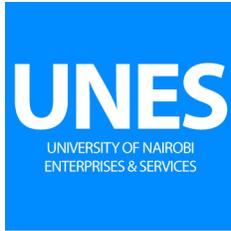




THE LONG TERM POLICY FRAMEWORK FOR PUBLIC PROCUREMENT IN KENYA

DRAFT ZERO

SEPTEMBER 2009



University of Nairobi

Prepared by:

Prof. Madara Ogot (Team Leader)

Dr. Samuel Nyandemo

Mr. John Kenduiwo

Mr. Joseph Mokaya

Dr. Waithaka Iraki

Research Assistants:

Ms. Rita Muriuki

Ms. Mariana Mulinge

Table of Contents

List of Tables	iii
List of Figures	iv
Acronyms	v
Executive Summary	1
1 Introduction	12
2 The Size and Structure of Public Procurement in Kenya	14
2.1 Public Procurement Reforms in Kenya	18
3 Philosophy Underpinning Public Procurement	20
3.1 Definition	20
3.2 Value for Money	22
4 Core Principles and Pillars	24
4.1 Transparency and Accountability	24
4.2 Efficiency	25
4.3 Consistency	25
4.4 Open and Effective Competition	26
4.5 Ethics and Fair Dealing	27
4.6 Integration with other Policies	28
4.7 Legal Framework	30
4.8 Recognition of International Trade Treaties and Interests	32
4.9 Due Process and Dispute Resolution	33
4.10 Electronic Procurement (e-procurement)	33
4.11 Outsourcing Procurement	36
4.12 Green Procurement	36
4.13 Professionalism	37
4.14 Capacity Development	38
4.15 Innovation	42
4.16 Procurement Collaboration	42
4.17 Increasing Awareness	43
4.18 Supplier's Charter	43
5 Governance	44
5.1 Governance Issues	44
5.2 Centres of Procurement Expertise (CoPE)	47
6 Classification for Public Procuring Entities	48
6.1 Proposal for Re-Classification	55
7 Public-Private Partnerships	56
7.1 Definition	58
7.2 Characteristics of Successful PPPs	60
7.3 Challenges of PPPs for Public Procurement	62
7.4 PPPs and Vision 2030	63
8 Risk Assessment and Management	64
9 Emerging Issues	65
9.1 Constituency Development Fund (CDF)	65
9.2 Profit-Oriented Enterprises	70

9.2.1	Introduction	70
9.2.2	Strengths of the Act for Profit-Oriented State Corporations.....	74
9.2.3	Challenges the Act presents to Profit-Oriented State Corporations	75
9.2.4	Proposals to Enable a Competitive Environment for Profit-Oriented State Corporations.	76
9.2.4.1	Proposed Legal Framework for Profit-Oriented State Corporations.....	76
9.2.4.2	Decentralization of the Oversight Functions of the PPOA	77
9.3	Micro, Small and Medium Enterprises.....	77
10	Conclusions.....	79
APPENDICES.....		80
The Roles and Responsibilities of the Public Procurement Oversight Authority		80
The Roles and Responsibilities of Public Procurement Administrative Review Board		81
The Roles and Responsibilities of the Public Procurement Oversight Advisory Board....		82
The Roles and Responsibilities of Kenya National Audit Office.....		83
The Roles and Responsibilities of Kenya Anti-Corruption Commission		85
The Roles and Responsibilities of Parliamentary Accounts Committee.....		86
The Roles and Responsibilities of Kenya Institute of Supplies Management		87
The Roles and Responsibilities of the Centres of Procurement Expertise		88

List of Tables

Table 1: Estimated size of public procurement in Kenya (Kshs. Millions).....	16
Table 2: Estimated size of public procurement by City and Municipal Councils in Kenya (Kshs. millions).....	17
Table 3: Estimated Size of Public Expenditure by Town and County Councils in Kenya (Kshs. Millions)	17
Table 4: Summary of Public Procurement Reforms in Kenya.....	18
Table 5: Current classification of each of the Procuring Entities	48
Table 6: Procurement Thresholds for Category A Procuring Entities	49
Table 7: Procurement Thresholds for Category B Procuring Entities.....	49
Table 8: Procurement Thresholds for Category C Procuring Entities.....	49

List of Figures

Figure 1: Estimates of Procurement Spend from various Ministries Currently in Category A for 2009/2010.....	51
Figure 2: Estimates on Procurement Spend for Selected State Corporations currently in Category A (Numbers will change once exact figures are obtained. Chart uses 33% of budget as an estimate).....	52
Figure 3: Estimates on Procurement Spend for Selected Universities, Colleges and Semi-Autonomous Government Agencies currently in Category B (numbers will be changed once exact figures obtained. Chart uses 33% of budget as an estimate)	53
Figure 4: Expected Contribution from PPPs in the Medium Term Plan (2008-2012).....	64
Figure 5: CDF allocations for the years 2003/2004 - 2008/2009.....	66

Acronyms

AGOA – African Growth and Opportunity Act

CDC - Constituency Development Committee

CDF – Constituency Development Fund

CGP – Central Government Procurement

COMESA – Common Market in East and Southern Africa

CoPE – Centres of Procurement Expertise

DBFMO – Design, Build, Finance, Maintain and Operate

DPC - District Project Committee

EAC- East African Community

e-GP – Electronic Government Procurement

EPA – Economic Partnership Agreement

EU – European Union

EPZA – Export Processing Zone Authority

ESA – East and Southern Africa

GDP – Gross Domestic Product

GNP – Gross National Product

IMF – International Monetary Fund

JKUAT – Jomo Kenyatta University of Agriculture and Technology

KACC – Kenya Anti-corruption Commission

KASNEB – Kenya Accountants and Secretaries National Examinations Board

KENAO – Kenya National Audit Office

KEPHIS – Kenya Plant Health Inspectorate Services

KEPSA - Kenya Private Sector Alliance

KIPPRA – Kenya Institute of Public Policy Research Analysis

KICC – Kenyatta International Conference Centre

LCC – Life Cycle Costing

MCP – Municipal Council Procurement

MDGs – Millennium Development Goals

MSEs – Micro & Small Scale

NARC - National Alliance Rainbow Coalition

NEMA – National Environment Management Authority

NHIF – National Health Insurance Fund

NMC - National Management Committee

NSSF – National Social Security Fund

OECD – Organization for Economic Co-operation and Development

PPARB – Public Procurement Advisory Review Board

PPOA – Public Procurement Oversight Authority

PPOAB – Public Procurement Oversight Advisory Board

PPPs – Private Public Partnerships

RFPs- Requests for Proposals

SMEs – Small and Medium Enterprises

TC – Tender Committees

TCP – Town Council Procurement

UK – United Kingdom

UNCTAD - United Nations Council for Trade and Development

WTO - World Trading Organization

Executive Summary

E.1 Introduction

Public procurement may be defined as the purchase of commodities and contracting of construction works and services if such acquisition is effected with resources from state budgets, local authority budgets, states foundation funds, domestic or foreign loans guaranteed by the state, foreign aid as well as revenue received from the economic activity of state. Public procurement thus means procurement by a procuring entity using public funds. The items involved in public procurement range from simple items or services, to large commercial projects such as the development of infrastructure including roads, power stations and airports. With government as a service provider, a basic measure of a successful or failed public procurement is manifested through quality and magnitude of the services it provides.

The size of Kenya Government procurement can be estimated using public expenditure figures. In principle, government expenditure on goods, works and services is public procurement. However, certain expenditures need to be netted out of these figures as they are not contestable and therefore do not qualify as public procurement. These include expenditure on social security pension transfers, interests on public debt, salaries of public sector employees, purchases of military material and subsidies. With these assumptions, Government expenditure for fiscal years ending June 30th 2002 to 2008 are shown in Figure E.1, with corresponding percentage to Gross Domestic Product (GDP) shown in Figure E.2. From the figures it can be seen that as percentage of GDP, Central Government procurement has been rapidly increasing from 5.8% in 2001/2 to 26.3% in 2007/8.

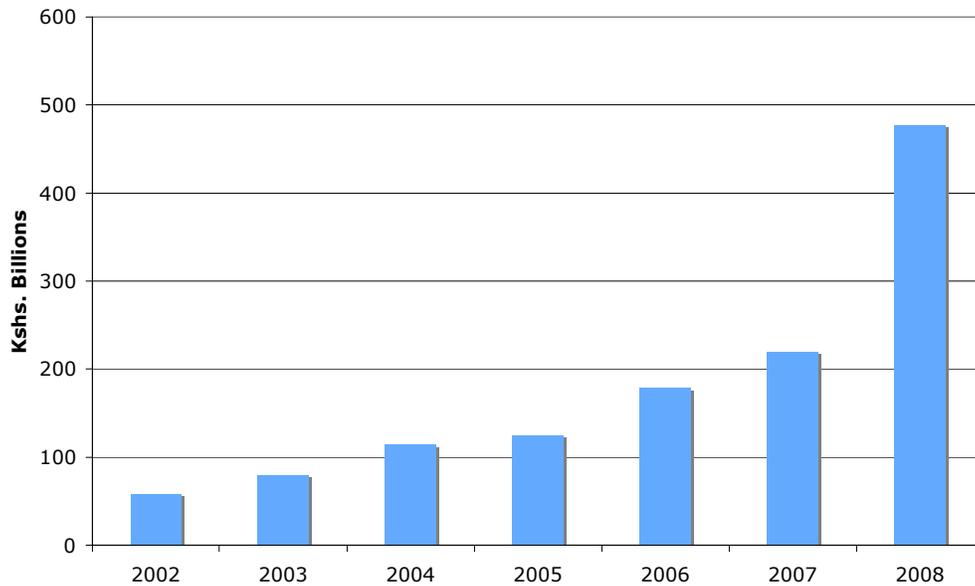


Figure E.1: Central Government Procurement 2002-2008

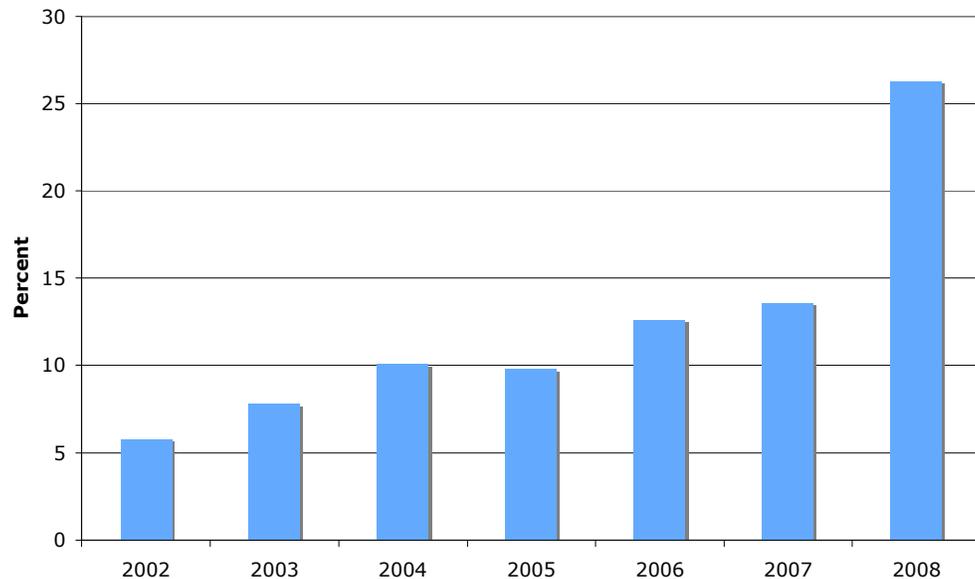


Figure E.2: Central Government Procurement as a percent of GDP

E.2 Value for Money

The concept of *value for money* is defined as the optimum combination of whole life cost and quality (or fitness for purpose) to meet the customer’s requirement. This definition enables a public body to compile a procurement specification that includes social, economic and environmental policy

objectives within the procurement process. “Whole life cost” includes quantitative and non-quantifiable costs and benefits. As part of *value for money*, due regard must be paid to other relevant organizational policies is important, for example, policies in relation to corporate social responsibility/sustainability. It equally means the best available outcome when all relevant costs and benefits over the procurement cycle are considered.

Value for money is an essential test for procuring entities to justify a procurement outcome. Price alone is not a sound indicator and procuring entities cannot necessarily get the best value for money by accepting the lowest price or bid. Best *value for money* therefore means going beyond the price to get the best available outcome when all relevant costs and benefits over procurement cycle are considered.

E.4 Core Principles and Pillars

Public procurement in Kenya should be based on eighteen core principles and pillars:

1. *Transparency and Accountability.* Government procurement processes, therefore, demands a high level of transparency and accountability through its purchasing of goods and services. Procuring entities should ensure there is openness and clarity on procurement policy and its delivery.
2. *Efficiency.* Encompasses the performance of the procurement process as cost effectively as possible and in a timely manner.
3. *Consistency.* The application of the procurement process should be the same across all procuring entities.
4. *Open and Effective Competition.* Provision of ample and equal opportunities for participation by interested and qualified suppliers of goods, works or services. Through an open and effective

competitive environment the government can get the best value for money and at minimum cost while making it possible for the suppliers/contractors to fully benefit from doing business within a regulated environment that safeguards against favoritism and profiteering.

5. *Ethics and Fair Dealing.* Under the Public Officers and Ethics Act (2003), it is an offence for those employed by contracting authorities in their official capacity to accept any gift or consideration as an incentive or reward for acting in a manner showing favour or disfavour for any person or entity. Under the act the courts will assume that any money, gift or consideration received from a person or organization holding or seeking to obtain a contract was received corruptly unless proven otherwise.
6. *Integration with other policies.* The long-term public procurement policy should pay due regard to other Government policies, rather than cut across them. The current overarching government policy is Kenya Vision 2030 and the corresponding First Medium Term Plan (2008-2012).
7. *Legal Framework.* Currently includes the Public Procurement and Disposal Act (2005), Public Procurement and Disposal Regulations (2006 and 2009), Supplies Practitioners Management Act (2007) and national case-law. The legal framework must in the near-term address three key areas: inter-agency collaboration, e-procurement and harmonization with other related Acts.
8. *Recognition of International Trade Treaties and Interests.* Kenya's external environment is significantly influenced by the changing international and regional trading arrangements. Procurement policy must recognize multilateral trading arrangements under the World Trade Organization (WTO) and the regional trading arrangement under the Economic Partnership Agreement (EPA) between the East and Southern African (ESA) countries and the

European Union (EU). In addition agreements under the Common Market for Eastern and Southern Africa (COMESA) and the East African Community (EAC) must come to bear.

9. *Due Process and Dispute Resolution.* Avenues must be established to allow disputes that may arise between suppliers and procuring entities to be resolved in a professional, impartial and timely manner.
10. *Electronic Procurement.* e-procurement is a range of technologies that facilitate automation of the procurement process. Benefits of e-procurement include enhanced transparency and compliance, increased performance and quality, and economic development. Implementation of e-procurement should not simply be engrafting electronic technology onto a paper-based procurement process, but should be a focus on reengineering the entire procurement process to take advantage of electronic innovations.
11. *Outsourcing.* Procuring entities may use the services of public or private procuring agents to advise them or manage their procurement process, especially where they lack the necessary capacity. Smaller procuring entities are especially encouraged to use the assistance of larger ones, who may have additional capacity for a fee.
12. *Green Procurement.* Is the purchase of products and services that are environmentally friendly, and that should have a lower impact on the environment over their whole life cycle than the standard equivalent. It involves the integration of environmental issues, such as pollution prevention and reduction of waste into purchasing decisions along with traditional factors such as price, performance and quality. Further, it encourages suppliers to safeguard the environment by producing goods or offering services that do not harm the environment or lead to heavy use of resources such as energy.
13. *Professionalism:* The procurement system requires the input of professionals with honed negotiating skills and a good grasp of market dynamics. The Public Procurement Act 2005

and Supplies Practitioners Management Act 2007 defines the procurement professional and spells out the requisite qualifications. Continuous education and training of procurement professionals within the framework established by the Act should be encouraged with the expressed aim of professionalizing public procurement.

14. *Capacity Development.* Continuous training and education on public procurement will ensure compliance, learning, innovation and improvement. Such training should incorporate national and international standards, best practices and procedures as the procurement function is key to any organization, and the environment in which procurement is carried out is competitive and continuously changing.
15. *Innovation.* The procurement process should provide mechanisms that encourage innovation both by the supplier in the goods and services procured, but also in the procurement process itself. The knowledge, experience and technical know-how of suppliers must be allowed to play a role in the decision process, especially during the procurement of complex systems.
16. *Procurement Collaboration.* Public procuring entities should strive to collaborate across all public procurement functions in order to exploit opportunities that may arise for: better utilization of procurement skills and resources; greater purchasing leverage through aggregation of spend; and spread of best practice. The exercise of pre-qualification of suppliers should also be consolidated and performed by the PPOA or a designated agency for common items and services. Procuring entities would simply check updated lists with PPOA. The prequalification process should be continuous, with those already pre-qualified required to seek re-qualification annually.
17. *Increasing Awareness.* Every effort should be made to ensure that the strides being made in the reforms of public procurement as well as any new or amended guidelines, policies, best

practices, manuals, etc. are widely publicized to all procuring entities and suppliers in particular, as well as the general public.

