

ETHICAL AND PROFESSIONAL STANDARDS CHALLENGES FACING PROCUREMENT ENTITIES IN THE PUBLIC SECTOR: A CASE OF THE MEDICAL HEALTH DEPARTMENT HEADQUARTERS)

**Dr. Francis Ofunya Afande, PhD., FCIM (UK).
Dedan Kimathi University of Technology
P.O. Box 657, 10100, Nyeri Kenya**

ABBREVIATIONS AND ACCRONYMS

OECD	Organization for Economic Cooperation and Development
PPDA	Public Procurement and Disposal Act
PPOA	Public Procurement Oversight Authority
RFP	Requests For Proposal
SBDs	Standard Bidding Documents
SOEs	State-owned enterprises
TOR	Terms of Reference

1.0 INTRODUCTION

1.1 Background

Public procurement has a tremendous impact on the economic, social, political and legal environment. In Kenya, public agencies are major purchasers of property and services and therefore exert significant influence on the size, structure, and performance of domestic industries. It therefore becomes necessary from time to time for the Government to review the effectiveness and efficiency of its procurement regime. This term paper presents a review of the current system of procurement and the reforms undertaken in the public sector.

1.1.1 The Concept of Public Procurement

Public procurement involves the utilization of public money in a complex of processes and choices in which needs are evaluated, scope of works, products or services identified, form of delivery and methodology for making contractual choices determined, contractual arrangements entered into and works or services performed. The term *public procurement*, for the purposes of this term paper, includes all stages of the process of acquiring property, works and services, involving the use of public money to accomplish specified public purposes, beginning with the identification of a need and ending with completion of the contract.

Public procurement distinguishes itself from private procurement through the utilization of public money and as a result is subject to a greater degree of transparency and accountability than obtains in the private sector. The utilization of public money imposes on all agents a duty of care in the public interest and a duty to safeguard and ensure the attainment of value for money. The utilization of public money also demands that such utilization will be undertaken only for the purposes intended and authorized.

Public procurement occurs wherever public money is spent on the acquisition, maintenance and disposal of property, or the procurement of works and services. This means that the legal

framework will apply not only to Government ministries and departments but also to statutory authorities, State-owned enterprises (SOEs) and civil society bodies. Wherever and whenever public money is being spent, the public interest must be paramount.

1.1.2 Rationale for Ethical and Professional Management

Since the mid 1980s the world has been undergoing major social, economic, and political changes. Amongst others, are privatization and contracting out, decentralized management, greater pressure for openness, multi-partism, changing mores, more intensive media scrutiny, and increased accountability mechanisms. Also, there has been a debate on how to make the public sector function in the best way, a debate on the role of government, of regulatory institutions and good governance in developing world. Ethics management has been singled out as a crucial aspect to better understanding of the responsibilities of the government and how it should interact with citizens, civil society and foreign as well as domestic corporations and private business. Ethics management plays an important role in democratic development and public administration, because it provides guidelines and regulations for the organization of the state (Thai, 2006). In their totality these guidelines and regulations are prescribed as minimum ethical standards, and have to be adhered to by elected, appointed officials and other public servants in the course of dispensing their duties. This is crucial in bringing about an efficient and effective public administration and democracy as a basis for improving public confidence in the integrity and credibility of the government.

1.1.3 Reforms in Public Procurement

In the past decades, the public procurement system in Kenya has undergone significant developments. From being a system with no regulations in the 1960s, and a system regulated by Treasury Circulars in the 1970s, 1980s and 1990s, the introduction of the Public Procurement and Disposal Act (PPDA) of 2005 and the Procurement Regulations of 2006 has introduced new standards for public procurement in Kenya. In line with the country's public procurement reform agenda, Kenya in 2006 committed itself to become one of the 22 countries participating in the pilot testing a new Methodology for Assessment of National Procurement Systems (version 4) developed by the OECD-DAC Joint Venture for Procurement. The core objectives of the assessment were to: (i) establish a common base for development through a well documented and broadly accepted understanding of key issues of the public procurement system; (ii) create a baseline against which future progress can be measured; (iii) serve as a benchmarking tool which may be used for comparison between systems and countries; and (iv) field test Version 4 of the assessment methodology with a view to proposing improvements to the methodology

