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## Abstract

Procurement challenges experienced by the counties and national governments contravene the key principles underpinning public procurement, which include value for money, ethical standards, competition, transparency and accountability. Thus, county and national governments extensively violate the general procurement rules provided in legislation. The causes of public procurement challenges experienced by the counties and national governments revolved around inadequate procurement planning, lack of pre-qualification of suppliers, failure to follow due process, lack of adequate numbers of qualified procurement professionals, poor inventory management and lack of capacity building/training. Consequently, the effects of the procurement challenges experienced include offences of financial misconduct, low absorption of resources, delays in project implementation, wasteful spending and unauthorized spending. Owing to the fact that national policy objectives on devolution reforms are not being fully met, counties and national governments need to take into account various procurement considerations. These include development of procurement plans; pre-qualification of suppliers; adherence to due process; development of staff capacity and inventory management.

**Keywords:** *Compliance, Public Procurement, Regulations & Kenya.*

## 1.1 Introduction

Public procurement is an important function of government for several reasons. First, the sheer magnitude of procurement outlays has a great impact on the economy and needs to be well managed. Indeed, in all countries in the world, estimates of the financial activities of government procurement managers are believed to be in the order of 10% – 30 % of GNP (Deloitte, 2019). Procurement encompasses the whole process of acquiring property and/or services. It begins when

an agency has identified a need and decided on its procurement requirement (Githinji & Were, 2018). Procurement continues through the processes of risk assessment, seeking and evaluating alternative solutions, contract award, delivery of and payment for the property and/or services and, where relevant, the ongoing management of a contract and consideration of options related to the contract. Procurement also extends to the ultimate disposal of property at the end of its useful life (Ndemo & Achuora, 2020).

The basic principles of good procurement practice include accountability, where effective mechanisms must be in place in order to enable procuring entities spend the limited resources carefully, knowing clearly that they are accountable to members of the public; competitive supply, which requires the procurement be carried out by competition unless there are convincing reasons for single sourcing; and consistency, which emphasizes the equal treatment of all bidders irrespective of race, nationality or political affiliation (PPOA, 2015).

Government officials and elected leaders have increasingly come to realize that public agencies must utilize ICT in order to enhance the procurement processes in the public sector. Faced with tight budgets and a retiring workforce, today's government agencies are operating in an environment defined by the need to 'do more with less'. Public authorities are expected to provide excellent service to their constituents in an effective and transparent manner, all the while working under constant resource constraints by adopting ICT. According to Transparency International Kenya (2017), ethics are the moral principles or values that guide officials in all aspects of their work. Ethical behavior encompasses the concepts of honesty, integrity, probity, diligence, fairness, trust, respect and consistency. Ethical behavior includes avoiding conflicts of interest, and not making improper use of an individual's position.

Over the years, the government came up with numerous policies and laws to govern public procurement until 2007 when it enacted the Public Procurement and Disposal Act, 2005 (the PPDA, 2005), the first of its kind in the country. The promulgation of the new constitution in 2010 outlined principles for public procurement and disposal (The Constitution of Kenya, 2010) [Chapter 13 (232)]. These are fair, equitable, transparent, competitive and cost-effective. In 2016, the government ratified the Public Procurement and Asset Disposal Act, 2015 (the PPDA, 2015) which repealed the PPDA, 2005. The Act applies to all state organs and public entities with regard to planning, procurement processing, inventory and asset management, disposal of assets as well as contract management (The Kenya Gazette Supplement, 2015). The act also lists institutions that can be termed as public entities as well as outlining the regulatory bodies, their functions, offences and sanctions (AfriCOG, 2019).

Public procurement being a core function in an economy is subjected to the dynamic changes and trends of the market and interests both from the Kenyan public and development partners. The public procurement function experiences a myriad of challenges due to the growing government expenditure and funding from development partners (Muange & Chirchir, 2016). It is therefore important to profile the challenges faced by public procurement partners to ensure cost-effective utilization of government resources.