18. *Suppliers' Charter.* The Government recognizes the need for effective procurement systems that enhances value for money. To this end, suppliers and contractors have a key role to play. Therefore, in order to promote mutual benefits the Government and all procurement entities should commit themselves to tenets of a Suppliers' Charter.

E.5 Centres of Procurement Expertise (CoPE)

Centres of Procurement Expertise would be organizations that have procurement expertise in their respective areas of responsibility and would help develop and facilitate best practice procurement of goods and services. They would be established and monitored by the PPOA and play an advisory role to PPOA in their respective sectors. Proposed areas are: Health, Local Authorities, Tertiary Education Institutions, CDF, Profit-Oriented State Corporations.

E.6 Classification of Public Procuring Entities

The current classification of public procuring entities has three categories: A, B and C. Membership in each of the categories is based on procuring entity type. It is proposed that classification be based on procurement spend as follows:

- Category A: Procurement spend exceeding Kshs. 300 million
- Category B: Procurement spend between Kshs. 100 million to Kshs. 300,000 million
- Category C: Procurement spend below Kshs. 100 million

Classification of all procuring entities to be reviewed on a biannual basis by PPOA and new lists published. In order to increase efficiencies and reduce the cost of procurement it is also proposed that within the new classification:

- For Category A:
 - Increasing awarding threshold for procurement committees from Kshs. 500,000 to Kshs. 1,000,000
- For Category B:
 - Increasing awarding threshold for procurement committees from Kshs. 500,000 to Kshs. 1,000,000
 - Increasing threshold for low value procurement from Kshs. 10,000 to Kshs. 30,000.
- For Category C:
 - Increasing awarding threshold for procurement committee from Kshs. 100,000 and Kshs. 200,000 to Kshs. 500,000.

E.7 Public Private Partnerships

The term public-private-partnership encompasses a variety of qualitatively very different arrangements that involve the use of private sector funding and expertise. PPPs enable the establishment of urgently required public infrastructure including the delivery of roads, rail, water and sewage treatment, hospitals, schools and prisons. PPPs also allow government departments to meet an increasing demand for high quality public services by improving or updating existing infrastructure.

The long-term development blueprint for the country, Kenya Vision 2030, aims to transform Kenya into “a globally competitive and prosperous country with a high quality of life by 2030.” An analysis of the medium term plan reveals that 85% of the funding for implementation of the plan or a total of Kshs. 3.9 Trillion is expected to be raised from the private sector through the implementation of PPPs. The plan firmly cements the use of PPPs as a means to ensure realization of Vision 2030.

Procurement policies and regulations on PPPs must therefore create an enabling environment to ensure that the desired funding levels from the Private sector are met.

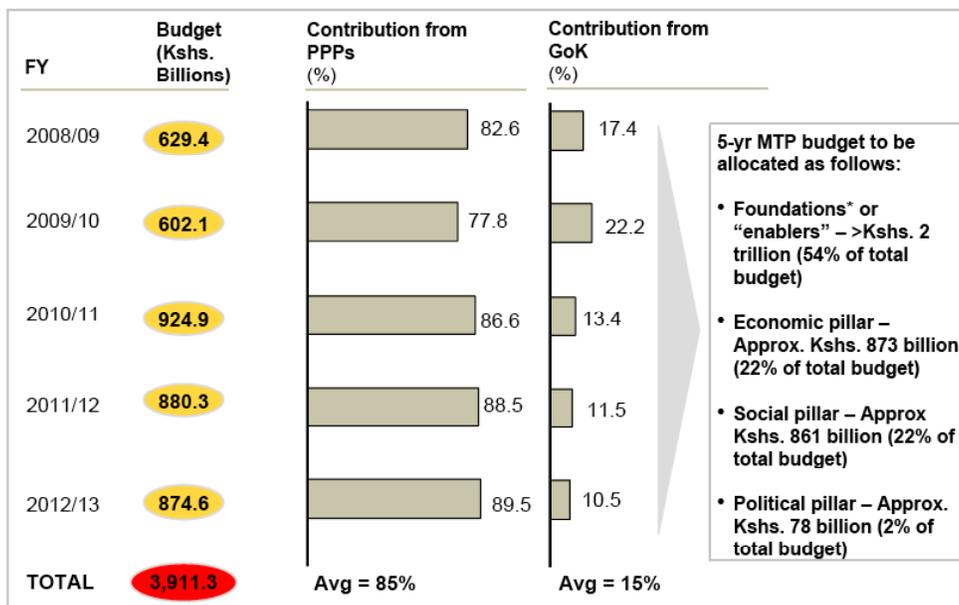


Figure E.3. Expected Contribution from PPPs in the Medium Term Plan (2008-2012)

E.8 Emerging Issues

The public procurement policy should embrace several emerging issues:

1. *Constituency Development Fund (CDF)*. Devolution of funds to the constituencies through the CDF will increasingly see public procurement actors, both as procuring entities and suppliers, at the grassroots level. Efficient and effective use of these funds will require a clear triangulation between the constituencies, management of the funds and timely dissemination of the funds. This will require a participatory and inclusive approach, as well as sustained and coordinated capacity building at the grassroots.
2. *Profit-Oriented State Corporations*. Public procurement can be defined as the purchase of goods, works or services if such acquisition is effected *with resources from state or local authority budgets, state’s foundation funds, domestic or foreign loans guaranteed by the state, foreign aid as well as revenue*

received from the economic activity of the state. Profit-oriented state corporations raise their own funds through their own economic activities, and actually provide funds to the state. Therefore, can their procurement really be classified as *public procurement*? We therefore propose that the legal framework should be amended to allow profit-oriented companies to operate on the same footing with their private sector competitors in the market. This would lead to more efficiency in service delivery and translate to higher returns for the benefit of the shareholders—citizens of Kenya. For those corporations that are *not* monopolies¹ we propose the following exemptions from certain provisions of the Act and regulations:

- *Holistic Approach.* Profit-oriented state corporations should be allowed, in a transparent manner, to foster long-term partnerships with suppliers, enhance negotiations and promote value for money. Financial evaluations should be allowed to include cost-benefit analysis, value for money, opportunity cost, return on investment and all other hidden costs and benefits, not just the lowest financial bid.
- *Negotiations and Partnerships with suppliers.* Direct negotiations should be allowed with all compliant (pre-qualified) suppliers, as well as strategic partners to have negotiated contracts.
- *Lead times.* Exemption should be given from stipulated mandatory advertising times for tenders, where the need to respond promptly to a business opportunity can be demonstrated.
- *Purchase of Branded items.* Customers often request items by brand. Where *items are meant for resale* (either directly or as value added input) and the need can be justified,

¹ The challenges the Act presents to profit-oriented state corporations are mainly with regard to their ability to compete in the market with private sector competitors. This would not be the case for those companies enjoying monopoly status.

profit-oriented state companies should be allowed to specify a *brand*. Items used for normal operations can follow regular procurement procedures.

3. *Micro, Small and Medium Enterprises*. Micro, Small and Medium size Enterprises (MSMEs) account for the majority of employment in Kenya and contribute a significant portion of the GDP. MSMEs employment was about 80% of Kenya's total employment in 2007 and many of these are the youth, yet MSMEs face many challenges accessing public procurement. They lack adequate information on how to access public procurements and a level playing ground. Participation of Kenya's MSMEs cannot be ignored if Kenya is to attain Vision 2030. Within the policy, several strategies are proposed that can increase their participation within the current Act and Regulations.

E.9 Conclusions

Efficient, effective and transparent public procurement must be viewed as the responsibility of all stakeholders. These include the procuring entities, the suppliers as well as the funders and beneficiaries of the procurement, the Kenyan public. It must be viewed within a continuously changing climate, where best practices are continuously identified and implemented. Success will be measured by the extent to which the public can see a significant increase in the quality of service delivery and achieve value for money. The concepts and ideas outlined in this policy will go a long way to achievement of this goal.

1 Introduction

Public Procurement has undoubtedly become an increasingly important factor in economic and business circles globally. This is evidenced by the growing interest of donors, governments, civil society, professional organizations, the private sector and the general public. After decades of messy Public Procurement systems, a majority of developing countries, Kenya being no exception, are now reforming the legal, organizational and institutional frameworks for public procurement. Through public procurement, 12 to 20% of developing countries' GDP is spent annually (and as much as 70% of GDP in post conflict countries such as Uganda and Sierra-Leone). Even marginal improvements in procurement systems, therefore can yield enormous benefits.²

Governments worldwide have received a lot of attention as providers of essential services including health, education, defense, infrastructure, etc. To provide these critical services, governments purchase goods and services from the market place through public procurement broadly defined as the purchasing, hiring or obtaining by any other contractual means of goods, construction works and services by the public sector.

Public procurement is alternatively defined as the purchase of commodities and contracting of construction works and services if such acquisition is effected with resources from state budgets, local authority budgets, states foundation funds, domestic or foreign loans guaranteed by the state, foreign aid as well as revenue received from the economic activity of state. Public procurement thus means procurement by a procuring entity using public funds³. The items involved in public procurement range from simple items or services such as clips or cleaning services to large

²OECD, 2005, Organization for Economic Cooperation and Development. Volume 3: Strengthening Procurement Capacities for Developing Countries

³ World Bank, 1995

commercial projects such as the development of infrastructure including roads, power stations and airports. With government as a service provider, a basic measure of a successful or failed public procurement is manifested through quality and magnitude of the services it provides. Kenya, therefore, needs to move fairly quickly to complete the reforms in this area and enact the necessary legislations. Public procurement systems in Kenya have not been very strong because of weak laws and legal barriers. Many of the institutions involved in public procurement lack the requisite technical and human resources capacities.

The importance of public procurement in terms of size relative to World GDP and World trade was enlightened in a report by OECD (2001)⁴. In this report the value of the contestable government procurement was estimated at over 2,000 billion in 1998. This is equivalent to 7% of the World's GDP and 30% of the world merchandise trade. A related study, estimates that the size of public procurement varies between 5% and 8% of GDP in industrialized countries.⁵ For the Middle East and Africa, the magnitude of public procurement purchases ranges between 9 and 13 %. This clearly indicates that public procurement is important within both developed and developing economies.

In so far as public procurement has important economic and political implications, ensuring that the process is economical and efficient is crucial. This requires that the whole process is well understood by both the actors (the government, the procuring entities, the business community/suppliers) and the other stakeholders including professional associations, academic institutions and the general public. This calls for Kenya to put in place appropriate social-economic and political environments characterized by a bourgeois democracy, a strong civil society, and public transparency and

⁴ (2001) Organization for Economic Co-operation and Development Measuring the impact of public procurement policy, First indicators, simple market news, March 2000, Paris. Trorifetti F (2000)

⁵Ibid

accountability, for public procurement to work. The role of the government in these issues is critical. The process so far is still shrouded with secrecy, inefficiencies, professionalism, corruption and undercutting, resulting in significant waste of resources.

The Government, therefore, needs to adopt appropriate measures to improve management of its public procurement systems. There is need for it to embrace the basic principle of providing ample opportunities for participation of interested parties in the procurement process. This will equally require that every procurement transaction will require to be competitively offered in a transparent way in order to avoid corruption. With Government as a service provider, a basic measure of successful or failed public procurement is manifested through the quality and magnitude of the services it provides. This success or failure emanates from the goods, works or services obtained.

Before any procurement transaction is enhanced, procuring entities must determine their procurement needs which must be consistent with their organization's objectives. The assessment should take account of the need to ensure that the procuring entity uses its resources effectively and efficiently.

2 The Size and Structure of Public Procurement in Kenya

The estimation of public procurement in most countries in Africa, where Kenya is not an exception, provides a number of conceptual as well as technical problems. Conceptually, the composition of the entity called 'public' cases the term refers to the central and local governments only. However, it is extended in some countries to include government owned enterprises servicing the public such as telecommunications, railways and water companies. Thus where it is not clearly specified, the term public may be used to refer to very different entities, which may not be comparable.

Technically, problems arise due to lack of data and sometimes the manner in which it is kept and reported. The authority in charge of public procurement does not keep public procurement data in Kenya. This calls for a decentralized system of data processing and storage but with accountability systems.

In the absence of procurement information, public procurement can be estimated using public expenditure figures. In principle, government expenditure on goods, works and services is public procurement. However, certain expenditures need to be netted out of these figures as they are not contestable and therefore do not qualify as public procurement. These include expenditure on social security pension transfers, interests on public debt, salaries of public sector employees, purchases of military material and subsidies⁶.

Table 1 presents the estimated size of Central Government procurement in Kenya from 2001 to 2008. Tables 2 and 3 present the estimate expenditure of City and Municipal Councils, and Town and County Councils respectively from 2003 to 2008. Local authorities and other government entities such as parastatals, schools and universities are by definition public utilities. The local authorities' procurement in Kenya constitutes less than 1% of the GDP.

⁶ Ibid

Table 1: Estimated size of public procurement in Kenya (Kshs. Millions) ⁷

	2001/02	2002/03	2003/04	2004/05	2005/06	2006/07	2007/08
Total Government Expenditure	308,005.8	310,341.0	376,176.7	379,665.6	430,745.4	476,347.6	711,131.4
Less labour costs	(110,418)	(105,961.4)	(131,672.9)	(116,541.6)	(135,924.8)	(145,308.5)	(172,363.8)
Less subsidies	(4,423.6)	(6,553.7)	(10,253.1)	(250)	(420.5)	(45.5)	(2,988.6)
Less interest payments	(29,851)	(35,677.9)	(27,743.5)	(26,767.2)	(31,453.2)	(38,347.3)	(49,244.5)
Less transfers	(5,972)	(7,989.9)	(7,284.8)	(6,389.3)	(17,224.5)	(2,487.7)	(38,387.1)
Less net lending	(20.5)	(31.1)	(-18,620.8)	(57,19.2)	(-24,320.2)	(-14,983.7)	(-111,632)
Less public debt redemptions	(84,502)	(55,063.2)	(86,635.7)	(81,539.8)	(75,546.78)	(70,611.3)	(82,355.5)
Less military expenditure	(14,150.0)	(19,079.7)	(16,902.2)	(17,203.5)	(15,921.3)	(14,752.2)	
Central Government Procurement(CGP)	58,709.8	79,984.1	114,305.5	125,255.1	178,574.4	219,778.9	477,424.1
GDP at Market	1,020,022	1,022,208	1,131,783	1,273,975	1,418,071	1,620,732	1,814,243
CGP as % of GDP	5.8	7.8	10.1	9.8	12.6	13.6	26.3
Labour Costs as % Total Govt Exp	35.8	34.1	35.0	30.7	31.6	30.5	24.2
Total Govt Exp as % GDP	30.2	30.4	33.2	29.8	30.4	29.4	39.2

Note:

1. The amounts quoted in Military Expenditure are those of Military Construction and Equipment alone
2. Transfers in this case refers to Capital Transfers

⁷ Kenya National Bureau of Statistics, *Statistical Abstracts and Economic Surveys*, 2003 to 2008

Table 2: Estimated size of public procurement by City and Municipal Councils in Kenya (Kshs. millions) ⁸

	2003/04	2004/05	2005/06	2006/07	2007/08
Total Expenditure	10,321.1	8,435.9	9,881.4	12,659.6	15,348.3
Less Labour Costs	(4,067.5)	(2,651.9)	(3,029.0)	(3,034.2)	(3,802.0)
Less Transfers to Households and Enterprises	(62.3)	(65.4)	(70.4)	(83.4)	(111.6)
Less Transfers to Funds(current)	(75.4)	(53.5)	(59.9)	(78.3)	(95.0)
Less Interest	(47)	(31.7)	(30.5)	(39.9)	(48.3)
Less Loan Repayment	(284.4)	(203.6)	(172.4)	(20.8)	(4.3)
Less Transfers to Funds(capital)	..	..	..	..	..
Municipal Council Procurement	5,784.5	5,429.9	6,519.2	9,403	11,287.1
GDP	1,131,783	1,273,975	1,418,071	1,620,732	1,814,243
MCP as % of GDP	0.5	0.4	0.5	0.6	0.6

Table 3: Estimated Size of Public Expenditure by Town and County Councils in Kenya (Kshs. Millions) ⁹

	2003/04	2004/05	2005/06	2006/07	2007/08
Total Expenditure	4,592.4	4,910.8	5,841.2	7,520.4	7,731.5
Less Labour Cost	(1,859)	(1,790.1)	(1,956.9)	(2,381.5)	(2,341.8)
Less Transfer to households and enterprises	(415.6)	(392.5)	(305.7)	(336.1)	(391.1)
Less Transfer to funds(current)	(22.4)	(82.1)	(67.4)	(70.0)	(72.1)
Less Interest	..	..	..	..	..
Less Loan Repayment	(11.5)	(15.3)	(3.8)	(2.1)	(7.1)
Town and County Council Procurement	2,284	2,630.7	3,507.4	4,730.7	4,919.4
GDP	1,131,783	1,273,975	1,418,071	1,620,732	1,814,243
TCP as % of GDP	0.2	0.2	0.3	0.3	0.3
Total Procurement as % of GDP	0.7	0.6	0.7	0.9	0.9

⁸ Ibid

⁹ Ibid

2.1 Public Procurement Reforms in Kenya

The past decade has seen sustained commitment of the Government towards reform of the public procurement function culminating in the Public Procurement and Disposal Act (2005) and subsequent regulations of 2006 and 2009. A summary of the milestones in the reform path is presented in Table 4.