In undertaking public procurement reform, a number of important issues arise: (i) The definition of public money as all monies spent on the acquisition, management and disposal of property and services and including all money received by a public body regardless of the source, or money received by a nonpublic body from a public body; (ii) The obligation of all Bodies spending public money to be held accountable for the achievement of Value for Money; (iii) The extent of the function of public procurement in the formulation and implementation of public financial management policy and, by extension, public policy; and (iv) The appropriate trade-off for procurement officials between, control, rules, regulations and accountability on the one hand, and efficiency, flexibility, judgment and innovation, on the other.

1.1.4 Imperatives for Reforms in Public Procurement

The imperatives for reforms in public procurement are as discussed below.

Good Governance: The Government of Kenya, in its national policy statement-Vision 2030, has set as a goal, a quality of governance reflecting the highest standards of ethics, transparency and accountability. Implicit in this goal is the need for good governance and securing the public interest. The quality of prevailing governance is often reflected in the practices and procedures of public procurement. The operation of its procurement practices and procedures directly affects the esteem in which Trinidad and Tobago will be held at home and abroad. Efficient procurement practices incorporating the principle of good governance will signal to the world at large the Government's preferred way of doing business.

Social and Economic Development: Procurement is a major driver of the development or weakening of public sector institutions. If there is a lack of clear and objective criteria and of direct accountability of decision-makers at every phase of the procurement process, windows of opportunity are created for poor spending practices. Conversely, where procurement decisions are clearly seen to reflect the principle of good governance, there is a strengthening of public institutions. Procurement practices also operate as a direct driver of the national economy. The volume of purchases by public agencies must profoundly impact upon the sustainability of small and medium sized enterprises. In fostering social and economic development, Government's procurement policy must therefore address the guaranteeing of substantial market share to local businesses and the development of local skills.

Public Confidence: Integral to successful business - public or private - is the confidence of the parties in the integrity of the procurement process. The current practices of sole tendering by SOE's are cause of concern with respect to the lack of transparency of the contracting process and criteria for evaluation and decision-making. In public procurement, the public must have confidence in the integrity of the process. There is need therefore for processes that have public endorsement and which will restore and deepen public confidence.

Impact of Technology: The use of information and communications technology is profoundly affecting the way people and institutions do business. Changes in technology affect what people procure and how they procure. The advancement of cross-border trading and e-commerce places additional demands for the establishment of a procurement system that can meet international demands. The current procurement system would function more efficiently if placed on an electronic platform. The imperative, therefore, is for a procurement system that meets these challenges without compromising the public interest.

Conformity to Best Practice: The removal of trade barriers and the evolution of procurement practices internationally have triggered the need to review current practices in Kenya and ensure that domestic practices are in conformity with international best practice.

Regional and International Developments: In the East African Region, , the formation of the East African Community Protocol, which is expected to deepen regional economic, social and political relationships, will create new challenges for private and public sector management. It is expected to expand opportunities for the free movement of capital, property and services throughout the Region. Part of this integration process involves the establishment of a

regional regime for Government procurement, reflecting current best practice. It will entail therefore, uniformity in procurement processes and conformity to agreed principles.

Judicial Notice: A national policy on procurement, sanctioned by Parliament, signals Government's regulatory philosophy to the public at large. It will also assist the Courts in resolving legal disputes arising out of decisions of procurement involving public money, particularly in the context of judicial review.

Weaknesses in the Current System: Prevailing deficiencies in the legislative framework have weakened the current system. These weaknesses are further flawed by a shortage of skilled procurement staff in the various public agencies. The lack of a Regulator, with the responsibility of oversight of the whole system to ensure efficiency and effectiveness, has promoted windows of opportunity for dubious practices.

2.0 REVIEW OF THE CURRENT PROCUREMENT SYSTEM

2.1 Introduction

This section considers the strengths and limitations of the present public procurement system. It highlights the fact that the current system deals only with activities in the product or production cycle of procurement. The weaknesses associated with the present procurement system and the impact of agencies operating outside of the purview of the Public Procurement Oversight Authority (PPOA) is also considered.