## **1.2 Statement of the problem**

Regulated public procurement plays a very vital role to the economy. In Kenya, procurement reforms through enactment of procurement laws and establishment of watchdog body such as Public Procurement Oversight Authority (PPOA) has improved transparency, accountability and achievement of value for money in public expenditures. PPOA (2019) procurement review of

public institutions and counties report that established that based on a rating scale of 1 > 10, many counties and national governments ratings on the implementation of public procurement regulations fell between 3 > 5 out of 10. Compliance levels continue to be low in public entities in Kenya despite efforts by the Public Procurement Oversight Authority (PPOA) to put in place measures to improve compliance (PPOA 2017). This poses a problem of slow implementation of public procurement regulations than a desired rating of any figure above 5 in relation to the rating scale. It is thus evident that there has not been impetus to implement public procurement regulations in public institutions.

This leaves a research gap that has necessitated this study since the public procurement regulations were established to counter some of the problems that were rampant before the regulations were established but to date procurement within the public sector still faces some challenges. To achieve the intended objectives, the study will seek to answer the following questions: How can the Public Procurement regulations be implemented at more robust speed in public institutions? What are the current challenges of that are affecting the existing regulations

### **1.3 Objective of the study**

The objective of the study was to assess the challenges influencing compliance to public procurement regulations in Kenya.

### **1.4 Research Question**

What are the challenges influencing compliance to public procurement regulations in Kenya.

## **2.1 Theoretical review**

### **2.1.1 Legitimacy Theory**

The legitimacy theory by Suchman (1995) states that the organization has the mandate to state its activities to the stakeholders, more specifically to the public and state the benefits the society will get from it. Legitimacy is a perception that the organization are acceptable in the constructed system of behavior in the society that it exists in Suchman (2015). Legitimacy theory therefore brings in good understanding in the government procurement systems. The concept of legitimacy strongly suggests that the social contract which is between the government and the public can be eliminated. In government procurement context, there are issues (such as non-compliance to the set laws) that could endanger the legitimacy practice (Jibrin, Ejura & Augustine, 2014).

In accordance to the legitimacy theory, government officers' choices of legitimizing implementation strategies are focused on the interpretation of the local authority or department involved. Different government officers will be likely to have different ideas of what is expected of them from the public and whether the department or agency or local authority is viewed by the society as complying with the expectations that is expected from them. The legitimacy theory argues that officers makes the disclosure practice as a way of building a good reputation among the stakeholders and the society at large.

## **2.2 Challenges influencing compliance to public procurement regulations in Kenya.**

### **2.2.1 Enforcement by Relevant External Agencies**

In Kenya, the PPRA (2015), being the main procurement oversight body conducts investigations on any complaint of non-compliance with the procurement rules and regulations and makes recommendation to the Ethics and Anti-Corruption Commission (EACC), a body established



under the Constitution for its assistance in enforcing compliance with the procurement rules by prosecuting suppliers and or procurement or public officers found to have acted corruptly in the public procurement process. Working also in the area of ensuring transparency and compliance to procurement rules in Kenya are the Kenya National Audit Office and the Internal Auditor General (IAG). IAG is responsible for the internal audit function across government especially in the area of procurement. This internal audit is governed by the Public Financial Management Act, and is carried out on an ongoing basis throughout the Fiscal year and in accordance with the required annual work plan thus providing the basis for a sound internal audit mechanism (PPRA, 2015).

### **2.2.2 Procurement Procedures**

There is a Public Procurement and Regulatory Authority established The Public Procurement and Asset Disposal Authority (PPADA, 2015) the Act to ensure that procurement procedures are complied with, and to generally monitor and assist with the implementation and operation of the public procurement system. The main steps are as follows: invitation to tender, preparation of tender documents in accordance with the PPADA (2015), submission and receipt of tenders before set deadline, opening of tenders and the evaluation of tenders. The invitation to tender must be advertised at least twice in a newspaper of nationwide circulation. Muendo, (2015) concluded that the PPADA (2015) provide a number of rules of conduct for the whole procurement process which all the procuring entities need to comply with. The aims of the directives (Suchman, 2015) are, firstly, to avoid discrimination (for instance, on grounds of nationality) by providing a set of coherent rules (for instance, on objective specifications, types of award procedures and time limits), and secondly to ensure transparency by requiring publication in the public media. KIPPR (2019) found out that sound public procurement policies and practices are among the essential elements of good governance. According to Thai (2018), the basic principles of good procurement practice include accountability, where effective mechanisms and must be in place in order to enable procuring entities to comply with the set rules regulations.