Table 4: Summary of Public Procurement Reforms in Kenya¹⁰

Year	Event
1963	Procurement function carried out by Crown Agents
1969-2001	Treasury Circulars and Supplies Manual
1969-1978	Treasury Circulars
1978-2001	Supplies Manual
1997	Government initiates public procurement reform with support of the World Bank. Diagnostic survey undertaken. Main findings included no legislation or standard tender documents, rampant corruption, single sourcing, poor specifications, lack of unified procurement procedures, and lack of accountability and capacity to handle complex tenders.
1998	Official launch of Public Procurement Reform Programme
2001-2006	Public Procurement Regulations issued under the Exchequer and Audit Act
2001	Public Procurement Regulations issued by the Ministry of Finance. Unified all circulars that had governed public procurement. The Central Tender Board was abolished and public entities establish their own tender committees and begin to procure independently; The Public Procurement Appeals Board (PPAB) was dissolved and replaced with the PPCRAB (?); and suppliers and contractors given the right to appeal.
2002	Public Procurement Directorate (PPD) begins public procurement system awareness campaigns and countrywide training of more than 700 procurement officers
2003	<i>Independent Procurement Review</i> . Identified several short comings in the procurement function including: abuse of contract variations, poor record keeping for audit, lack of guidance on low value procurements, lengthy procurement process, poor institutional arrangements, conflicts of interest amongst players in procurement system, lack of evidence on procured items, and lack of ceilings on procurement methods.
2003	Government dismisses over 2,000 procurement officers from ministries and state corporations and temporarily suspends all procurement activities.
2004	1 st National Procurement Consultative meeting is held. PPD undertakes a training needs assessment and develops training programs; government employs new procurement staff and deploys them to ministries.
2005	Public Procurement and Disposal Act is enacted

¹⁰ Sources: Owegi, F. and E. Aligula, 2006, Public Sector Procurement in Kenya: The Need for a Coherent Policy Framework, Kenya Institute for Public Policy and Research and Analysis; Kirungu, H., 2009, Public Procurement Situation in Kenya, 2nd East African Public Procurement Forum, Nairobi, Kenya.

Year	Event
2007-	Public Procurement Disposal Act (2005) and Regulations
2007	Act operationalized via the Public Procurement and Disposal Regulations (2006). Established the Public Procurement Oversight Authority (PPOA) , Public Procurement Administrative Review Board (PPARB) and The Public Procurement Advisory Board (PPAB) .
2007	Enactment of the Supplies Management Practitioners Act (2007) to support professionalism in the procurement function.
2009	Public Procurement and Disposal (Public Private Partnership) Regulations, 2009.

3 Philosophy Underpinning Public Procurement

3.1 Definition

Public procurement is defined as the process of the acquisition, usually by means of a contractual arrangement after public competition, of goods, services, works and other supplies by the public service. The process spans the whole life cycle from initial conception and definition of the needs of the public service through to the end of useful life of an asset. Public procurement can alternatively be defined as the purchase of commodities and contracting of services if such acquisition is effected with resources from state budgets, local authority budgets, states foundation funds, domestic loans or foreign loans guaranteed by the state. Public procurement thus means procurement by the procuring entity using public funds¹¹. The items involved in public procurement ranges from simple items or services such as clips or cleaning services to large commercial projects such as the development of infrastructure including roads, power stations and airports. It can also be the acquisition, whether under formal contract or not of works, supplies and services by public bodies.

Procurement can equally mean the process of acquisition of goods and services (i.e. purchasing) and hiring contractors and consultants to carry out works and services. This includes rental, lease, hire purchase, license, tenancy, franchise or any other contractual acquisition of works, services and supplies. Procurement also embraces clearing out unnecessary acquisitions. In essence, the subject of procurement runs at all times alongside that of disposal of public assets which once acquired may need to be discarded in accordance with the principles of their purchase. According to Westring (1985)¹², the scope covers

¹¹ OECD (2001). Government procurement a synthesis Report, working party of the trade committee, TD/TC/WP Paris.

¹² Westring, G., (1985), International procurement; A training manual, International Trade Centre UNCTAD/GATT.

- Specification of the kind and quality of goods or service to be acquired or disposed ,
- Investigation of the market for supply and contacts with potential suppliers or buyers,
- Placing the order or contract ,including negotiation of terms,
- Supervising delivery and performance, and taking necessary action in the event of inadequate performance,
- Payment and
- Dealing with any disputes

Public and Private Procurement

Public sector procurement refers to procurement by or on behalf of ministries, departments of central government, organs of local government and state corporations. Procurement in the public sector aims to achieve multiple objectives. These include: economy, efficiency, fairness (i.e. non-discrimination among potential suppliers), accountability, transparency and, where more than one country is involved, respect for international obligations. Besides its business objectives, public procurement is an instrument for the attainment of broader national socio-economic objectives such as supporting employment of citizens and income creation through preference for local suppliers; promotion of indigenous micro, small and medium enterprises (MSMEs); and enhancement of regional integration through improvement of cross-border trade. Accordingly, public procurement is checked by various regulations including laws, statutes and ministerial decrees in form of regulations specifically enacted to protect public interest. It is also subject to scrutiny by the auditing arm of government, which in itself assumes ultimate responsibility for obligations incurred in relation to third parties.

Procurement in the private sector, on the other hand, seeks merely to achieve efficiency and a good economic result for the buyer; securing the best price for goods and services is paramount.

Consequently, procurement in the private sector does not follow any firm procedure. As a result of these and other differences, the public procurement process is much more complicated and slower, and not always as efficient as private sector purchasing.

3.2 Value for Money

The concept of *value for money* is defined as the optimum combination of whole life cost and quality (or fitness for purpose) to meet the customer's requirement. This definition enables a public body to compile a procurement specification which includes social, economic and environmental policy objectives within the procurement process. "Whole life cost" includes quantitative and non-quantifiable costs and benefits. As part of *value for money*, due regard must be paid to other relevant organizational policies is important, for example, policies in relation to corporate social responsibility/sustainability. It equally means the best available outcome when all relevant costs and benefits over the procurement cycle are considered.

Value for money is an essential test for procuring entities to justify a procurement outcome. Price alone is not a sound indicator and procuring entities cannot necessarily get the best value for money by accepting the lowest price or bid. Best *value for money* therefore means going beyond the price to get the best available outcome when all relevant costs and benefits over procurement cycle are considered.

The main aim of national policy on procurement, therefore, is to achieve value for having regard to probity and accountability. While price is very important in determining *value for money* outcomes in procurement and for certain categories of purchases, it is not the only variable that needs to be considered. *Value for money* also encompasses non-cost factors. When making purchases of goods or services consideration should be given to whether they are fit for the purpose for which they are intended, whether the goods or services provided are of sufficient quality and whether the level of service or support provided meets the requirements. There are

other issues that should also be considered including whole-of-life and transaction costs associated with acquiring, using, holding, maintaining and disposing of the goods or services. Value for money in procurement is therefore the optimum combination of whole-life-costs and/or price, where appropriate, and quality (or fitness for purpose) to meet user's requirements.

The procurement function itself must also provide value for money and must be carried out in a cost-effective way. Procurement organizations, whether centrally located or devolved to individual departments should:

- i. Avoid any unnecessary costs and delays for themselves or suppliers;
- ii. Monitor the supply arrangements and reconsider them if they cease to provide the expected benefits; and
- iii. Ensure continuous improvement in the efficiency of internal processes and systems.

It is therefore the responsibility of any set procurement structure, like internal procurement committees, tender committees (TC), to ensure that procurement proposals in the organization reflect the best value for money and highest quality possible. TCs as a structure that is sanctioned to ascertain the availability of funds to pay for procurement at the organization should ensure that payment as dictated by their thresholds are commensurate with approved specifications, value and quality of goods, works or services.

Another avenue of enhancing *value for money* is through competitive tendering which occurs when suppliers make written quotations or bid to supply goods, services, and works. Unlike single tendering, competitive tendering helps to avoid favouritism and to discourage the emergence of monopolies and cartels. Competitive tendering underpins contemporary procurement markets and differs substantially from pure competition found in conventional demand-supply exchange situations. The later aims to achieve the "lowest bid price" while the former aims to achieve the

“lowest total cost of ownership.” This is achieved through Life Cycle Costing (LCC), a key procurement –contract award technique that balances price and quality considerations against all other costs to be incurred during an item’s lifetime. LCC is the basis of sustainable public procurement and helps in realizing the objective of value for money.

As such attitudes of those who sit in TCs and procuring units must demonstrate the spirit of upholding value for money and cost effectiveness. It is disheartening on the part of taxpayers and deserving masses to get disservice from their government simply because those entrusted with procurement activities abuse their offices and systems, and in other instances, connive with some irresponsible suppliers/contractors to rip off public resources through unrealistic price bloat-ups. A responsible attitude towards public procurement is therefore the first step towards its decency if poverty is to be eradicated and development spread.

Responsibility for ensuring *value for money* outcomes rests with individual ministries/departments and offices but with the Public Procurement Oversight Authority (PPOA). All the involved procuring entities are required to provide cost effective public services, achieve better use of resources and comply with the requirements of Public Procurement and Disposal Act 2003.

4 Core Principles and Pillars

4.1 Transparency and Accountability

Transparency and accountability in public procurement are presented in the context of ‘corruption’. Corrupt, coercive, collusive and fraudulent practices may be defined as follows:¹³

¹³ Asian Development Bank, ‘Anticorruption Policy: Harmonized Definitions of Corrupt and Fraudulent Practices’, Manila, Philippines, ADB, 2006.

- i. A corrupt practice is offering, giving, receiving, or soliciting directly or indirectly, anything of value to influence improperly the actions of another party.
- ii. A fraudulent practice is any act or omission, including a misrepresentation that knowingly or recklessly misleads, or attempts to mislead, a party to obtain financial or other benefit or to avoid an obligation.
- iii. A coercive practice is impairing or harming, or threatening to impair or harm, directly or indirectly, any party or the property of the party to influence improperly the actions of a party.
- iv. A collusive practice is an arrangement between two or more parties designed to achieve an improper purpose, including influencing improperly the actions of another party.

Government procurement processes, therefore, demands a high level of transparency and accountability through its purchasing of goods and services. Procuring entities should ensure there is openness and clarity on procurement policy and its delivery. In addition, effective mechanisms must be put in place to enable accounting officers to execute their personal responsibility on issues of procurement risk and expenditure. They must be able to show how the public interest has been protected in the expenditure of public funds.

4.2 Efficiency

Efficiency encompasses the performance of the procurement process as cost effectively as possible and in a timely manner.

4.3 Consistency

The application of the procurement process should be the same across all procuring entities. Suppliers should therefore expect the same procurement policy across the public sector.

4.4 Open and Effective Competition

A basic tenet of public procurement is to provide ample and equal opportunities for participation to interested and qualified suppliers of goods, works or services. This ensures a healthy and effective competition.

It is principally through such an open and effective competitive environment that the government, just like any procurer, gets the best value in procurement and at minimum cost while making it possible for the suppliers/contractors to fully benefit from doing business with it in a regulated environment that safeguards against favouritism and profiteering and provides equal participating opportunities to every potential and eligible supplier/contractor.

For procuring entities, open and effective competition should therefore aim at obtaining from suppliers the best possible combination of costs, goods and services. Suppliers/contractors competing with each other become market conscious by being innovative, strategic and focused in the delivery of their services. Consequently, they make effort to optimize their price and quality for the procuring entity. While suppliers and contractors, as a result of market competition, strive to satisfy the anticipated needs of their customers, procuring entities need not sit back. They should be proactive and professionally apt to get the best possible outcome from the market.

To facilitate this and to reduce the burden on procuring entities, PPOA should annually produce a list of pre-qualified suppliers for common goods and services. Suppliers are able to get on the list continuously throughout the year, but are required to be re-qualified annually.

Procuring entities will be required to publish procurement opportunities on a website maintained by PPOA. Mandatory electronic publication will reduce cost of procurement as well as increase

participation due to longer availability of the announcement. Procuring entities may still use print media and other forms to advertise their opportunities.

4.5 Ethics and Fair Dealing

Ethics and fair dealing in public procurement are a mark and distinctive features of professionalism. In any procurement process, the budget holder and the purchasing authority should not be performed by the same individual. The budget holder has the authority to commission goods, services or works and to provide financial authority on expenditure. The purchaser has the authority to commit the procuring entity to a contract for the purchase of goods, services or works. Separation of these roles within a procurement process provides the necessary safeguards against wrongdoing or unethical practice.

Under the Public Officers and Ethics Act (2003), it is an offence for those employed by contracting authorities in their official capacity to accept any gift or consideration as an incentive or reward for acting in a manner showing favour or disfavour for any person or entity. Under the act the courts will assume that any money, gift or consideration received from a person or organization holding or seeking to obtain a contract was received corruptly unless proven otherwise.

Suppliers and all potential suppliers should be:

- Engaged even-handedly, treated with impartiality without unfair discrimination
- Assured that there will be protection of commercial confidentiality where required.
- Paid promptly

In addition, procuring entities:

- Should not impose unnecessary burdens or constraints on suppliers or potential suppliers. Suppliers should be paid promptly for services rendered.
- Should ensure confidentiality in their procurement transactions. This should be done by endeavoring to maintain confidentiality of information received in the course of business dealings and never to use information for personal gain.

Further those engaged in commissioning of tenders or contracts or dealing directly with suppliers or potential suppliers must:

- Acquire and maintain current technical knowledge
- Achieve appropriate professional standards in the management of contracts
- Recognize and deal with conflicts of interest or any potential traits of the same. Under such circumstances, they are morally required to reveal any personal interest that may impinge or might reasonably be deemed by others to impinge on any business dealings with the suppliers.
- Respond promptly, courteously and efficiently to suggestions enquiries.

4.6 Integration with other Policies

Public procurement policy should pay due regard to other Government policies, rather than cut across them. The current overarching government policy is Kenya Vision 2030¹⁴ and the corresponding First Medium Term Plan (2008-2012).¹⁵ Whereas Kenya has been able to scale up economic growth to 6.1% per annum it is recognized that the desired scaling to 10% growth present some challenges. These include:

- Ensuring continued macroeconomic community stability
- Minimizing institutional risks, especially related to corruption and security

¹⁴ Government of Kenya, Kenya Vision 2030: A Globally Competitive and Prosperous Kenya, 2008.

¹⁵ Government of Kenya, First Medium Term Plan, 2008-2012, Kenya Vision 2030: A Globally Competitive and Prosperous Kenya, 2008.

- Scaling up quantity and quality of infrastructure, especially the condition of roads, access to water, cost of electricity and the quality of ports and rail services
- Raising the level of investments from current estimate of 20% of GDP to above 30% consistent with the desired levels of growth.

Clearly the success of the Vision 2030 rests heavily on effective, efficient, open and transparent public procurement.

Further, in support of Vision 2030 especially as relates to the economic and social (social equity and poverty reduction) pillars, procuring entities should be fair but demanding buyers and who will purchase from internationally competitive domestic suppliers where the domestic suppliers offer best value for money. Due consideration should be given to potential commercial and practical advantages in purchasing locally produced goods and services. These may include:¹⁶

- A better price and total or whole-of-life cost of ownership (Value for Money).
- Better through life support, for example better availability of spare parts and after-sales service.
- Shorter supply lines and/or delivery lead times
- Reduced inventory costs
- Reduction or elimination of exchange rate risks
- Easier and cheaper communications and/or transport
- Simpler and cheaper contract administration and dispute resolution
- Greater scope for cooperative and innovative product development and influence over the supply base
- Continuity of supply and more direct control over orders

¹⁶ Ministry of Economic Development, Government of New Zealand, 2002, Government Procurement in New Zealand, Policy Guide for Purchasers

- Goods or services better adapted to local conditions
- Better knowledge of the producer's reputation and reliability.

