2017/2018. This was considered a moderate compliance level given the compliance rating was below the cut-off score of 60 percent. In the same assessment, the risk rating was also found to be moderate at only 44.5 percent. The low compliance rating demonstrated a high risk rating which required urgent risk mitigation measures by management of the procuring entities in order to address the issue of non-compliance with law. Other causes for non-compliance cited in the assessments were failure by procurement entities to use appropriate procurement methods in their procurement processes. Bid documents were also found to be lacking adequate specification of requirements, non-adherence to evaluation criteria and use of alternative procurement methods including restricted tender and request for quotations without fulfilling the conditions for use of such methods.

On Mandatory Reports, compliance issues identified include, failure by procuring entities to submit mandatory reports to the Authority, late submissions of the mandatory reports, submission of incomplete reports with incomplete information and no attachments, failure to submit the reports in prescribed format, use of direct procurements and termination of procurement proceedings which do not meet thresholds set in law. However, the Authority put in place a mechanism to remedy the situation by developing simpler user friendly reporting templates, providing technical support to procuring entities in need and enforcing compliance by rejecting non-compliant and late reports.

Average compliance level on procurement inspections of procuring entities averaged 55.9 percent which is considered marginally compliant with a moderate risk score of 44.1 percent by Fiscal Year 2017/2018. The main compliance issue being failure to maintain complete procurement files and failure to submit mandatory reports to the Authority. Procurement Audits are compliance requirements which are undertaken to ensure that procurement systems and processes are complied with as provided in the Law. Key indicators include institutional arrangements, procurement processes and management of contracts. Audits were for the 47 County Governments and Country Assemblies during the Fiscal Year 2017/2018. The average compliance score was 39.7 percent which is considered non-compliant and a high risk level of 60.3 percent for County government. The score of 46.6 percent on compliance with procurement audits and a risk score 53.4 percent for County Assemblies.

2.2.5 Professional Competence

Inadequate competence amongst procurement personnel is cited as a material important blockage for further improvements in the procurement system. There are great disparities across government. Some Ministries have highly professional units and procure for large amounts on a yearly basis, whereas others are in dire need of assistance (OECD, 2007). This disparity is affirmed by the findings of the annual assessment and reviews undertaken by the PPRA over a period of five years, which indicated that out of 14 procuring entities assessed for the reporting period ending June 2018, all had established procurement functions as required except 1 and some of the procurement functions were under staffed while a few of the staff were not members of Kenya institute of Supplies Management meaning they were not professionally qualified at the time of the assessment. Sometimes, due to low competency levels, special expertise may be needed to prepare the technical specifications, scope of work and terms of reference. This situation, If not addressed many lead into huge delays as periods taken in identifying and hiring an expert is another independent activity.

On a stronger and positive note however, the government has, in addressing the challenges of inadequate professionalism in procurement competencies taken important steps in recent years to establish a sound basis for a professionalized procurement discipline. One example is the introduction of the Revised Scheme of Service for Supply chain management Personnel in which clear provisions for the qualifications, skills and experience required for appointment of procurement professionals at various levels are made. The Scheme is used in the recruitment of procurement officers by the Public Service Commission. Capacity building programmes for the County governments as provided in the PPDA is also being implemented by The National Treasury and Planning since 2018 in collaboration with the PPRA. Under the programme, sensitization of all the 47 Counties' leadership, both at Executive and Assembly levels, and the Public Finance Management Staff has been undertaken between 2014 and 2018 with participants drawn from officers of procurement entities, Special Interest Groups and SMEs totaling 39,545 being sensitized.

4.1 Results and Discussions

Public procurement laws and reforms have played a critical role in streamlining this critical function of the public service and the economy. The basis for having a functional public procurement support is evident in legislation and established institutional framework. Kenya has implemented the procurement process based on a law that is sound, having been modeled from the UNICITRAL procurement model law. That notwithstanding, the revised Public Procurement Assets and Disposals Act, 2015 has improved on the loopholes experienced post constitution promulgation and beyond.

An interview held with a key person involved in the day to day operations of a procurement entity domiciled in one of the security organs with government confirmed that for them, the procurement process is followed to the letter and spirit of the law. Delays across the practice is minimal, unlike 15 to 20 years ago, when issues of glaring malpractice were common. These have reduced tremendously. Needs assessments are conducted by the user service and the procurement process conducted without delay. This was noted in the OAG Report for National government

However, from the reports reviewed, challenges still exist mainly due capacity issues both at the Regulator point of view and procurement entities. Enforcement of the Law is weak and uptake of reform is slow.

Enhancement of e-Procurement

Automation of processes not only saves time but cut costs as it is efficient. Reengineering through an online platform will enable accuracy in monitoring and reporting which are a big component of regulation in public procurement. Economies that have advanced e-procurement platform, not only have improved performances but have a range of services offered. Transparency and Accountability is increased when there is less interaction with humans and this results in trust of the practice.

Enhanced Monitoring and Reporting

Monitoring and reporting is at the core of regulation of public procurement. As has been observed in this analysis, the body that is vested with regulating the procurement system in the country seems to lack capacity to adequately implement this function. The PPRA should learn from the Banking.

Strict Enforcement of the Law

Law is not developed and enacted in vain. Why is it difficult to fully implement the Public Procurement Law and related legislation? Was a Regulatory Impact assessment undertaken to establish the workability of the Law? Citizens need to hold responsible offices to account when legislation is breached.

Citizen Awareness and Education

It is Government responsibility to provide civic education to its people. This is a practice that is lacking in Kenya generally, the issue always being lack of resources to conduct citizen empowerment programmes. However, Civil Society Organizations (CSOs) having played a big role in informing citizen on issues of accountability, need to continue filling this gap. Without an

informed citizen, government cannot be held to account which then gives room to continued impropriety.

5.1 Conclusions and Recommendations

Recommendations on Award of Contract

Integrity issues associated with award of contract could be addressed through a holistic risk mitigation and corruption prevention measures given that integrity risks exist throughout the public procurement process. Focus on integrity measures should be in all stages in the procurement cycle and all types of risks should be identified and addressed as well in order to achieve administrative compliance and prevent the risk of political interference in the identification of needs, bid-rigging and determination of tender award.

Recommendations on Contract Management/Performance

- i. Develop requirements for internal controls, compliance and anti-corruption programmes for suppliers, including monitoring.
- ii. Implement contract and supplier management involving completing drafting and finalizing the contract while ensuring all obligations are filled and defined within the document.
- iii. Develop a plan for meeting quality and other inspection requirements to ensure acceptance.
- iv. Ensure oversight and control of inventory and making sure the product is in the right place at the right time.
- v. Designate Project Manager with required expertise to carry out the day-to-day contract management and supervision and to perform the duties of a contract administrator.

Recommendation for enhancing integrity and curbing corruption in all stages of the public procurement cycle

Employ a holistic approach by enhancing integrity and curbing corruption in public procurement by focusing integrity measures in all steps in procurement process in order to reduce risks in all stages including implementing mutually supportive principles which may, directly or indirectly, prevent corruption and stimulate good governance and accountability in public procurement. These principles include: Integrity; Transparency; stakeholder participation; accessibility; e-procurement; and oversight and control.

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