The PPDA 2015 was a timely document, which could ensure that the government receives and therefore provides the best quality goods, services and works to its citizens, at the best price. However, in reality, this has not been the case as issues of corruption, incompetence of staff, unwillingness of governing bodies to crack the whip on errant public officials and companies have marred the procurement process. According to the Kenya Corruption Report (2017) for example, Kenyan public procurement is subject to rampant corruption and bribery. Numerous companies in the country report that it is common for them to be asked for bribes and irregular payments during the process of awarding public contracts. PriceWaterhouseCoopers (2019) alleges that one in every three companies has encountered procurement fraud in the last two years. This was most common during vendor selection and widespread to all state and county departments as well as parastatals. A report by the Ethics and Anti- Corruption Commission (EACC) (2016) claimed that procurement fraud is quite rampant at the county level.

Although the Public Procurement Regulatory Authority (PPRA) and the PPDA, 2015 outline the public procurement regulations as well as sanctions and penalties given to companies found guilty of going against the law during procurement, corruption cases are still prevalent. For example, in 2016, Kenya Power was accused of procurement fraud when it gave a contract to a Chinese company that had been in existence for only 11 months. This is in direct contravention to the law that requires companies to have audited reports for the last 18 months (AfriCOG, 20219). Moreover, this contract was Kshs. 1.2 billion higher than the bid presented by the lowest bidder. Furthermore, numerous public officials like former finance ministers and other senior government

officials have been linked to extensive bribery schemes involving different state contracts worth \$700 million that were given to fictional companies (AfriCOG, 20219). Consequently, a number of infrastructure projects were not delivered and so far, no one has been held accountable for the same.

### **2.2.3 Public Procurement Law Compliance**

World Bank (2020) stipulated that compliance occurs when the target performs a requested action, but is apathetic about it, rather than enthusiastic, and puts in only a minimal or average effort. However, as an organizational outcome, compliance has traditionally been understood as conformity or obedience to regulations and legislation. Familiarity with procurement regulations is a significant predictor of compliance with procurement regulations. The implication is that the more procurement personnel are familiar with the regulations, the more compliant they will be.

Procurement encompasses the whole process of acquiring property and/or services. It begins when an agency has identified a need and decided on its procurement requirement. Procurement continues through the processes of risk assessment, seeking and evaluating alternative solutions, contract award, delivery of and payment for the property and/or services and, where relevant, the ongoing management of a contract and consideration of options related to the contract. Procurement also extends to the ultimate disposal of property at the end of its useful life (Waters, 2019).

The procurement regulations compliance which is contained in Public Procurement and Asset Disposal Act (2015) is mainly used to govern all the public procurement and disposal process in the public sector. It was made through the act of parliament to establish procedures for efficient public procurement and for the disposal of unserviceable, obsolete or surplus stores, assets and equipment by public entities and to provide for other related matters. In reference to Kenya Gazzette Supplement for the Act (PPADA2015), the purpose to establish procedures for procurement and the disposal of unserviceable, obsolete or surplus stores and equipment by public entities to achieve the following objectives; to maximize economy and efficiency; to promote competition and ensure that competitions are treated fairly; to promote the integrity and fairness of those procedures; to increase transparency and accountability in those procedures; to increase public confidence in those procedures and to facilitate the promotion of local industry and economic development (AfriCOG, 2019).

While there have been developments in the compliance to the Public Procurement and Disposal Regulations (Mukasa, 2019), there are still challenges to be addressed in public secondary schools to realize full benefits of compliance to public procurement and Asset Disposal Regulations. Some of the notable challenges include; organizational culture lack of enforcements by the external Agencies, lack of staff training and awareness and procurement procedures.

### **2.2.4 Use of ICT in Procurement Process**

According to the World Bank (2019), a significant number of nations have spent more on information communication technology (ICT) over the last decade than on traditional capital investments such as roadways, airports, water purification plants and the like. Those governments investing heavily in e-governance initiatives anticipate that these efforts will transform governance. Eventually how governments operate, how citizens interact with their governments, as well as what role government plays in society will change.