Generally, it will make good business sense, in terms of value for money and a reliable supply base, that goods and services are sourced from local suppliers where the necessary standards of competitiveness, quality and availability are met.

4.7 Legal Framework

The legal framework for public procurement includes:

- Public Procurement and Disposal Act, 2005
- Public Procurement and Disposal Regulations 2006,
- Public Procurement and Disposal Regulations (Public Private Partnerships) 2009
- Supplies Practitioners Management Act, 2007.
- National case-law.

Adherence to public procurement procedures is critical to ensure that public funds are used in the best possible way. There must therefore be a sound enforcement mechanism that ensures procuring entities comply with the regulations. From the Act, the Public Procurement Oversight Authority (PPOA) has the functions include:

- i. Ensuring that the procurement procedures established under the Act and the subsequent regulations are complied with;
- ii. Monitoring and reporting on the overall functioning of the public procurement system;

- iii. Assisting in the implementation and operation of the public procurement system by amongst others preparing and distributing manuals and standard documents to be used in connection with procurement by public entities; providing technical advice and assistance to procuring entities; and developing, promoting and supporting the training and professional development of persons involved in procurement.

Decisions of the national courts provide interpretation of the requirements of the Act and regulations and can establish precedents that must be observed. By its very nature, case-law, is constantly evolving and have significant effects.

The legal framework is constantly evolving through new or amended legislation. All procuring entities should therefore ensure that their procurement staff constantly keeps abreast of developments in the legal framework and further equipped to meet their legal obligations.

Legal Framework for Inter-agency Collaboration

The mandate of PPOA established in the Act often overlaps with other government agencies, for example Kenya National Audit Office (KNAO), Kenya Anti-Corruption Commission (KACC), the Office of the Ombudsman and the National Anti-Corruption Steering Committee, established by several Acts of parliament including the Anti-Corruption and Economic Crimes Act, the Public Officers Ethics Act (2003), and the Government Financial Management Act (2004). The agencies were all established as implementing authorities in the fight against graft. Clear legal frameworks should therefore be established that sets clear boundaries and frameworks for collaboration between the different agencies.

Legal Framework for e-Procurement

Procurement laws need to be updated to allow procuring entities to issue request for proposals, notices of award, protest and award information as well as receive bids and proposals via the Internet. The legal framework should also consider legislation, case law and administrative policies regarding electronic transactions, and electronic document management policies and regulations. These will affect whether e-procurement is authorized, whether transactions are binding, and the extent to which the procurement system can be automated.¹⁷

Harmonization of the Act with other Related Acts

The legal framework for public procurement should be harmonized with other Acts to ensure ready adoption and effective implementation of the public procurement regulations. Specifically areas in the public procurement legal framework that appear to contradict sections of the State Corporations Act and The Architects and Quantity Surveyors Act Chapter 525 (Revised Edition 1978) should be harmonized for easier interpretation and implementation by the procurement entities and suppliers.

4.8 Recognition of International Trade Treaties and Interests

Kenya's external environment is significantly influenced by the changing international and regional trading arrangement. Procurement policy must recognize multilateral trading arrangements under the World Trade Organization (WTO) and the regional trading arrangement under the Economic Partnership Agreement (EPA) between the East and Southern African (ESA) countries and the European Union (EU). In addition agreements under the Common Market for Eastern and Southern Africa (COMESA) and the East African Community (EAC) must come to bear.

¹⁷ Wilkinson, C., 2002, Public E-Procurement: Policy and Practice, *Contract Management*, June.

4.9 Due Process and Dispute Resolution

Avenues must be established to allow disputes that may arise between suppliers and procuring entities to be resolved in a timely manner. The process must be seen to be transparent and impartial. In addition, procuring entities should have in place a formal process to ensure that any supplier complaints are handled in a professional, objective and timely manner.

4.10 Electronic Procurement (e-procurement)

e-procurement is a range of technologies that facilitate automation of the procurement process. Benefits of e-procurement are in line with the objectives of internationally recognized public procurement systems that include enhanced transparency and compliance, increased performance and quality, and economic development.

Implementation of e-procurement should not simply be engrafting electronic technology onto a paper-based procurement process, but there should be a focus on reengineering the entire procurement process to take advantage of electronic innovations. When determining change parameters, procuring entities should examine what they would like to do and what they are allowed to do. It is necessary to prioritize which aspects of the process will be implemented electronically, in addition to the delineation of the costs and benefits to the government and the suppliers. In addition, cognizance should be made of the fact that there will be resistance by existing personnel. As a result there must be a high level champion for the effort and central coordination with wide involvement of all stakeholders.¹⁸

An e-procurement platform is expected to deliver functionalities that include:¹⁹

- *Electronic data interchange* which refers to inert-organizational information system using structured data exchange protocols usually through value added networks.

¹⁸ Ibid.

¹⁹ Telgen, J. (2001) procurement goes electronic. Public procurement goes electronic conference. Brussels, European Public Procurement Group.

- *e-sourcing* involving ways of identifying new sources of supply using internet technologies.
- *e-tendering*, the process of inviting offers from suppliers and receiving their responses electronically.
- *e-reverse auctioning*. Using internet technologies, bidders usually bid down the price of their offer against those of other bidders until no further downward bids are received.
- *e-auction disposal*. Using internet, technologies for on-line auctions of items for disposal.
- *e-informing*. Use of internet technologies for gathering and distributing procurement related information.
- *e-collaboration*. The collaborative procurement related planning and design using facilitating technologies.

For e-procurement to be implemented, enactment of appropriate legislation is essential. The legislation should introduce the general validity of computer-based administrative activity to have the same value as the traditional paper-based. This provision should make it possible to enact a specific regulation and the relevant technical rules for the use of digital signatures as a means to sign a computer-based document. Digital signatures are used to ensure authentication, confidentiality, data integrity and non-repudiation of all operations carried out within the e-procurement system.²⁰

The regulations should lead to the creation of electronic markets and electronic auctions. The creation of these markets will entail regulation of all the activities that have to be fulfilled before the start of electronic transactions. Creation of electronic markets will involve ensuring that the system can carry out the functionalities of supplier registration, supplier qualification and uploading of supplier catalogues.

The expected impact from enacting e-procurement systems include:

²⁰ Paolo Giacalone, et al. E-procurement at work: A practical Experience in Italy, International Public Procurement Conference proceedings, 21-23 Sept 2006.

- i. Breaking down the physical barriers of space and time, by providing a more transparent and efficient means to provide information and services. Beneficiaries include not only governments and suppliers but also the public at large in having access to transparent information on the public expenditure of taxpayers' money.
- ii. Facilitating higher quality outcomes for public procurement through improved accessibility and interoperability which enable:
 - a. Greater business access and competition for government expenditure thereby creating commercial benefits for business, and price and quality gains for government;
 - b. Integration and automation of many workflow processes for transactions and other supply chain management activities improving efficiency and reducing processing costs allowing either purchasing agencies or bidders to deviate from the public procurement process thereby eliminating corruptive practices; and
 - c. Greater and easier access to real time and historic information for management and audit enabling higher quality decision making and planning as well as greater transparency and accountability.
- iii. The implementation of e-Procurement offers the opportunity of adding value to the relationship between procuring entities and private businesses. An effective e-Procurement program can deliver a broad range of benefits to taxpayers, the economy and the community generally. Online technology provides the potential to significantly reform the accountabilities and performance of public procurement systems.
- iv. A high level of transparency can be achieved through the use of the internet for the free disclosure and distribution of public information, such as relevant legislation, policies and guidelines, procurement plans and notices, bidding documents, minutes of procurement activities and contract award results.

E-procurement brings with it concerns about privacy and security. These include:²¹

- Authentication – ability to establish the parties identities with certainty
- Confidentiality – ensuring that there is no eavesdropping on transactions in progress
- Integrity – ensuring that the message sent is identical to the one received.
- Security – data must be protected from loss, theft, misuse, alteration or destruction.

4.11 Outsourcing Procurement

Procuring entities may use the services of public or private procuring agents to advise them or manage their procurement process, especially where they lack the necessary capacity. Smaller procuring entities are especially encouraged to use the assistance of larger ones, who may have additional capacity for a fee.

When a procuring entity uses a private sector procuring agent, the entity should ensure that the agent adheres to the public procurement policy.

4.12 Green Procurement

Green Procurement can be stated as the purchase of products and services which are environmentally friendly. The products or services purchased should have a lower impact on the environment over their whole life cycle than the standard equivalent. It involves the integration of environmental issues, such as pollution prevention and reduction of waste into purchasing decisions along with traditional factors such as price, performance and quality.

²¹ Wilkinson, C., (2002), op. cit.

The Green Procurement entails practices which encourage suppliers to safeguard the environment by producing goods or offering services that do not harm the environment or lead to heavy use of resources such as energy when being used. These practices include:

- i. Use of products made using recycled materials
- ii. Use of energy efficient or low energy-consuming products.
- iii. Procuring products that use alternative fuel for example solar, bio-diesel, and ethanol.
- iv. Use of bio-degradable materials.
- v. Use of non-ozone layer depleting substances.

Suppliers should be required to provide proof of their commitment to environmental protection. This may take the form of statements on the steps they are taking to reduce their impact on environment, or alternatively to demonstrate that they are not in breach of any statutory requirements relating to the environment. In addition, suppliers should consider the environmental impact of their products through the whole life cycle, from ‘cradle to grave’.

4.13 Professionalism

The procurement system requires the input of professionals with honed negotiating skills and a good grasp of market dynamics. This need is urgent in light of the diversity of functions that a procuring unit is charged with that are intricately connected to its efficiency and effectiveness.

The Public Procurement and Disposal Act 2005 and its Regulations of 2006 and 2009, coupled with the Supplies Practitioners Management Act 2007 have helped in recognizing procurement professionalism in Kenya. Within the Public Procurement Act, a ‘procurement professional’ is defined as a person who:

- i. Has professional qualifications in procurement and supply management from a recognized institution
- ii. Is engaged in a calling or occupation in which recourse to procurement is directly or indirectly involved and has experience in the practice of procurement; and
- iii. Is a member of a recognized institute of Purchasing and Supply.

The Supplies Practitioners Management Act 2007 spells out the qualifications for procurement practice, defines who a practitioner should be and the qualification for registration and licensing procedures so as to regulate the profession. Continuous education and training of procurement professionals within the framework established by the Act should be encouraged with the expressed aim of professionalizing public procurement.

4.14 Capacity Development

Capacity is the ability of people, organizations/institutions and society as a whole to successfully manage their affairs. *Capacity Development* is the process of unleashing, conserving, creating, strengthening, adapting and maintaining capacity over time.²²

Continuous training and education on public procurement will ensure compliance, learning, innovation and improvement. Such training should incorporate national and international standards, best practices and procedures as the procurement function is key to any organization, and the environment in which procurement is carried out is competitive and continuously changing.

A sustainable national capacity development programme to achieve the objectives captured in the Suppliers Practitioners and Management Act 2007 should be developed on the following basic principles:²³

²² OECD/DAC Task Force on Capacity Development, 2004

- i. *Do not rush*: Capacity development is a long-term process. It eludes delivery pressures quick fixes and the search for short-term results
- ii. *Establish positive incentives*: Motives and incentives need to be aligned with the objective of capacity development, including through governance systems that respect fundamental rights. Public sector employment is one particular area where distortions throw up major obstacles
- iii. *Scan locally and globally, re-invent locally*: There are no blue prints. Capacity development draws upon voluntary learning, with genuine commitment and interest. Knowledge cannot be transferred; it needs to be acquired.
- iv. *Build on existing capacities rather than creating new ones*. This implies the primary use of existing national expertise, resuscitation of national institutions, as well as protection of social and cultural capital
- v. *Challenge mindsets and power differentials*. Capacity development is not power neutral, and challenging mindsets and vested interests is difficult. Frank dialogue and a collective culture of transparency are essential steps
- vi. *Think and act in terms of sustainable capacity outcomes*. Capacity is at the core of development; any course of action needs to promote this end. Responsible leaders will inspire their institutions and societies to work accordingly.
- vii. *Remain accountable to ultimate beneficiaries*. Any responsible government is answerable to its people, and should foster transparency as the foremost instrument of public accountability.

The process or plan for capacity development should not be considered as a blue print. An iterative process should be pursued aimed at creating a viable institutional framework. The principles on which this process should be based include:²⁴

²³ OECD, *Harmonizing Donor Practices for Effective Aid Delivery. Volume 3: Strengthening Procurement Capacities in Developing Countries*. DAC Guidelines and Reference Series, 2005.

²⁴ Ibid

- i. *Broad Stakeholder Involvement:* A procurement system is a multilevel holistic ‘organism’ where every organization at all levels interacts with and is interlinked to others inside the system. To be effective, procurement capacity development needs to take account of these multiple levels and the power relationships between the important actors at each level of the system. Experience has shown that there is an important need to involve a broad range of stakeholders, both organizations and stakeholders.
- ii. *Realistic needs assessment:* The capacity development programmes should be based on the long term procurement policy of the Government. Kenya’s existing capacities and realistic future requirements needed to implement the policy should be broadly assessed. For example, what is the current percentage of qualified procurement professionals in procuring units? What percentage requires training and certification? In carrying out a needs assessment, great effort should be made to manage the costs. This can be partly achieved through use of information from previous assessments. New research should only be undertaken to fill important gaps concerning high risk areas of performance where capacities are critical. Key areas the Government will need an inventory of include: (1) current procurement resources, (2) the volume and qualifications of procurement staff, and (3) capacity needs for the Government’s anticipated programme over the next three to five years, both in terms of numbers and skill levels.
- iii. *Strategic procurement capacity development planning:* Effort should be made to develop a programme that is focused on realistic and achievable objectives with implementation based on real performance indicators. The following characteristics will be important for the success of the programme:
 - a. *The Approach to the plan should be Entrepreneurial and Opportunistic.*
 - b. *The design of the plan should have an institutional focus.* While developing the professional skills of a broad range on individual staff is the main objective of capacity development, the best means to sustainably achieve this goal is to create

a viable and institutional framework for developing and maintaining procurement capacity. Actions should strengthen the institutions that are important to long term viability of the overall procurement system, for example, the Public Procurement Oversight Authority, the Kenya Institute of Supplies Management, Public Procurement Oversight Advisory Board and the Public Procurement Administrative Review Board.

- c. *The plan should be long term and not impose unrealistic deadlines for milestone achievement.*
 - d. *Programme should be sequenced with other on-going public sector reforms.*
 - e. *Programme should be cost effective.* Where funding constraints exist, one should initially target a few procuring entities.
- iv. *Closely monitored and flexible managed implementation:* Close monitoring and evaluation of the programme will allow detection of opportunities for improvement or trends that require corrective action. The process should be iterative, one which monitors, adjusts, monitors and then re-adjusts with the expressed aim of sharpening the programme and improve its chances of success. Effective monitoring requires agreement on and introduction of meaningful performance indicators that should adequately capture performance the programme as well as feed into an on-going government-wide monitoring and evaluation mechanism to enable the Government to detect trends and take corrective action. Note that during the monitoring process, early successes should be broadcast widely and celebrated. The ripple effect of even minor victories in capacity development can have a major long-term impact on the success of future bigger reforms. Word of mouth reports of success shared by a group of key stakeholders are often more persuasive than the results of elaborate and costly communication strategies.

4.15 Innovation

The procurement process should provide mechanisms that encourage innovation both by the supplier in the goods and services procured, but also in the procurement process itself. The knowledge, experience and technical know-how of suppliers must be allowed to play a role in the decision process, especially during the procurement of complex systems. This should especially be encouraged and appropriately accommodated during the establishment of specifications. For example, it may be appropriate to ask the market solutions that are currently or potentially available before advertising a tender. Sounding the market can be beneficial as a long term strategy, even if a purchase is not imminent.

The procurement of innovative goods, services and works may contribute to improvements in quality and delivery of public services and that can lead to growth in the Kenyan economy by encouraging suppliers to invest in and deliver pioneering solutions to current and future public service needs. Further, stakeholders should also be presented with avenues to suggest innovative methods to improve the procurement process to the benefit of both the procuring entities and the suppliers.

4.16 Procurement Collaboration

Public procuring entities should strive to collaborate across all public procurement functions in order to exploit opportunities that may arise for: better utilization of procurement skills and resources; greater purchasing leverage through aggregation of spend; and spread of best practice. For example, where appropriate, procuring entities should consolidate their needs for common items and perform a single procurement process. This arrangement will spread the cost of procurement amongst the procuring entities, resulting in significant savings. In addition, economies of scale may result in larger concessions from suppliers.