2.2 Strengths

The PPOA, as governed by the Ordinance, operates in a largely transparent manner in the tendering process. Apart from the occasions of selective tendering, the PPOA invites all tenderers to submit bids. Opening of these bids is done publicly before being evaluated by an evaluation team appointed by the PPOA. While the PPOA is not involved in all steps of the procurement process, it has a good reputation for ensuring that the procurement processes and procedures within its ambit are properly followed.

2.3 Weaknesses

2.3.1 Deficiencies in the Legal & Regulatory Framework

The existing procurement legislation is considered archaic by all stakeholders and in need of major reform if it is to meet current needs and to conform to current best practice. The underlying principle of accountability in the PPOA Ordinance was compromised by prescribing the PPOA as the procuring agency of the State, while at the same time limiting its activities mainly to the tendering stage. The processes, as prescribed particularly in relation to the award of contracts, do not reflect involvement in the full procurement cycle.

In law, the PPOA has no direct involvement in the design of the Terms of Reference (TOR), nor the preparation of Requests For Proposal (RFPs), nor the monitoring or the execution of the contract. Further, after the award of a contract, all matters that are dealt with fall within the domain of contract law to which the PPOA cannot be a party. Even within its realm of responsibility, the PPOA in many cases refers the documents back to the client

Ministry/Department as a consequence of obvious faults, which appear to predispose a particular outcome in contradiction to the principle of fair competition, and compromises the integrity of the procurement process. As a consequence, the process is often delayed.

Some contractors, suppliers and consultants share the view that there are too many stages in the procurement process, especially where it is necessary to go back and forth from PPOA to client. They argue that the resultant delays affect tender prices and more often than not justify price increases since the validity period of three months expires before a contract is awarded. The Ordinance does not apply to tendering on financial matters and as a result does not accommodate these systems. These limitations effectively put the procurement activity of these projects outside the ambit of the PPOA. In addition, amendments to the PPOA Ordinance have led to the use of off-budget arrangements and the proliferation of procurement activities not covered by the legal and regulatory framework.

2.3.2 Absence of Uniformity in the Tendering Process

State-owned enterprises are fully responsible for their own procurement activities. These procuring entities tend to use their own standard bidding documents (SBD's) and procedures, thereby creating unnecessary parallel systems. While the PPOA has striven for uniformity in the tendering process, in practice this uniformity has not been achieved. The net result is a complete lack of standardization at all levels of the procurement cycle, and particularly so in the standardization of bidding documents. Standardization is an essential prerequisite for the utilization of digital technology and the modernization of organizational processes.

2.3.3 Human Resource Limitations

The current staffing and training of the PPOA's personnel constrains the organization's ability to adequately service ministries and departments. The organization is restricted also in its ability to be current with present practices in a rapidly changing technological environment. Currently, the office of the PPOA prepares all major contracts in the goods, works and services areas. However, it is neither staffed nor structured to deal efficiently with the volume and complexity of the work involved or with rapid changes in technology contracts. This contributes to delays in the preparation and execution of contracts and is a major deficiency in the system. Many State-owned enterprises and Statutory Bodies, also lack staff properly trained in procurement. In fact, procurement is not looked upon as a professional discipline in its own right.

2.3.4 Lack of Regulatory Oversight

The partially decentralized nature of the current system extends the contracting authority among the various players without providing adequate monitoring. Cabinet has authority to direct Ministries/Departments to use selected State-owned enterprises thereby bypassing the regulatory oversight of the PPOA. In most cases, these companies lack the technical capability to conduct the activities under contract and award sub-contracts using their own procurement rules and procedures. The PPOA does not have the authority to regulate. The regulatory procurement framework lacks the authority to audit the procurement system and ensure compliance with the rules and procedures for the award and implementation of contracts. However, under the Constitution, the Auditor General is responsible for auditing and reporting annually on public expenditure matters.

2.3.5 Absence of a Complaints Mechanism and Dispute Resolution

Although the PPOA receives and acts upon supplier complaints with respect to the procurement process, there is no formal independent complaint and dispute resolution mechanism in place.