The ICT sector within government has seen significant reform efforts, as well as notable investments in ICT procurement. Those attempting to reform the procurement process argue that the current system is broken, and unsuitable for the demands of modern governance (Thai, 2017). As a result of various efforts to limit the opportunity for corruption, increase accountability, and promote transparency, procurement has witnessed tremendous pressures to change current processes. Investing in ICT, primarily through e-procurement, has been an attempt to change how government procurement operates. Eventually by adopting digital platforms, procurement would be better suited to achieve the advances of modern government (World Bank, 2020).

The PPOA launched the tenders' portal in 2008 as a link under its website, whose domain name is [www.ppoa.go.ke](http://www.ppoa.go.ke). The portal can be reached under [www.tenders.go.ke](http://www.tenders.go.ke). The tender portal acts as a database storage for tender advertisements and contract awards only worth (Kshs. 5,000,000/=) five million and above. It serves as an online archive for all government tenders and further enables procuring entities to advertise their tenders online and suppliers both locally and internationally are able to access the advertisement and participate in the tender (Deloitte 2019).

The tender portal was launched with the intention of: acting as a database for tender advertisement and contract awards worth five million and above; aiming to improve access to government tenders and other any other Procuring Entities advertising tenders; aiming at Suppliers being able to view tender documents online before purchasing; aiming to encourage effective competition; and aiming at enhancing the implementation of eProcurement. Over the years, procuring entities and potential bidders are using the portal more and more as the increasing numbers of posted tender notices and contract awards are proving. Nevertheless, since not every procuring entity or potential bidder in Kenya has internet access, PPOA also publishes tender opportunities and contract awards on a monthly basis in three nationwide circulated daily newspapers.

### **2.2.5 Staff Training**

The procurement process within the public sector in Kenya follows steps as enumerated in the PPADA, 2015. According to Rossi (2019), compliance with formal elements gives an indication of knowledge of the rules. Hui, et al (2017) noted that one of the factors that causes non-compliance with the procurement regulations is the level of familiarity or awareness with the procurement regulations. Oluka (2020) maintained that public purchasers will comply with the rules if they perceive them as clear. Oluka (2020) added that the simple fact that the management of a public agency is familiar with the essence of the EU rules could function as an organizational incentive to comply. Educating and training public purchasers will be an effective tool for increasing the compliance with the directives. In Uganda, a study by Eyaa (2018) found out that lack of familiarity with procurement rules results into poor compliance levels.

A study by Fisher (2019), compliance arises from a dynamic and continuous training. A report by the PPOA (2013) and the Kenya Institute of Supplies Management (KISM, 2018) stated that the procurement staffs in many procuring entities suffer from a general lack of information about the legal frame- work, principles, procedures and processes of procurement. Nonetheless, it is also possible that those who are very much aware of the regulations know it so well that they know how to beat the loopholes to their advantage. It is worth noting that the ambiguity in the public procurement procedures may provide a chance for dubious acts including opaque tendering and discriminate supplier selection which may progress into poor compliance levels. Other studies have also noted that deficient awareness of the procurement procedure by all the internal stake holders may affect compliance. Hui et al.,(2019) opinioned that procurement officers must be

trained and made aware of all regulations in relation to procurement and related procedures in public institutions so that they can comply with such rules while undertaking the procurement activities.

The study by Amembe, Nyaboke, Osoro and Mburu (2018), which sought to determine the challenges affecting the public procurement process in Kenya, also indicated that the lack of skilled personnel is the major problem hindering the assimilation and effective use of ICT in developing countries for the area is technical wanting and quiet involving . This is in line with the study conducted by Raymond (2018) in the United States, which argues that even though the country boasts of over 500,000 professional procurement personnel, only a negligible 10% belong to a professional body while the remaining are unaware that the country has ethical and legal standards that govern procurement. This lack of knowledge thus makes it impossible for the people involved to conduct the procurement process professionally, leading to numerous problems.