The exercise of pre-qualification of suppliers should also be consolidated and performed by the PPOA or a designated agency for common items and services. Procuring entities would simply check updated lists with PPOA. The prequalification process should be continuous, with those already pre-qualified required to seek re-qualification annually. PPOA would also receive feedback from procuring entities on suppliers' performance, a factor that would be considered during annual reviews. Procuring entities would be required to pay a token annual 'user fee' but still realize significant savings from avoiding individual pre-qualification processes.

4.17 Increasing Awareness

Every effort should be made to ensure that the strides being made in the reforms of public procurement as well as any new or amended guidelines, policies, best practices, manuals, etc. are widely publicized to all procuring entities and suppliers in particular, as well as the general public. Sustained campaigns will result in a change in attitude towards public procurement that would see the three major stakeholders: the procuring entities, the suppliers and the tax-paying public, hold each other accountable for the effective use of public funds.

4.18 Supplier's Charter

The Government recognizes the need for effective procurement systems that enhances value for money. To this end, suppliers and contractors have a key role to play. Therefore, in order to promote mutual benefits the Government and all procurement entities should commit themselves to:

- i. Remove barriers to public procurement participation.
- ii. Promote full understanding of public procurement law and Legislations.
- iii. Base procurement decisions on proven facts.
- iv. Simplify procurement processes in order to reduce costs to suppliers.

- v. Widely publicise public tenders.
- vi. Provide feedback to suppliers on technical and financial evaluation results.
- vii. Provide guidance to business community on tendering.
- viii. Professionalize procurement function.

The business community should also commit itself to:

- i. Working in accordance with Public Procurement and Disposal Act 2005 and Regulations, 2006 and 2009.
- ii. Effective bidding.
- iii. Understanding and application of good principles of business.
- iv. Delivering value for money.
- v. Averting and reporting corrupt practices.
- vi. Supporting use of approved tender documents.
- vii. Been responsible of quality and bearing cost of rework or replacement.
- viii. Working together to improve national economy.
- ix. Minimising waste
- x. Considering environmental factors.

5 Governance

5.1 Governance Issues

Effective governance of the public sector is at the centre of many pressing challenges confronting both developed and developing countries. Good governance entails a well-functioning public sector, which is thought to be responsive to the citizenry and to be reasonably efficient in the delivery of public services. A well-functioning public sector also involves the following: transparency and predictability of its decision-making processes and oversight mechanisms (checks and balances) to guard against arbitrariness and to ensure accountability in the use of public resources. However, these oversight mechanisms do not eliminate the flexibility

and delegation needed to respond quickly to changing circumstances. In summary, they are accountable and result-oriented.

Over time, the challenge for decision makers in Africa has been to structurally and institutionally transform the state and the government to become legitimate and relevant to the masses. Good governance is measured around four key pillars: accountability, transparency, predictability, and participation. None of the four pillars and their constituent components can stand alone without the other because the public sector operates like a system. A mistake or weakness in one part of the public sector is felt by other components of the public sector.

Since the late 1980s and early 1990s the debate on public sector management reforms and the promotion of good governance became the centre of discussion among donor agencies, academics, and policy makers. Several reforms have taken place with mixed degrees of successes and failures. Public procurement reforms have occupied a centre stage in broad public sector reforms in Africa since the late 1990s. The increasing number of players in public procurement, the pressures to cut costs in public sector operations, the increased demand for accountability and transparency from the tax payers, the increased link between public procurement and trade and investment, the influences of world class management philosophies, the changing roles of the public sector, and the overall desire for efficiency among others combined to generate a renewed interest in the area of public procurement.

A weak public procurement system is a breeding ground for inefficiency in service delivery. This is because public procurement is directly related to economic growth, development, poverty-reduction strategies, and overall service delivery. There is no sector of government that is not affected by public procurement. This is because each sector needs goods, services, and works of

varying magnitude to effectively perform its function. Such goods have to be acquired through a procurement process. This implies that a problem in the functioning of the public procurement system will have wider implications for the entire public sector.

An effective public procurement system is one that has a strong and well-organized structure of relationships and distribution of roles. Such a structure is concerned with elements as the definition and allocation of specific tasks—for example, “who does what;” the grouping of related tasks into manageable functions, divisions, departments, sections, or other units; the creation of systems that facilitates the coordination between functions or other units; the distribution of formal authority across the organization and within the functions or units comprising the organization; and the allocation of responsibility within the organization and to constituent functional groups.

The overall strategy of improving public procurement reforms rotates around instilling the principles of good governance in the public sector. Improved accountability, transparency, legislative frameworks, and addressing corruption are among the much-needed strategies for improving public sector performance through procurement reforms. Implementing public procurement reforms have to be seriously planned and require coordinated processes. Amid the poverty and development challenges that the continent is experiencing, uncoordinated public procurement will not yield many benefits. Political commitment and will is critical.

A well-functioning public sector should balance the policy, efficiency, and process objectives of public procurement. But as the authors of the above framework argue, the conduct of public procurement has reflected tensions between public expectations of high standards of governance, management requirements for performance, overt (covert) political influence, and

pressures from broader stakeholder interests such as business. However, there are no internationally accepted standards of best practice for the management of public procurement to address these issues. It has been apparent that each country has tried its own approach although there are common strategies that have cut across.

5.2 Centres of Procurement Expertise (CoPE)

Centres of Procurement Expertise would be organizations that have procurement expertise in their respective areas of responsibility and would help develop and facilitate best practice procurement of goods and services. They would be established and monitored by the PPOA and play an advisory role to PPOA in their respective sectors.

Considerable added value can be derived from the Centres of Procurement Expertise. They would advise the PPOA in the development of operable policies in their specific lines of expertise by learning/reviewing areas of existing best practice as well as new opportunities for improvement then developing proposals for operational policies and procedures that are in line with the overarching procurement policy for consideration by the PPOA.

Specific CoPE would be created for the following sectors:

- Health
- Local Authorities
- Tertiary Educational Institutions
- CDF and
- Profit-oriented enterprises.

Competency of Centres of Procurement Expertise should be reviewed by the PPOA on a periodic basis.

6 Classification for Public Procuring Entities

The current classification of public procuring entities has three categories: A, B and C. Procuring entities belonging to and procurement thresholds for each of the categories are presented in Tables 5-8. The following should be noted. For an *Open International Tender*, all three categories have no minimum or maximum procurement amount specified. In addition, for *Direct Procurement* all three categories have no minimum or maximum, but certain specified conditions must be met. Also, *Request for Proposals* for all three categories is only applicable to the procurement of services and has neither a maximum nor a minimum, but must meet certain conditions to be applicable. Finally, irrespective of procurement methods, in Class A and B the tender committee is responsible for making any awards above KShs. 500,000, while the procurement committees for amounts below. For Category C, the cut-off is KShs. 100,000 and KShs. 200,000 and below for procurement committee to award if procurement through *request for quotations* and *direct procurement*, respectively. The tender committee awards all other contracts. The user awards all low-value procurements.

Table 5: Current classification of each of the Procuring Entities

Category A	Category B	Category C
Ministries State Corporations	City Councils (Nairobi, Mombasa, Kisumu) Co-operative Societies Universities and Colleges Judiciary Commissions Parliament Districts Provincial Hospitals Semi-autonomous Government Agencies	Other local authorities Schools District, sub-district hospitals, health centres, dispensaries CDFs Voluntary Organizations/Institutions

Table 6: Procurement Thresholds for Category A Procuring Entities

Procurement Method	Kshs Millions					
	Goods		Works		Services	
	<i>Min.</i>	<i>Max.</i>	<i>Min.</i>	<i>Max.</i>	<i>Min.</i>	<i>Max.</i>
National Open Tender	6	--	6	--	3	--
Restricted Tender Sec 73 (a)	20	--	20	--	20	--
Restricted tender sec 73 (b)	1	20	2	20	1	20
Restricted tender sec 73 (c)	1	20	2	20	1	20
Request for Quotations	--	1	--	2	--	1
Low Value Procurement ²⁵	--	0.03	--	0.03	--	0.03

Table 7: Procurement Thresholds for Category B Procuring Entities

Procurement Method	Kshs Millions					
	Goods		Works		Services	
	<i>Min.</i>	<i>Max.</i>	<i>Min.</i>	<i>Max.</i>	<i>Min.</i>	<i>Max.</i>
National Open Tender	4	--	4	--	2	--
Restricted Tender Sec 73 (a)	5	--	5	--	5	--
Restricted tender sec 73 (b)	1	4	2	4	1	4
Restricted tender sec 73 (c)	1	4	2	4	1	4
Request for Quotations	--	1	--	2	--	1
Low Value Procurement ²⁶	--	0.01	--	0.01	--	0.01

Table 8: Procurement Thresholds for Category C Procuring Entities

Procurement Method	Kshs Millions					
	Goods		Works		Services	
	<i>Min.</i>	<i>Max.</i>	<i>Min.</i>	<i>Max.</i>	<i>Min.</i>	<i>Max.</i>
National Open Tender	--	--	--	--	1	--
Restricted Tender Sec 73 (a)	0.5	--	0.5	--	0.5	--
Restricted tender sec 73 (b)	0.5	3	0.5	3	0.5	1
Restricted tender sec 73 (c)	0.5	3	0.5	3		
Request for Quotations	--	1	--	2	--	1
Low Value Procurement ²⁷	--	0.01	--	0.01	--	0.01

²⁵ The maximums are 'per item'

²⁶ The maximums are 'per item'

²⁷ The maximums are 'per item'

As reflected in Table 5, the current classification is based on the nature of the procuring entity and not related to the actual annual procurement budget. For example, using the 2009/2010 budget estimates, the estimated procurement expenditure for Ministries is presented in Figure 1.²⁸ As shown there is a wide variance between ministries, with procurement expenditure ranging from about Kshs. 335 million for the Ministry of East African Community to Kshs. 45 Billion for Ministry of Roads.

Further with reference to Figure 2 for state corporations and parastatals, the variance is also wide with the Kenya Revenue Authority at top of the list at Kshs. 3.25 Billion and Kenya Institute of Administration with the lowest procurement spend at Kshs. 74 Million.²⁹ A similar analysis was done for Municipalities³⁰. When one looks at the Constituency Development fund, it has grown from Kshs. 1.26 Billion in 2003/4 to Kshs. 10.1 Billion in 2008/9, with estimate procurement spend of Kshs. 8.3 Billion.³¹ On average each constituency receives therefore has a procurement spend of Kshs. 40 million in 2008/9.

²⁸ Procurement expenditure was estimated by taking Gross Expenditure (Recurrent and Development) and subtracting non-procurement budget items that include salaries, allowances, wages, utilities, rentals for produced assets, grants to government agencies, employers contribution to NSSF and NHIF, subscription fees to international bodies, retirement and pension benefits, scholarships and other educational benefits, other transfers, grants and subsidies, and domestic loans to individuals and households. Figures obtained from: GoK, 2009/2010 Estimates of Development Expenditure of the Government of Kenya for the Year Ending 30th June 2010 Vol. I-II; GoK, 2009/2010 Estimates of Recurrent Expenditure of the Government of Kenya for the Year Ending 30th June 2010 Vol. I-III.

²⁹ Current procurement spend based on assumption of 33% of total budget as is the case for University of Nairobi. Actual estimates per State Corporation are being sought and will be put in place.

³⁰ Budgets being sought and will be put in place with figures once obtained.

³¹ 82% estimated available for procurement spend. 3%, 5% and 10% are allocated to running the constituency office, emergency fund and bursaries, respectively.

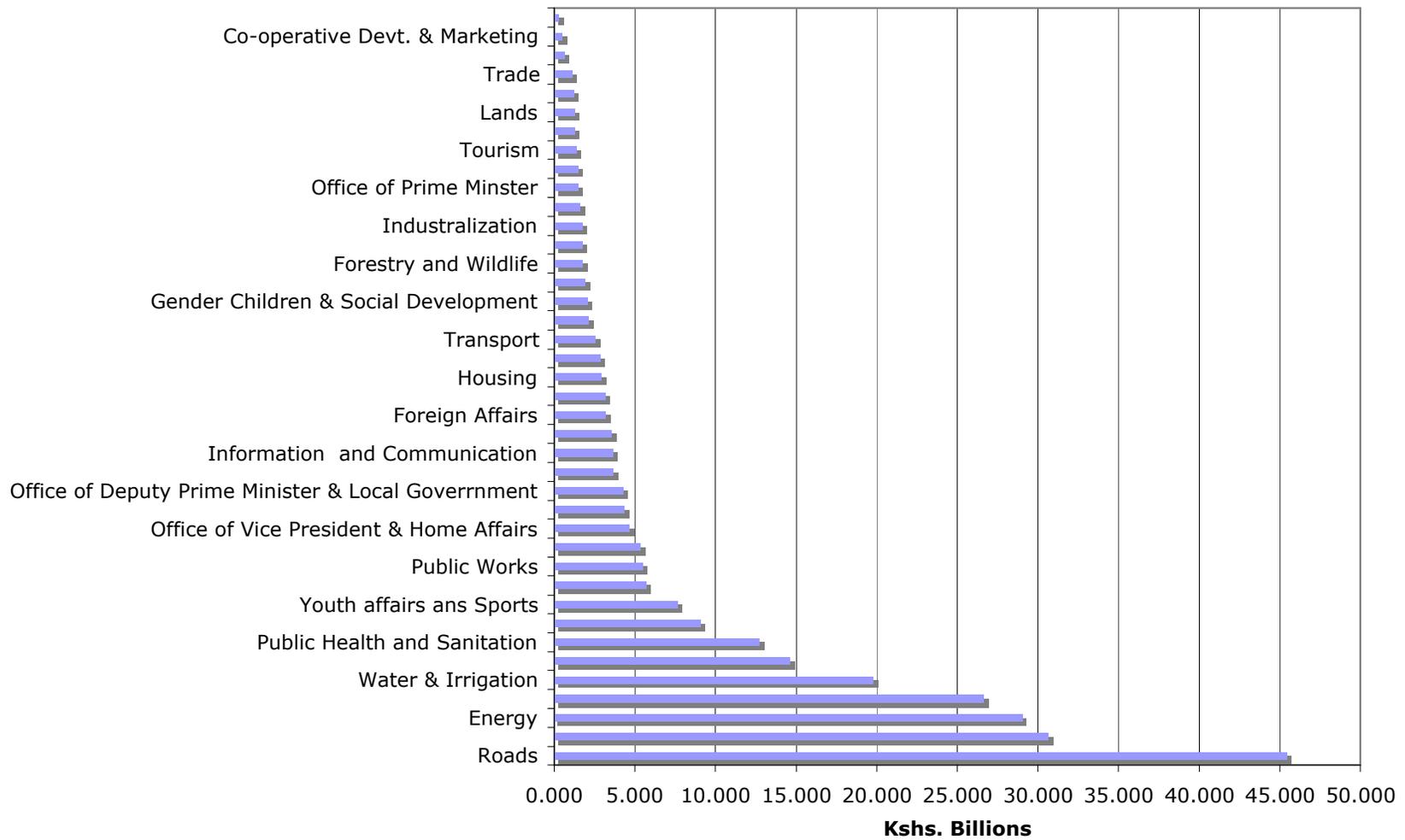


Figure 1: Estimates of Procurement Spend from various Ministries Currently in Category A for 2009/2010