2.3.6 Lack of a National Registry

Each procurement agency keeps its own register for inviting bids, and uses its own procedures for prequalification registration. There is no national registry of contractors, consultants and suppliers. The absence of such a registry creates additional work for consultants and contractors by having to register with the various agencies.

2.3.7 Lack of an Electronic Public Information System

There is no system in place to provide suppliers or the public at large with full, up-to-date and electronically accessible information on tender opportunities, the publication and status of bids and awards, or the progress of major projects.

2.3.8 Concerns of Local Suppliers

Notwithstanding the Government's stated objective of supporting the development of local industry, local contractors, consultants and other suppliers do not believe that they are being fairly considered in the tendering process. There are concerns that some SOEs negate fair competition by the use of the selective tendering process without due regard to the prequalification or registration criteria. The Ordinance does not stipulate any guidelines or restrictions limiting the use of this method of procurement.

2.3.9 Poor Data Collection and Reporting

Procurement records are maintained by both PPOA and State-owned Corporations. There is no minimum requirement, however, on the contents of such records and the maintenance period that is applicable to all procuring entities. Furthermore, there is no adequate centralized reporting of the awards of government contracts.

3.0 CURRENT BEST PRACTICE

3.1 Introduction

In response to the evolving complexities of the global marketplace, many countries are reforming their governmental procurement systems. These efforts are leading to general agreement on what constitutes good public procurement practice. An analysis of these reform efforts suggests that any system of public procurement should: (a) be efficient and reflect best business practice; (b) be publicly acknowledged as fair, open and above reproach; (c) involve civil society as a check and balance to ensure transparent practices; (d) be ethical: the conduct of all parties must be that of mutual trust, respect and integrity; (e) promote competition and not discriminate; (f) promote the competitiveness of local business; (g) clearly identify

relevant decision-makers; and (h) be alert to the impact of technology in the marketplace and avoid bureaucratic red tape.

3.2 Operating Principles for Best Procurement Practice

Based on a survey of a number of reformed procurement systems in the Commonwealth, including Jamaica and Australia, and those in operation by multilateral financial institutions, some core operating principles which characterize these systems have been identified. These principles are primarily Value for Money, Transparency and Accountability. They redefine the economic concerns, identify with the public interest, and impact the procurement process. How these principles are implemented in best practice is outlined below.

3.2.1 Value for Money

Value for Money in the context of current best practice in procurement means the attainment of the best combination of price and quality to meet the particular need in the shortest possible time. It is essential that procurement attains the best quality of property and services for the price that is paid, or the lowest price for the acceptable quality of property and services. It does not necessarily result in the lowest priced goods available or the absolute highest quality available. It is the best combination of price and quality to meet the particular need. An assessment of Value for Money must take into account not only the immediate cost of property and services procured, but also: (i) the performance of the suppliers in meeting their contractual obligations, quantitatively and qualitatively; (ii) financial considerations including the source and cost of funds; (iii) the cost of maintenance support; and (iv) the anticipated price on disposal.

In other words, life cycle costing must be done as part of the evaluation process leading to the recommendation for award. Measures which might be employed to affect Value for Money include: (a) Undertaking of value analyses for contracts over a specified limit; (b) Public consultation on the rationale and elements of major projects during the design phase before the bidding documents are finalized; (c) Greater use of standard clauses in Conditions of Contract; (d) A registration system of endorsed suppliers, contractors and consultants who get preferential consideration for contracts by virtue of that registration after a thorough prequalification or evaluation exercise; (e) Prompt payment of suppliers, contractors and consultants by Government agencies and the introduction of penalty interest in the event of late payment; (f) Monitoring of the execution of large contracts by civil society; (g) Coordinated purchasing by Government departments to take advantage of volume discounts (bulk purchasing); and (h) The use of measurable criteria to determine the best combination of price and quality.

3.2.2 Transparency

Transparency through internal and external scrutiny is an essential element of accountability and should be an inherent characteristic of all processes and procedures, plans, actions or decisions relating to procurement. Given that procurement systems are a key indicator of the prevailing culture of governance, it is a generally stated imperative of reform that procurement systems be transparent, particularly with respect to details of bids and awards.