Procurement challenges experienced by the counties and national governments contravene the key principles underpinning public procurement, which include value for money, ethical standards, competition, transparency and accountability (Ndemo & Achuora, 2020). Thus, counties and national governments extensively violate the general procurement rules provided in legislation. The causes of public procurement challenges experienced by the counties and national governments revolved around inadequate procurement planning, lack of pre-qualification of suppliers, failure to follow due process, lack of adequate numbers of qualified procurement professionals and poor inventory management. Consequently, the effects of the procurement challenges experienced include offences of financial misconduct, low absorption of resources, delays in project implementation, wasteful spending and unauthorised spending.

Owing to the fact that national policy objectives on devolution reforms are not being fully met, counties and national governments need to take into account various procurement considerations. These include: development of procurement plans; pre-qualification of suppliers; adherence to due process; development of staff capacity; and inventory management

### **3.0 Conclusions**

The most prevalent challenges in the public procurement process is the selection of the most suitable procurement methods, with appropriate justifications, record keeping is also a major challenge in the sense that very few public entities have designated records management officers; therefore public procurement entities in Kenya need to improve on record keeping, data and documentation controls and contract management processes and follow up mechanism have to be established by the oversight authority to ensure that firms are conforming to the existing procurement laws.

The high value of the transactions in the public procurement process along with pressures to lower costs could result in bribery, corruption and other practices which could be deemed unethical. In the public sector, it is important that procurement professionals exhibit the highest levels of ethics through being impartial, professional and transparent in the day to day conduct of procurement activities. Ethical procurement best practice starts with the employees in procurement following an ethical code which dictates their behavior and actions while conducting business. Though the Public Procurement and Disposal Act (2015) provides for procuring entities to practice confidentiality and disclose conflict of interest in the procurement process, ethical procurement practices should be extended to all stakeholders in the procurement cycle. Ethical procurement



should also include an understanding of suppliers' operations and the procurement professional should offer guidance and support when improvement is necessary or appropriate.

The adoption of ICT in Kenya is relatively low; hence, there are still many factors that need to be considered. Based on the literature review, it is certain that the adoption of ICT would bring about enormous opportunities for Kenyan public entities. It is necessary for the Kenyan government to develop a generic ICT plan that will assist its public entities to successfully adopt ICT, and technological infrastructures should be put in place by the government to support ICT adoption. For Kenyan public entities to remain competitive or to become successful, it is important for entity leaders to understand the critical success factors related to ICT adoption. This involves the Kenyan government making more funds available to public entities and putting some structures in place to ensure a successful investment.

#### **4.1 Recommendations**

Public investment is prone to high inefficiencies, which emanate from cost overruns, benefit shortfalls, waste and low completion rates. As such, the government need to take into account various considerations.

##### **Development of staff capacity**

To improve budget execution, counties and national governments should consider improving the capacity of procurement staff in order to improve operational efficiency and avoid delays in the implementation of development activities. Continuing education and capacity enhancement, based on lessons learnt from past experiences, should also be encouraged. Part of enhancing citizen capacity in procurement matters is the distribution of simplified procurement manuals (based on the procurement rules) to ensure all procurement processes are clear and well understood by the public.

##### **Development of procurement plans**

All departments should develop work-plans to enable the procurement departments to prepare harmonized annual procurement plans and cash flow projections to enhance implementation of development projects. Effective harmonization of counties and national governments procurement procedures with national government procedures would help speed up the procurement process and enhance efficiency.

##### **Pre-qualification of suppliers**

For efficiency, the government could advertise for a prequalification exercise for the provision of regular goods and services they need in a given period and conduct a comprehensive exercise that helps them identify service providers for each category that they can use in that given period. Training of local suppliers to enhance competitiveness in the procurement processes could also help in diversifying the service providers and enhancing competitiveness.

##### **Following due process**

Since the PPOA is mandated to provide oversight of the procurement process in Kenya, it should do so regularly in order to help counties and national governments comply with required procedures. Any procurement that does not follow due process should be nullified and the necessary disciplinary action taken to deter such cases in future.

### **Inventory management**

The government should ensure the timely management of procurement procedures to guarantee timely delivery of services. Additionally, the simultaneous procurement of goods could save on costs. Careful selection of procurement teams with a major focus on integrity, including signing of an ‘integrity pact’ by every member of the team involved in any aspect of the procurement process, should be adopted.

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