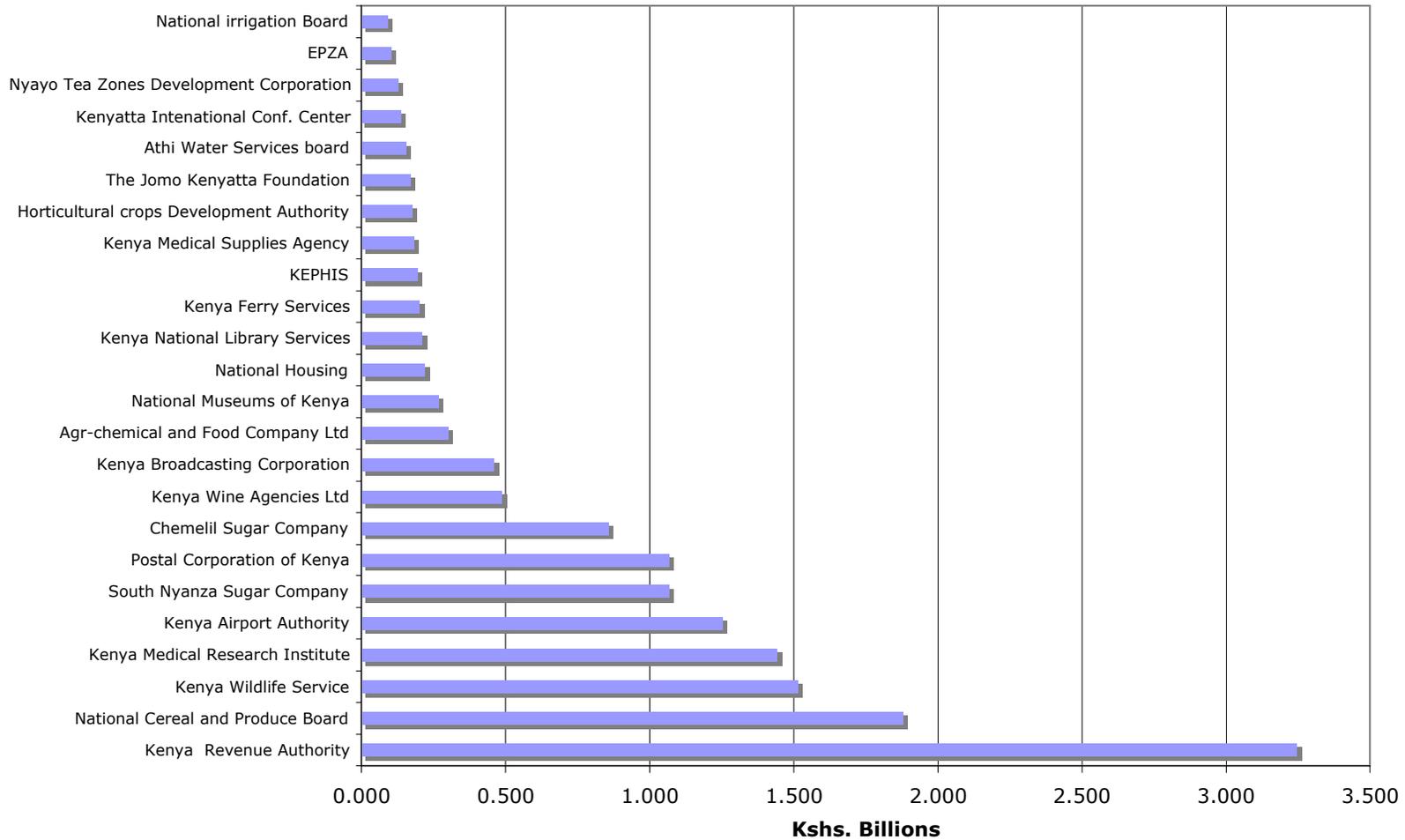


Figure 2: Estimates on Procurement Spend for Selected State Corporations currently in Category A (Numbers will change once exact figures are obtained. Chart uses 33% of budget as an estimate)

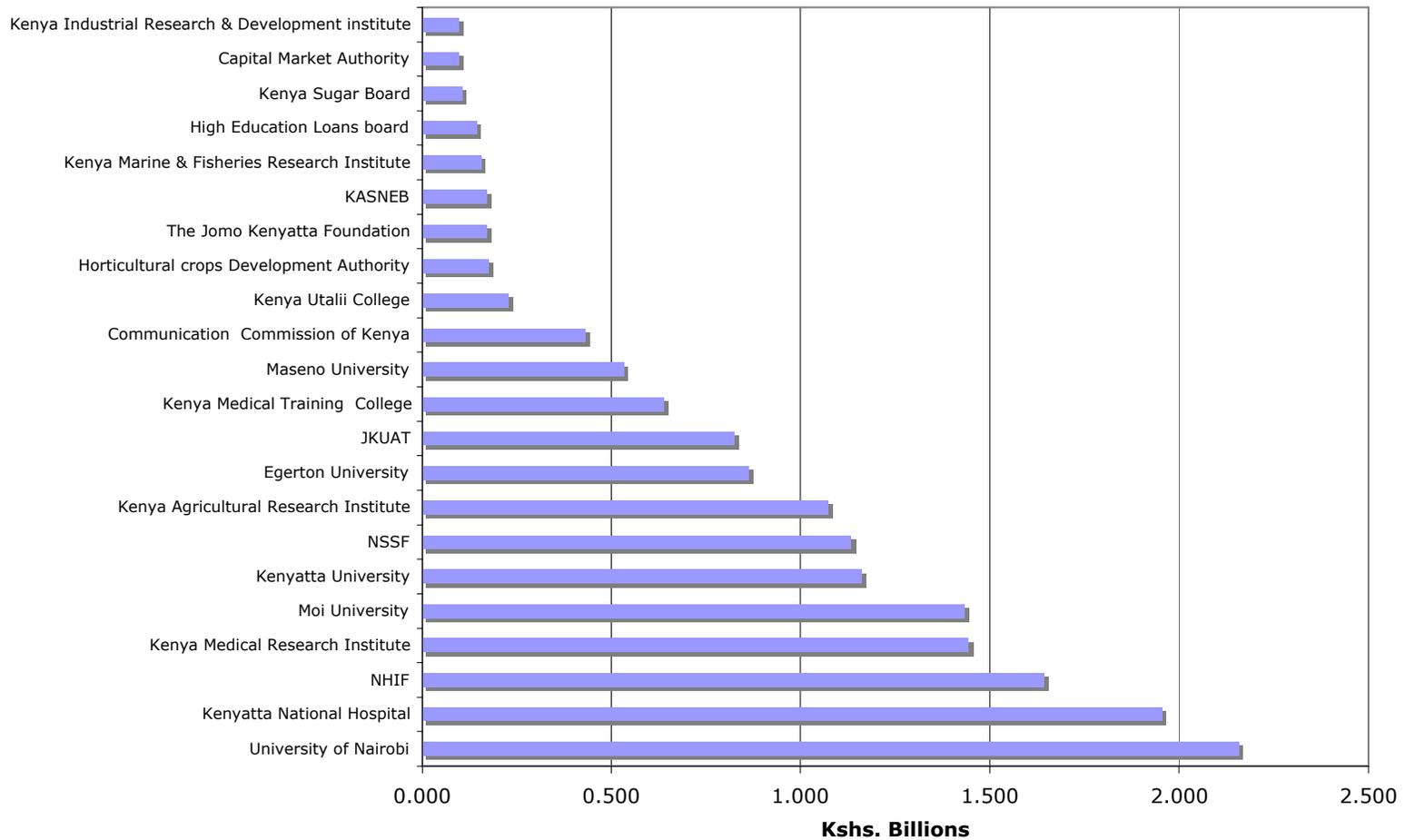


Figure 3: Estimates on Procurement Spend for Selected Universities, Colleges and Semi-Autonomous Government Agencies currently in Category B (numbers will be changed once exact figures obtained. Chart uses 33% of budget as an estimate)

Figure to be provided once complied

Figure: Estimates on Procurement Spend from Selected Municipal Councils currently in Category C

The entities in each category are currently based on the type of entity, yet, the definitions for the categorizations into A, B and C are based on procurement thresholds. Implicit in the thresholds is the assumption that 'larger spending' procuring entities should have higher thresholds for each of the procurement methods as well as for the committee that awards the contracts. As can be seen from the figures, however, it is evident that the current classification has no correlation to the actual procurement spend of the procuring entity.

6.1 Proposal for Re-Classification

Any new classification scheme must be based on a rationale that will result in increased efficiencies within the procurement function and potential lowering of procurement costs for the procuring entities. Several factors are therefore considered in the rationale for the new classification:

- Tender committees are harder to assemble and have a higher cost each time they meet than procurement committees. One should therefore consider for Category A and B increasing the awarding threshold for procurement committees from Kshs. 500,000 to Kshs. 1,000,000; and from Kshs. 100,000 and 200,000 for Category C to Kshs. 500,000. This view was supported by our survey of non-profit and profit-oriented procuring entities.
- Thresholds should be tied directly to procurement spend, not the type of entity.
 - From a political point of view, however, all ministries should remain in Category A with the lowest estimated procurement spend from the Ministry of East African Community **guiding the threshold between categories A and B to Kshs. 300 million.**
 - Similarly, State Corporations who currently enjoy Category A status should not be lowered by more than one Category. As such we propose that the lowest

procurement spend for State Corporations should **guide threshold between Category B and C to Kshs. 100 million.**

- The threshold for low value procurement for the category B should be considered for increase from **Kshs. 10,000 to Kshs. 30,000**. This category will comprise among other entities parastatals that initially enjoyed a Kshs. 30,000 threshold for low value procurement and it would be too unfair to have them work with threshold of Kshs. 10,000. Categories A and C to remain the same.
- All other entities are then placed in the appropriate category based on their procurement spend.
- Categorization of entities can be reviewed every two to three years by PPOA and new listings provided.

7 Public-Private Partnerships

Most scholars and public decision makers advocate for a more pragmatic approach to promoting efficient partnerships between the public and private sectors for the provision of major services and goods to the general public. Most public services require the performance of a complex array of tasks. These activities typically necessitate first, the building of some infrastructures and second, to manage those assets as efficiently as possible. Recently, however, the private-public-partnership (PPP) procurement framework has given government a minimalist stance. The government chooses a private consortium that is both in charge of designing the quality attributes of the infrastructure, building those assets and finally managing them as efficiently as possible.³²

³² Martimort, D. and J. Pouyet, "Build it or not: Normative theories and positive theories on public-private partnerships.", *Journal of Economic Literature*

The term public-private-partnership encompasses a variety of qualitatively very different arrangements that involve the use of private sector funding and expertise. PPPs enable the establishment of urgently required public infrastructure including the delivery of roads, rail, water and sewage treatment, hospitals, schools and prisons. PPPs also allow government departments to meet an increasing demand for high quality public services by improving or updating existing infrastructure.³³

The United Nations Economic Council for Europe (UNECE) acknowledges that PPPs in the delivery of public services have become a phenomenon which is spreading the globe and generating great interest³⁴. The renewed interest can be traced, at least partially, to the ideas of the “new public management”,³⁵ the “governance” paradigm,³⁶ and the “reinventing government” movement,³⁷ all of which stress harnessing of private sector expertise and resources to assist in the accomplishment of public policy goals. Although the modern use of PPPs began in the so-called Anglo-Saxon countries (e.g., Australia, Canada, New Zealand, the United Kingdom, and the United States), the concept has migrated to the European Union and its member countries as well as other developed and developing countries.³⁸

The reason for the generation of interest is explained that PPPs avoid the often negative effects of either exclusive public ownership and delivery of services, on the one hand, or outright privatization, on the other. In contrast, PPPs attempt to combine the best of both worlds: the private sector with its resources, management skills and technology; and the public sector with its regulatory and protection of the public interest.

³³ Braun, P., ‘The Practical Impact of EU Public Procurement Law on Private Finance Initiative Procurement Practice in the United Kingdom’, PhD. Dissertation, University of Nottingham

³⁴ United Nations Economic Commission for Europe: *Guidebook on Promoting Good Governance in Public-Private Partnerships*, 2008.

³⁵ Rhodes, R. (1996) The new governance: Governing without government. *Policy Studies* (44): 652–667.

³⁶ Salamon, L. (2002) *The Tools of Government: A Guide to the New Governance*. New York: Oxford University Press.

³⁷ Osborne, D. and Gaebler, T. (1992). *Reinventing Government*. Reading: Addison-Wesley

³⁸ *The Economist* (2007), Locking in the best price. January 27, pp. 60–61

7.1 Definition

There is no common understanding of PPPs except for the very basic feature that partnerships require the involvement of a public sector body and a private sector company. Mainly due to the elusiveness of its definition, the term PPP designates a heterogeneous range of co-operative ventures between the public and the private sector reaching informal co-operations to complex long-term contractual relationships related to a specific asset. Of crucial importance to the partnership is a high degree of complementary aims, allowing both parties to maximize their synergy gains.³⁹ Governments have utilized different types of PPPs to accomplish a wide range of public policy goals. For example the United Kingdom makes extensive use of PPPs across a variety of policy areas, while Chile and Italy make a more targeted use of PPPs.

Several definitions for PPPs have been advanced. These include:

- The private sector designing, building, financing, maintaining and operating (DBFMO) infrastructure assets traditionally provided by the public sector⁴⁰
- The existence of a ‘partnership’ style approach to the provision of infrastructure as opposed to an arms length ‘supplier’ relationship with the private sector⁴¹
- A contractual agreement between the public and private sectors, whereby the private operator commits to provide public services that have traditionally been supplied or financed by public institutions⁴²
- Arrangements where the private sector supplies infrastructure assets and services that traditionally have been provided by the government.⁴³

³⁹ Ibid

⁴⁰ Khi. V. Thai, (Ed). (2009). *The International Handbook of Public Procurement*. London New York, CRC Press Taylor & Francis Group

⁴¹ Ibid

⁴² European Commission (2005) *Report on the Public Consultation on the Green Paper on Public–Private Partnerships & Community Law on Public Contracts & Concessions*. Brussels

⁴³ International Monetary Fund (2002) *Public–Private Partnerships*. Washington, DC

- A risk-sharing relationship based upon an agreed aspiration between the public and private sectors to bring about a desired policy outcome, often taking on the form of a long-term flexible relationship, usually underpinned by contract, for the delivery of a publicly-funded service.⁴⁴

Common types of PPPs include:

1. *Contracting Out (Outsourcing)*. Describes all circumstances where an independent private entity is given responsibility for the daily services previously done by government. Here the private contractor does not necessarily finance the project. Governments in many countries have outsourced ancillary services, for example cleaning and accommodation, as well as the actual delivery of public services such as prison services, refuse collection and public transport.
2. *Joint Ventures*. In this arrangement companies are formed that are co-owned by the public and private sector, to which both parties contribute assets, finance and/or expertise. These businesses are established for a specific purpose and can either be long or short-term.
3. *Private Sector Ownership into State-Owned Businesses*. A large range of options are available to involve the private sector companies into the delivery of public service by means of introducing ownership. For example, bringing in a strategic private sector partner or selling either a majority or minority share of a floated state-owned enterprise. Examples in Kenya include Kenya Airways, Safaricom and Telkom Kenya.
4. *Build Operate Transfer/Build Own Operate*. These arrangements entrusts the management of what is essentially a public service or facility to the private sector, with the private sector providing the necessary capital for a substantial asset. Besides the provision of capital, the private sector is responsible for the design, construction, and management of the

⁴⁴ UK Institute for Public Policy Research

facility. The core of this arrangement is that government departments no longer acquire assets or infrastructure, but seek a private sector partner to provide the services related to the asset. Subsequent to the completion of the asset, the private sector company is reimbursed for the delivery of the public service either by means of periodic payments or typically by giving the private company the right to levy charges on the end-user of the facility, for example a toll-bridge or highway. The level of payment by the public sector is based on the performance of the private sector operator against agreed upon levels of service. In the case of BOT, the asset reverts back to the procuring entity at the end of a predetermined period, typically not less than 20 years.

7.2 Characteristics of Successful PPPs

Successful implementation of PPPs is embedded in six main characteristics. These are:

1. *Political Leadership.* Political leaders should play a role in the development of the partnership through planning and any sort of statutory development, as well as be strong advocates of the plan to the general public. By their participation and assurances to the public, citizens are more likely to support the partnership and its goals.
2. *Partner Accountability.* In the initial plan or contract, the involvement of the public agency must be stated. In addition, the sort of accountability and monitoring standards that will be enacted to facilitate timely progress should be written into plans and contracts to reduce waste and provide results in a timely manner. Specificity of terms is extremely important and whether this monitoring is done on a daily, weekly, monthly, or quarterly basis should be noted as such. Even though the public agency and private entity enter into a partnership, it is still imperative that accountability and standards be in place, to facilitate a mutually beneficial relationship.

3. *Well-Thought-Out Plan.* PPPs require a great deal of planning and development. Rushing into a partnership, without the right type of expertise and planning, could prove to be fatal for any blossoming partnership. Involvement by experienced people would be greatly beneficial for the plan. The plan itself should be detailed, indicate the specific responsibilities of individual partners and also lay out a clear method of conflict resolution. As in any relationship, there is always a real possibility of disagreements between two parties and to avoid them or at least facilitate a quick resolution, every measure should be accounted for in a detailed plan.
4. *Dedicated Income Stream.* One of the most important factors in a partnership is the ability for the private partner to recoup their investment, be able to repay loans they may have incurred and still make a profit. There are many options that can facilitate this revenue stream, including user fees, taxes, and tolls. The nature of the income stream should be addressed in the contract, to ensure a consistent payment method for the life of the partnership. Because benefits and rewards are shared, it is important to ensure that financial obligations are taken into consideration during the planning phase of the partnership.
5. *Communication with Stakeholders.* Positive public perception, understanding and support at all levels is a very important consideration for any partnership. It is therefore important to inform community leaders and the general public of the partnership's intentions. This may be achieved by being open and creating an effective communication and marketing campaign.
6. *Selecting the Right Partner.* It is incredibly important to establish a relationship in which the private partner is experienced and trustworthy in the field of the partnership. This will allow the public agency to find a partner that will provide the best value for money giving a high level of partnership for a cost that is justifiable.