Best procurement practice requires that all information regarding the process be in the public domain. The potential suppliers of property and services must have full access to information on procurement requirements, rules and decision-making criteria (Burt *et al.*, 2003). Bids are opened publicly and all decisions are fully recorded and published. The public is therefore

able to debate the rationale of projects, particularly the large ticket items or those of strategic importance, and to monitor the implementation of contracts awarded. Some measures employed in other jurisdictions to incorporate the principle of Transparency into the procurement process are: (a) public reporting, of all business opportunities in an adequate and timely fashion and in a separate gazette, for example a Procurement and Disposal Gazette, and the Internet; (b) greater use of e-procurement; (c) reporting of details of awards, agreements, and reasons for selection of the supplier, contractor or consultant; (d) oral debriefing of all unsuccessful bidders by the awarding agency; (d) public access to details of different tendering procedures; (e) incorporation of the draft Agreement and/or Contract in the tender documents; and (f) publication of bids and awards with price; and (g) incorporation of specified ethical standards and codes of conduct into the Terms of Reference, Requests for Proposal, tender notices and letters of invitation.

3.2.3 Accountability

In the context of current best practice in public procurement, officials of buying agencies are not only clearly identified but are held directly accountable within the framework of ministerial responsibility to Government, Parliament and the public. In conducting their duties, they are protected from the undue influence of the Executive. They are obliged by law to ensure that their procurement practices reflect the policies and principles that are specified. In addition, they are subject to heavy penalties and personal liability if the policies and principles laid down are not manifested in transactions involving public money. Some measures in current best practice to incorporate the principle of Accountability in procurement are: (a) all interested parties are required to sign a joint undertaking guaranteeing the integrity of the process and accepting sanctions in the event there is a lapse, arbitration in the event of disputes, and monitoring by a third party such as a civil society body; (b) identification of contact persons and relevant decision-makers together with details of the extent of their authority and contact information; (c) keeping of proper auditable records, which can be scrutinized at any point of the process; and (d) instituting and enforcing heavy penalties for parties in transgression as well as adverse publicity and debarment from future consideration both in their corporate and individual personas.

3.3 Promotion of National Development

Buying agencies in best practice environments are required to be alert to the wider implications of their procurement activities on Government's national policy objectives, particularly in the context of Value for Money, and are expected to collaborate where their activities have an effect on the operations of other agencies. Reform initiatives in some Commonwealth jurisdictions clearly specify that procurement systems should promote local industry while being sensitive to international commitments. For example, tender documents are required to specify industry criteria, associated evaluation methodology and opportunities for participation by small and medium sized business enterprises (SMEs).

3.4 Some Discernible Trends in Current Best Practice in Public Procurement

Given that no single procurement model suits all situations, the general trend is towards one with a legal and regulatory framework that specifies the underlying fundamental operating principles of the system. This trend steers away from prescribing specific methods and arbitrary thresholds. This Framework approach supports the buying agencies by providing

them with the authority to consider their requirements and the existing market and select a procurement method on its merits. However, the method selected should reflect the prescribed operating principles, which have the force of law.

These operating principles are supported by policy guidelines that have the force of law and will be relevant in any judicial proceedings. The key element in the Framework approach is that the purchaser is held responsible and accountable. The trend is towards full decentralization of authority with differing but effective checks and balances that are determined by the complexity of the transaction and the amount of public money involved. Thus, larger multi-million dollar contracts are subject to a greater degree of monitoring than smaller contracts. The monitoring of the process to ensure effectiveness and efficiency is usually performed by a Regulator who plays no role in the actual operation of the procurement process of the purchaser.

The major function of the Regulator is to ensure the integrity of the process conceptually, strategically and operationally. This body is established either by statute with its functions and duties specified as a matter of law or by the creation of an administrative unit, usually within the Ministry of Finance. The Regulator is removed from the operation of the procurement process and is mandated to: (a) ensure the relevance and effectiveness of procurement by developing policies and guidelines that all participants, whether Government, quasi-Government or suppliers/purchasers, are obliged to follow as a matter of law; (b) advise the buying agencies on process improvement; (c) monitor and audit the procurement process; and (d) Investigate complaints.