7.3 Challenges of PPPs for Public Procurement

1. *Type of Solicitation and Contract.* PPPs involve non-routine contracts that start with many more unknowns and may take unexpected turns during implementation, more than in traditional procurement. Increasingly, governments are coming to the realization that traditional procurement and contracting relationships are insufficiently flexible and can actually constitute an impediment in attracting private sector partners. For highly complex contracts like PPPs the use of “negotiated procurements” is most appropriate and as such “requests for proposals” (RFPs) is recommended.
2. *Dealing with Risk and Complexity.* As PPPs are more complex than traditional forms of government contracting, risk determination, assessment and management is more difficult. Yet another risk and complexity challenge is determining how much risk can, and should be, transferred to the private sector partner. The corollary here is what type of compensation and incentives are necessary to induce the private partner to agree to this risk transfer. The complexity of PPPs also makes them more risky in political terms. Elected officials, citizens, and other stakeholders are generally familiar with traditional contracting, but not with PPPs. In an era of governmental reform that prides itself on “transparency,” the education of stakeholders on PPPs is an important task.
3. *Building and Maintaining Trust.* PPP planning and documentation cannot cover all contingencies that may arise over the life of the partnership. A PPP is a high trust relationship. Due to the risks inherent in PPPs, trust and trust assessment becomes an important consideration.
4. *Dealing with Long-Term Contracts.* Managing long-term PPPs contracts present unique challenges. If a PPP goes wrong, the private partner can walk away from the project, for a variety of reasons including both economic and political. The public partner is not able to do the same. An additional consideration is the turnover in personnel on both sides of the partnership towards the latter years of the project. Most PPPs have a life-span of

at least 20 years by which time no-one may still be familiar with the original goals of the PPP and thus be able to make informed decisions about alternations.

7.4 PPPs and Vision 2030

The long-term development blueprint for the country, Kenya Vision 2030, aims to transform Kenya into “a globally competitive and prosperous country with a high quality of life by 2030.”⁴⁵ Further, the plan aims to transform the country into “a newly-industrializing, middle-income country providing a high quality of life to all its citizens in a clean and secure environment”.

The Vision is anchored on three pillars: economic, social and political governance. A number of flagship projects have been identified to directly address priorities in the key sectors such as agriculture, education, health, water and the environment. An analysis of the medium term plan reveals that 85% of the funding for implementation of the plan or a total of Kshs. 3.9 Trillion is expected to be raised from the private sector through the implementation of PPPs. A summary of expected funding from PPPs and GoK for each year of the medium term plan is shown in Figure 4.⁴⁶ Numbers in the table include funding for physical infrastructure and ICT; land and public sector reforms; labour and employment; and peace building and conflict management

The plan firmly cements the use of PPPs as a means to ensure realization of Vision 2030. Procurement policies and regulations on PPPs must therefore create an enabling environment to ensure that the desired funding levels from the Private sector are met.

⁴⁵ Government of Kenya, 2007, Kenya Vision 2030.

⁴⁶ Owegi, F., Personal Communication

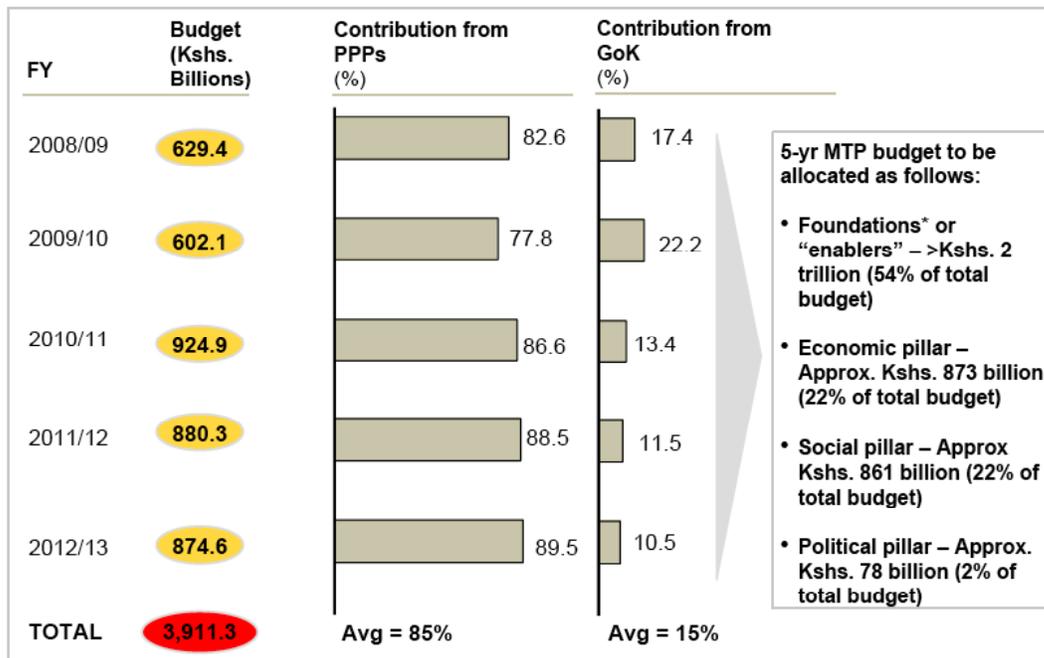


Figure 4: Expected Contribution from PPPs in the Medium Term Plan (2008-2012)

8 Risk Assessment and Management.

By its nature, procurement is prone to several risks which if not attended to, will greatly hinder smooth delivery of goods, services and works. Some of these risks include:

- Specifications
- Procurement method
- Public procurement procedures
- Suppliers' identification
- Performance risk
- Price and exchange rates risks
- Legal framework on Public Contract Management

It should be borne in mind that the assessment of risk can be a very complex exercise. In carrying out risk assessment, the following can be used as a guide:

- i. The value of the purchase

- ii. Complexity in the procurement process
- iii. Impact on core operations
- iv. Impact on delivery of service to key stakeholders

It is, therefore, imperative that those involved in public procurement understand the nature of the goods and services that they purchase, the nature of the supply market for the same, the relative spend on them and come up with workable solutions.

9 Emerging Issues

9.1 Constituency Development Fund (CDF)

This is among the many decentralised funds in Kenya. The CDF was initiated by the National Alliance Rainbow Coalition (NARC) Government of Kenya in 2003 by an Act of Parliament. The CDF and the other decentralized funds go directly to the grass roots to every constituency and provide expenditure opportunities that maximized the welfare needs and preference of the people.

The CDF comprises of annual budgetary allocation equivalent to 2.5% of government ordinary revenue, with 75% of the fund being allocated equally to all 210 constituencies. The remaining 25% is allocated as per constituency poverty levels. The funds are used to finance community-based projects in the following sectors: education, water and sanitation, health, infrastructure and poverty alleviation. Out of the total allocation:

- 3% is allocated for office expenses
- 5% for emergency purpose
- 10% bursary allocation

Also there should be no projects of similar nature that can take up funds exceeding 50%

Since the inception of CDF the Government of Kenya has overtime allocated the following funds has stipulated in the figure 5.

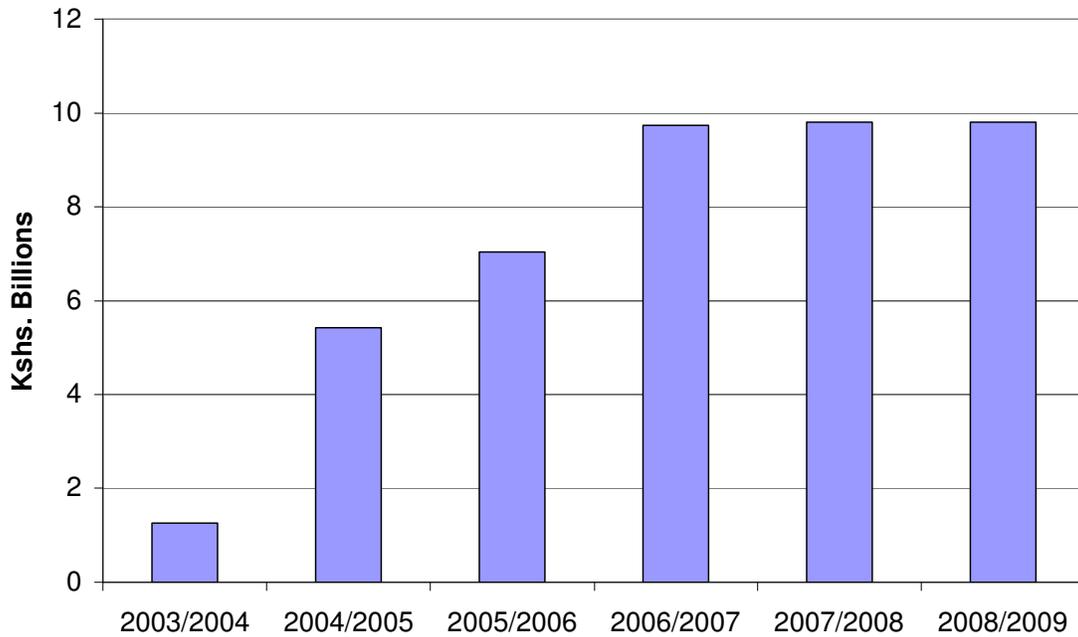


Figure 5: CDF allocations for the years 2003/2004 - 2008/2009

From the figure it is evident that there is increasingly more resources being allocated to procurement under CDF arrangement. In the past, there has been hardly any efficient and effective procurement structure at the constituency levels.

The constituency Development Fund (CDF) is managed by the following committees⁴⁷

- CDF Board
- Constituency Development Committee (CDC)
- District Project Committee (DPC)
- Constituency Fund Committee in Parliament

⁴⁷ CDF Act (2003); CDF Amendment Act (2007)

CDF Board

The functions of the CDF Board are;

1. Ensure allocation and disbursement of funds to every Constituency
2. Ensure prudent management of the Fund
3. Receive and discuss annual reports and returns from the Constituencies
4. Ensure the compilation of proper records, returns and reports from the Constituencies
5. Receive and address complaints and disputes and take any appropriate action.
6. Ensure timely submission to Parliament of various returns, reports and information as required
7. Perform such other duties as the Minister with concurrence of CFC may deem necessary from time to time for the proper management of the fund
8. Review, scrutinize and approve Project Proposals from the Constituencies that are consistent with the Act
9. Refer Disapproved Project Proposals or any other policy issue, from the Constituencies with adequate reasons, to the Constituency Fund Committee for direction consideration.

Constituency Fund Committee (CFC)

This is a select Committee of the National Assembly that draws its membership from sitting members of Parliament charged with the responsibility of:

1. Considering and recommending to Parliament any matter requiring action by the National Assembly
2. Considering referenced project proposals submitted from various Constituencies through the Board

3. Considering and reporting to Parliament, names of persons required to be approved under the Act.
4. The link between the CDF Board and National Assembly
5. Overseeing the implementation of the CDF Act, 2003 and its subsequent amendments (CDF Amendment Act 2007)
6. Overseeing the policy frame work and legislative matters that may arise in relation to the Fund
7. Continuously review the frame work set out for the efficient delivery of development programmes financed through the Fund
8. Carry out any other functions relevant to the work of the Fund

The Constituency Development Committee (CDC)

The CDC receives and prioritizes projects proposed by the community. Any on-going projects or existing projects initiated by the community undergoes a technical and financial evaluation by the relevant departmental head in the district.

The District Project Committee

The District Project Committee (DPC) coordinates the implementation of projects financed through the fund. The District Development Officer compiles and maintains a record showing all receipts and disbursement of every project and submits returns to the CDF Board at the end of every financial year.

The CDF has played a crucial role in economic development since its initiation in 2003. Economic development is regarded as growth accompanied by structural changes which has so far been achieved through CDF projects initiation both in rural and urban areas. From Audit released in August 2007, about 1000 health centres and 10,000 classrooms have been set up by

CDF. The Kenya Private Sector Alliance (KEPSA) acknowledges that the CDF which was established in 2003 is a popular development initiative among many Kenyans and if well managed has the unrivalled potential of boosting economic development around the country. The Kenya Institute for Public Policy and Research Analysis (KIPPRA) conducted a research in 8 districts for enhancing citizens' participation in the planning, monitoring, and evaluation of decentralized funds and realized that despite the important contribution by CDF in economic development, there are several challenges faced by CDF management. These include;

- Misrepresentation of actual submitted projects
- Re-allocation of project money
- Changing Constituency Development Committees arbitrarily
- Illiteracy
- Mismanagement by members of parliament. Money is allocated by MPs into political motivated projects that do not always benefit their constituencies
- Overlooking the District Development Committee
- Delayed work plans
- Little technical involvement from the line ministries
- Inadequate project monitoring and evaluation

The management of grass root development (funds) can only be possible if there is a clear triangulation between the constituencies, the management of the devolved funds and information. This therefore will require a participatory and an all inclusive strategic approach. This will require that the first stop shop for information on CDF activities for any constituency be the constituency website funding. This is likely to chide any format of disconnect between users and managers and any other stakeholders. To this end the CDF Committees need to

empower members of the public with adequate information to enable them not only measure and report performance of these devolved funds but also own the projects.

The CDF funds need to be subjected to and be implemented within normal government procedures. With the new policy by the Government of Kenya to have all the constituencies designated also as provincial administration districts, it is evident that Government procurement structures will be developed to constituency level. Preferential treatments/guidelines will have to be developed to ensure that CDF resources benefit more the enterprises that have the capacity to deliver and also provide the multiply effect at the grass root level.

9.2 Profit-Oriented Enterprises

9.2.1 Introduction

Procurement in the public sector differs from the private sector in several ways. First, government purchasing systems administers the money that belongs “to all”. In addition, the number of customers and the suppliers of the government purchasing systems are often excessively large. Further, the public sector must follow a number of procurement regulations, bringing legislative requirements into force.

It is crucial that public procurement follows strict and clear business models that optimize the specific objectives and considers the impact on processes across the organization. However, in most governmental areas the process of procurement may be a very complex and expensive task, particularly for smaller purchasing values, the group of potential suppliers willing to bid may be excessively large. Moreover, although such a decision is often characterized by conflicting

objectives and imprecise and qualitative information, decisions have to be based on simple economic evaluations, due to the imperative need for full transparency.⁴⁸

Understandably, public procurement law is meant to safeguard public funds and interest. As a result, the guiding principles are: accountability, transparency, integrity and value for money. In public entities, procurement decisions must be corporate therefore several committees are set up to ensure that this requirement is met. This normally causes delays. So if a public organization is profit-oriented, it finds its maneuvers to make profit curtailed. This is unlike the private sector. In addition, sometimes involving a large number of potential suppliers in a procurement process can be a source of waste in terms of costs for the bidding process that are part of broader transaction costs. This 'waste' may outweigh the advantages connected to the competition amongst bidders.⁴⁹ Also, public markets are often uncompetitive in that they fail economic test models that require features such as perfect information and particularly low barriers to supplier entry or exit.⁵⁰

Csaki⁵¹ did a comparative study of private and public sector profit-oriented companies procurement processes in Hungary. He looked at private companies who had to begin using European Union public procurement rules in 2004 due to the sectors that they operated in: water, energy, transportation, and telecommunication. Some of the observations from the study may be relevant for the Kenyan context:

⁴⁸ Costantino et al., 'Reducing the Costs of Public Tenders: A Modest Proposal', 3rd International Public Procurement Conference Proceedings, 28-30 August 2008.

⁴⁹ Ibid

⁵⁰ Caldwell et al., 'Promoting Competitive markets: The role of public procurement' Journal of Purchasing and Supply Management, 11:242-251, 2005

⁵¹ Csaki, C., 'Irreconcilable differences or the best of two worlds: Analyzing the similarities and the differences between private and public procurement rules and practices', 3rd International Public Procurement Conference Proceedings, 28-30 August 2008.

1. In the first year of the switch over from private to public procurement procedures, the need to change planning procedures became evident. The practice of placing major requests to be completed within a month did raise issues related to required value aggregation. Most importantly, however, the time required to run a public procurement procedure prohibited the fulfillment of requests on short notice. Choosing accelerated procedures or ones without a notice to speed up the process raised the risk of legal challenges. This issue of being unable to quickly react to business opportunities within the current Public Procurement framework was queried from Kenyan profit-oriented state corporations, as part of this study.
2. Procurement and technical professionals who became involved in public procurement, constantly nagged about the administrative overhead: the perception was that they spent twice as much time and effort preparing the same project under Public Procurement. Minimal time limits set by the law slowed down projects and put pressure on the recipients of goods and services. People, previously operating as a private sector entity, were used to having incomplete requirements that could be refined once short-listed suppliers were known. For open tenders this was prohibited by law: criteria had to be defined fully in advance, forcing certain decision to be made earlier than usual.
3. When operating as a private entity, the companies had their own pre-qualification system in place. No supplier could make a bid or be invited to submit one without going through the process consisting of filling out a large survey and providing proof of claims made in the response. A bidder's ability was first assessed based on references. Prequalification data was then updated by evidenced performance of positive and negative experiences alike. These would all contribute to the overall judgment of the ability of the supplier to perform. All this resulted to reduction of risk, thereby leading to reduced cost. A consequence of this was that smaller organizations rarely invested the effort to jump the hurdle, leaving the company with untapped potential suppliers. On

the other hand, as it was difficult for a new supplier to earn points based on past performance, it was customary to offer them smaller jobs first to test their abilities. This also ensured that established suppliers were somewhat under pressure as they were aware that the procuring entity was constantly looking for new opportunities. In the private sector it was almost unimaginable to give a large contract to a new untried supplier.

4. As private entities, companies would be able to initiate negotiations with all short listed companies. However, before the award is finally made, a second round of price negotiations is entered into with the leading supplier. Selection and award criteria as well as the winning price are never publicized and kept within the companies. This approach is unacceptable under the public procurement regime.
5. The restrictions in the European Union law that disallow requirements containing the references to brands or makes – other than in the context of equivalency – lead to an increased number of differing machinery and part types. This led to more warehousing, more training, new people with specialty skills to be hired and more documentation, all leading to increased costs, difficulties in maintenance and increased risk.

From the study and as a way of summary, the following issues were seen as the main public procurement threats by the commercial side of purchasing:⁵²

1. Not being able to rely on past supply performance of a contractor, especially in relation to the procurer.
2. Allowing unknown, untested company to come, ‘out of the blue’ and win a major contract.

⁵² Csaki, C., ‘Irreconcilable differences or the best of two worlds: Analyzing the similarities and the differences between private and public procurement rules and practices’, 3rd International Public Procurement Conference Proceedings, 28-30 August 2008.

3. Inability to know and influence (after signing the contract) who will actually come and do the work.
4. The inability to negotiate with multiple suppliers.
5. The perception that bidders are over-protected by the law.

9.2.2 Strengths of the Act for Profit-Oriented State Corporations

The Act and subsequent regulations of 2006 and 2009 were aimed at increasing transparency and accountability as well as value for money in the procurement process. From a 2009 survey of the Kenya profit-oriented state corporations,⁵³ 95% of respondents felt that the Act and Regulations had either enhanced or greatly enhanced transparency in procurement within their organizations. Further, 62% of respondents felt the Act had either greatly enhanced or enhanced the quality of goods and services, while only 19% felt that it had hindered. On the issue of disposal of goods and assets that are no longer required, 68% of respondents felt the Act had enhanced or greatly enhanced the ability to dispose.

Finally, one of the major goals of the Act and regulations was to level the playing field for and open up public procurement to more suppliers. Open transparent competition was supposed to result in increased value for money. A majority of the respondents, 59%, agreed or strongly agreed that the Act has resulted in a reduction in the average purchase price for goods and services for their organizations.

⁵³ A twenty-one question survey was developed to determine the impact of the Procurement Act and Regulations on profit-oriented state corporations. Participants were also given an opportunity to freely express themselves through three open-ended questions touching on the positive and negative aspects of the Act, as well as any suggestions they would have for improvement. Due to the relative small number of profit-oriented state corporations (54), a 100% sampling was employed. The surveys were sent both in electronic and print form to the companies' procurement managers. Of the 54 surveys sent out, 22 responded giving an effective sample rate of 40.7%. The results from this study are presented in the next two sections.

9.2.3 Challenges the Act presents to Profit-Oriented State Corporations

One of the key requirements for business success is the ability to react quickly to business opportunities as they present themselves. The 2009 survey of Kenyan profit-oriented state corporations revealed that 63.63% of respondents felt that the Act had hindered or greatly hindered their ability to react quickly to business opportunities. These results are inline with previously cited studies carried out in Hungary by Csaki.⁵⁴

In addition, many profit-oriented enterprises need to purchase branded items for resale to meet the needs of their customers. In this regard, 70% of respondents felt that the Act hinders or greatly hinders this need. Further, 63.6% of the respondents believed that the Act hinders or greatly hinders the organizations ability to bargain with suppliers. These results are also in line with other studies cited in the literature review, and from the Regulations (2006) that allow negotiations only with the final selected supplier at the end of the procurement process.

One of the keys to success in business is the ability to be able to form partnerships with a view to maximizing value to the shareholder. For Kenyan profit-making state corporations, on the formation of public-private partnerships, 64% of the respondents felt that the Act and subsequent Regulations of 2009 had hindered or greatly hindered the process, with 27% perceiving that the Act had enhanced or greatly enhanced their ability to form partnerships.

On the over-arching issue of the impact of the Act and Regulations on the competitiveness of their organization vis-à-vis their counterparts in the private sector, 67% of respondents disagreed or strongly disagreed that the Act had made them more competitive.

⁵⁴ Csaki, C., 2008, op. cit.

9.2.4 Proposals to Enable a Competitive Environment for Profit-Oriented State Corporations.

9.2.4.1 Proposed Legal Framework for Profit-Oriented State Corporations

As stated earlier, public procurement can be defined as the purchase of goods, works or services if such acquisition is effected with resources from state or local authority budgets, state's foundation funds, domestic or foreign loans guaranteed by the state, foreign aid as well as revenue received from the economic activity of the state.⁵⁵ Profit-oriented state corporations raise their own funds through their own economic activities, and actually provide funds to the state. Therefore, can their procurement really be classified as *public procurement*? As a business, won't their need to maximize profits ensure that they obtain value for money during their procurement process? Would not maximization or growth of profits within a transparent framework form a better measure of their performance? The legal framework, therefore, should allow profit-oriented companies to operate on the same footing with their private sector competitors in the market. This would lead to more efficiency in service delivery and translate to higher returns for the benefit of the shareholders—citizens of Kenya.

For profit-oriented state corporations that are *not* monopolies⁵⁶ we therefore propose the following exemptions from certain provisions of the Act and regulations:

1. *Holistic Approach.* Profit-oriented state corporations should be allowed, in a transparent manner, to foster long-term partnerships with suppliers, enhance negotiations and promote value for money. Financial evaluations should be allowed to include cost-benefit analysis, value for money, opportunity cost, return on investment and all other hidden costs and benefits, not just the lowest financial bid.

⁵⁵ World Bank, op. cit, 1995.

⁵⁶ The challenges the Act presents to profit-oriented state corporations are mainly with regard to their ability to compete in the market with private sector competitors. This would not be the case for those companies enjoying monopoly status.

2. *Negotiations and Partnerships with suppliers.* Direct negotiations should be allowed with all compliant (pre-qualified) suppliers, as well as strategic partners to have negotiated contracts.
3. *Lead times.* Exemption should be given from stipulated mandatory advertising times for tenders, where the need to respond promptly to a business opportunity can be demonstrated.
4. *Special Procurement.* Firms whose prices of inputs change sharply over a short period of time should be able to use direct procurement methods whenever this is to the advantage of the company.
5. *Purchase of Branded items.* Customers often request items by brand. Where *items are meant for resale* (either directly or as value added input) and the need can be justified, profit-oriented state companies should be allowed to specify a *brand*. Items used for normal operations can follow regular procurement procedures.

9.2.4.2 Decentralization of the Oversight Functions of the PPOA

PPOAs review board and compliance department roles on contract cancellations. Most aggrieved bidders instead of appealing to review board tend to avoid paying a fee by complaining directly to a compliance department looking for compliance technicality to cancel awards. Profit-oriented state corporations operate in all corners of the country, yet the review and appeal boards are situated in Nairobi. Review and Appeal should therefore be decentralized at provincial levels with specific schedules within a month. Suppliers whose appeals are dismissed should compensate procuring entity for time loss.

9.3 Micro, Small and Medium Enterprises

Micro and Small scale Enterprises (MSEs) and Small and Medium Size Enterprises (SMEs) account for the majority of employment in Kenya and contribute a significant portion of the

Gross National Product. MSEs/SME employment was about 80% of Kenya's total employment in 2007 and many of these are youth yet they face many challenges accessing public procurement. They lack adequate information on how to access public procurements and a level playing ground. Participation of Kenya's MSEs/SME cannot be ignored if Kenya is to attain Vision 2030. Without imposing quotas, procuring entities should promote MSEs/SME participation in public procurement by:

- i. Sub-dividing large contracts into smaller lots. Sub-division facilitates access by SMEs both quantitatively (lot sizes may better correspond to the productive capacity of the SME) and qualitatively (the content of the lots may correspond more to the specialized sector of the SME).
- ii. Making use of the possibility to conclude framework agreements with several SMEs not just a single supplier.
- iii. Making sub-contracting opportunities more visible and ensuring equal terms for sub-contractors.
- iv. Providing feedback information to SMEs about their strong and weak points on unsuccessful bids allows them to improve for future bids.
- v. Training and guidance for procuring entities putting special emphasis on the situation of SMEs and how to design award procedures in ways that ensure that SMEs can participate on an equal footing with large enterprises.
- vi. Training and guidance for SMEs on drawing up their tenders.
- vii. Ensuring that the selection criterion is proportionate to what is being procured. Procuring entities that fix too high capacity and ability levels exclude *de facto* a high proportion of SMEs from participating in tender procedures.
- viii. Taking advantage of the possibility for SMEs and groups of SMEs to prove their combined economic and financial standing and technical ability.

- ix. Requiring only proportionate financial guarantees to cover risks related to the award procedure and the performance of the contract so as not to lock out SMEs. In addition, unjustified and prolonged retention of the resources of the procuring entities should be avoided.
- x. Keeping administrative work to an essential minimum as most SMEs do not have large administrative capacities. For example, procuring entities may allow SMEs not to submit part of all of the documentary evidence for a current tender if that information had been recently submitted for a previous tender and is still valid.

10 Conclusions

Efficient, effective and transparent public procurement must be viewed as the responsibility of all stakeholders. These include the procuring entities, the suppliers as well as the funders and beneficiaries of the procurement, the Kenyan public. It must be viewed within a continuously changing climate, where best practices are continuously identified and implemented. Success will be measured by the extent to which the public can see a significant increase in the quality of service delivery and achieve value for money. The concepts and ideas outlined in this policy will go a long way to achievement of this goal.

APPENDICES

Appendix I

The Roles and Responsibilities of the Public Procurement Oversight Authority

- i. Policy initiation and dissemination
- ii. Regulation of procurement practice and ensuring compliance with the legal and regulatory framework.
- iii. Enforcing compliance with the Act and regulations through investigations and ordering of corrective actions
- iv. Monitor the application of the Act and the Regulations and evaluate the of procurement capacity of the procuring entities as well as the impact of the procurement policy initiatives that are implemented.
- v. Determine the professionalism of procurement officers and members of procurement and tender committees by defining standards and creating the necessary training capacity.
- vi. Maintain databases on procurement authorities and delegated authorities, procuring entities, units, tender committee memberships and debarred bidders
- vii. Public Sector-Private Sector Consultation
- viii. Update Procurement Thresholds and Authorities
- ix. Provide Support to Procuring Entities
- x. Certification of Procurement Professionals
- xi. Classification of procuring entities.

Appendix II

The Roles and Responsibilities of Public Procurement Administrative Review Board

- i. Handles complaints
- ii. Reviews and appeals stemming from procurement practices

Appendix III

The Roles and Responsibilities of the Public Procurement Oversight Advisory Board.

- i. To advise the Authority generally on the exercise of its powers and the performance of its functions
- ii. To approve the estimates of the revenue and expenditures of the Authority
- iii. To recommend the appointment and/or termination of the Director-General in accordance with the Act
- iv. To perform such other functions and duties as are provided for under the Act

Appendix IV

The Roles and Responsibilities of Kenya National Audit Office

- i. Examine the economy, efficiency and effectiveness with which the Government, a State Corporation or a Local Authority uses its resources
- ii. Ascertain how far activities of government institutions, Local Authorities and State Corporations have conformed to the existing Environmental Legislation in place in Kenya , and other International conventions
- iii. Establish how far the government is effectively controlling environment risks from its own operations.
- iv. Confirm whether the government and other institutions have put in place effective accountability framework for its environmental programmes and policies.
- v. Establish whether the auditee is meeting environmental performance targets it has set up for itself.
- vi. Ensure that all Public Debt commitments are identified and properly recorded.
- vii. Ensure that there are proper procedures for authorizing all Public Debt Commitments and that all these procedures are applied.
- viii. Ensure that records on all public borrowings and loan guarantees are well maintained.
- ix. Assess the economy and effectiveness of a particular borrowing.
- x. Assess the borrowing structural, regulatory, legal framework and legal provisions on borrowing and debt management, including such matters as ceilings for borrowing, authorizations, provisions governing the use of particular debt instruments, budgetary law requirements, adjustments of provision to changed environment
- xi. Promote a culture that rejects waste and values honesty, responsibility, and the rational utilization of economic wealth.
- xii. Influence the approaches used to combat fraud and corruption problem.

- xiii. Review statistical indicators that point to a likely relationship between various indices of public finance and perceived levels of corruption.
- xiv. Contribute to improving overall transparency and accountability, supporting an environment that limits the opportunity for acts of corruption and creating a climate of good governance.
- xv. Encourage the selection of public servants exclusively according to their integrity and capability.
- xvi. Report the existence of organizations' as well as government-wide formal codes of ethics as well as confirm that certain principles for the conduct of public servants are well defined, including integrity, objectivity, impartiality, honesty, and professionalism.

Appendix V

The Roles and Responsibilities of Kenya Anti-Corruption Commission

- i. Investigate corrupt or economic crime conduct and activities
- ii. Advise and assist individuals and/or public bodies on ways of preventing the occurrence of corrupt practices
- iii. Examine the practices and procedures of public institutions in order to facilitate the discovery of corrupt practices and advise public institutions on how to fight corruption
- iv. Educate the public on the dangers of corruption and economic crimes
- v. Enlist public support in fighting corruption and economic crime
- vi. Investigate the extend of liability for the loss or damage of any public property
- vii. Facilitate the recovery of ill-gotten wealth

Appendix VI

The Roles and Responsibilities of Parliamentary Accounts Committee

- i. Examine and report on the financial statements/accounts of the government Ministries/Departments in the light of the outputs proposed and the performance criteria in the relative estimates together with each statement and report of the Auditor General presented to the Parliament.
- ii. Examine and report to the Parliament on the financial statements of statutory bodies.
- iii. Examine and report to the Parliament on the transactions and financial statements of any body other than a ministry of government or statutory body for whose purposes a specified sum of money or a sum not exceeding a specified sum, has been appropriated by Parliament by way of grant, subsidy or loan to which a grant, subsidy or loan has been made out of the consolidated fund to meet the public expenditure.
- iv. Concern itself with change in the basic financial systems for better delivery of services to the public and minimal wastage of resources.

Appendix VII

The Roles and Responsibilities of Kenya Institute of Supplies Management

- i. Enhance integrity and professionalism among our members and stakeholders in the procurement profession by offering training in supply chain management and promoting high standards of skills
- ii. Promote ethical practices in procurement and supplies management both in the private and public sector by providing the very highest quality products and services possible, while showing leadership in this area.
- iii. Promote and represent the profession of purchasing and supply management through active involvement in the various forums impacting on procurement.
- iv. Develop improved methods of purchasing and supply and promote their use in all organizations' through trainings and seminars
- v. Promote and develop the value of membership of the Institute in-order to increase individual and corporate membership levels.
- vi. Offer a forum on which supplies management profession can meet, share, experiences and discuss issues affecting the profession in practice
- vii. Encourage publication of supplies management literature in the region and thus promote awareness and learning in this field
- viii. Offer consultancy services to client organizations
- ix. Encourage training for those interested in the profession and certify members who qualify through a well-designed program of study and recognizable experiences and contribute to the profession

Appendix VIII

The Roles and Responsibilities of the Centres of Procurement Expertise

- i. Contribute to the development of overarching procurement policy and the generic procurement process/model
- ii. Develop proposals for operational policies and procedures which are in line with the overarching procurement policy for consideration by Public Procurement Oversight Authority.
- iii. Collaborate with like organizations in the Republic of Kenya, share learning and use the information to inform/develop wider policy.
- iv. Assist in establishing a framework for savings targets and performance measures with customers/spenders, which meet the requirements PPOA
- v. Establish and highlight constraints (including funding) which prevent implementation of overarching policy or particular good practice developments
- vi. Interact as necessary with the private sector including trade bodies.