In reforms where the core mechanism is adherence to prescribed principles and guidelines, compliance with which is a matter of law, the details of the procurement process are found in comprehensive handbooks that are prepared as guidance material by either the Regulator or the procuring agencies themselves. These handbooks are publicly available and provide step-by-step instructions on the procedures to be used for different categories of purchase. Because of changing technologies, there is a trend towards e-commerce and the consequent reassessment of the legal foundation of commercial practices to accommodate this. Promotion of the use of e-commerce is seen as a means of further streamlining the process and providing access to a larger marketplace.

The emphasis in best procurement practice is on promoting objectivity and flexibility, minimizing the opportunity for manipulation, and increasing public trust in the integrity of the process. This is done not only by negotiation between the parties themselves but also by input from the society at large through full publication of the details of bids and of other elements of the process to enable stakeholders to comment thereon. Given advances in technology, this is easily and cheaply achieved within short time frames, depending on the nature and complexity of projects. Best Practice therefore requires the procuring agency to: (a) describe clearly and fairly what is to be procured; (b) publicize the bid widely to enable greater opportunity for offers of supply; (c) publicize the criteria for the selection of award of a tender; (d) publicize the details of all bids; (e) award the contract in accordance with predetermined rules for selection; (f) award the contract to the selected bidder without requiring price reductions or other changes to the winning offer; (g) give equal treatment to all bidders, potential and actual, in terms of deadlines, confidentiality and pre-selection information; (e) recognize that Value for Money does not equate with awarding the contract

to the lowest bidder; and (f) pay for property and services rendered on-time, with penalty for late payments in accordance with the terms and conditions of the contract.

3.5 Enabling Environment

Current best practice requires the procurement function to be placed within the framework of a well functioning integrated public financial management system, particularly with respect to the timely provision of funding to support the procurement activity. A lack of integration between the budgeting process and the procurement process can result in increased cost and inefficiencies in the use of public monies.

4.0 ETHICAL AND PROFESSIONAL STANDARDS CHALLENGES

According to Transparency International, Kenya (2006), regardless of different initiatives taken by Kenya to promote ethics, ethics management in still faces a number of challenges, such as: (i) Ethics is perceived as a personal, ineffective, religious stuff, which could not be enforced and it is not pertinent to work; (ii) Information asymmetry, whereby the public is not well informed on ethical issues; (iii) Duplication of and complimentary roles and responsibilities for institutions which oversee ethics promotion; (iv) It is influenced by different changes that occur in the world, which has negatively affected the process of ethics management in Tanzania, because the nation has been culture blurred; and (v) Lack of human and financial resources, but to mention a few. Lack of mechanism at the virtue of making a distinction between the business activities of public leaders with those of governance.

5.0 STRATEGIES TO ENHANCE ETHICAL AND PROFESSIONAL STANDARDS IN PUBLIC PROCUREMENT

The legal and institutional framework setting out the basic conditions and the manner in which procurement may be undertaken procedurally, the results that can be expected, and the potential efficiency gains that can be achieved (Mishra, 2006) is crucial in the fight against corruption. Within this environment, the commitment of public sector staff in managing and adhering to the requirements of the procurement process and taking advantage of the competition in the market is decisive to the outcome in terms of achieving the objectives of a national public procurement system

Not disputing the argument above, the World Bank (2004) confers that an effective anti-corruption strategy builds on five key elements: increasing political accountability, strengthening civil society participation, creating a competitive private sector, institutional restraints on power and improving public sector management. Others include; top political commitment, sound procurement legal framework (Transparency International- Uganda Chapter, 2007); Professionalizing procurement workforce and capacity building (Ferrell and Gresham 1985; Cooper *et al.*, 1997); Pidaparathi, 2003); workers themselves should care about ethics if they wish to work in respectful and ethical organizations (Ramsey, (1989; Trevino and Nelson, 1999) suggests strong procurement records management as a ways for detecting corruption through inspection, sanction and reporting. Burt *et al.*, (2003) contends that supply managers have to be aware of the potential conflict of interest when selecting suppliers which occurs when procurement managers divide their loyalty between the firm that employ them and another. Avoidance of showing favoritism toward certain suppliers, (Ferrell and Gresham

1985; Forker and Janson 1990; Turner *et al.*, 1994, Shah, 2006) advocates for the use of ethics codes and participation of stakeholders: Harnessing the potential of new technologies.

OECD (2007) urges governments to put in place accountability and control mechanisms in the public procurement office and in procuring agencies such as internal audit; internal control mechanisms; External audit. Other external controls include public oversight bodies; parliamentary controls. However worth noting is the fact the institutional mechanisms set in place should be backed up by commitment by all stakeholders to make it work.

6.0 THE PREFERRED PUBLIC PROCUREMENT MODEL

6.1 Introduction

The emergence of the global economy, increasing decentralization of Government functions, greater discretionary powers of public officials, the disparate objectives of public procurement, and the weaknesses of the current system have led to the need to regulate procurement in new ways (Carter, 2000). While the attainment of Government's policy objective is conventionally through the operation of Government Ministries and Departments, the trend increasingly is towards the achievement of public objectives through contractual arrangements with State-owned enterprises, statutory bodies and private organizations, incorporated and unincorporated (World Bank (2007). Any discussion for a preferred procurement model for Kenya must therefore acknowledge the increasing use of these bodies and agencies as a common means of achieving Governmental objectives. The success of the procurement system depends on a clear articulation and understanding of what the legal and regulatory framework seeks to achieve. The framework must reflect the various objectives and the relative weights given to these objectives. In the context of Kenya, these objectives must include: (a) value for money in public spending; (b) greater public accountability; (c) promotion of greater transparency in public procurement; (d) consistency with and support of government policies; (e) effective and efficient contract performance; (f) balance between a commitment to develop local businesses and the need to provide a level playing field; and (g) a trade-off between control, rules, regulations and accountability on the one hand, and efficiency, flexibility, judgment and innovation on the other.

A regulatory framework that accommodates the demands of these objectives is **the Principle Model**, appropriately modified to take into account the domestic environment. The underlying philosophy of the Principle Model is that once a body is spending public money there follows an obligation on that body to account for Value for Money – which by definition encompasses efficient and effective delivery of the property and services for which public money is spent. It is the use of “public money” that determines the degree of public accountability for expenditure – not the institutional or organizational framework of the spender. Critical to the new procurement regime is therefore a clear understanding of “*public money*” which, as articulated in legal models reflecting current best procurement practice and effective accountability, encompasses: (i) all money received by a public body, regardless of source; and (ii) all money received by a non-public body, from a public body.

The legal framework will embrace expenditure by: (a) a public organization for a public or private purpose; or (b) a private organization for a public purpose regardless of the source or type of funding where it can be reasonably inferred that the State is ultimately liable.

In addition, public accountability may exist for private money where that money is used for a public purpose even though the spender may be a private organization generally raising funds independently of the State. The test lies not with the mode of incorporation or even the extent of public control or funding, but whether or not it can be reasonably inferred that the ultimate financial responsibility is to be borne by the State.

Government's policy, as articulated in Vision 2030, is for greater transparency and accountability in public sector decision-making, and best practice in public procurement. The proposed new procurement regime must deal therefore with all components of the public procurement cycle and affect all involved in public procurement without fear or favor. From this perspective, the Principle Model, appropriately adapted to the economic, social and political environment of Trinidad and Tobago is the preferred model. It provides an overarching framework for all agencies involved in procurement using public money with immutable parameters in which the operating principles and guidelines are not negotiable. This Model addresses many of the weaknesses with the current system: (a) It recognizes the validity of the tendering process of agencies while providing an overarching uniform system which affects all transactions; (b) It increases openness and accountability, thereby enabling greater scrutiny by the public; (c) It enables stakeholder participation in the development of policies and guidelines; (d) It enables flexibility to accommodate technological change; (e) It removes ambiguities in the reporting relationships and strengthens Parliamentary oversight of public expenditure in procurement; (f) It enables greater monitoring of contract execution; (g) It provides a specific dispute resolution mechanism and proposes clear sanctions in the event of breach.

6.2 Construct of the Preferred Model - Prescribed Operating Principles

The following Operating principles are to apply uniformly to the entire public procurement process and be implemented by all procuring agencies using public money: (i) Value for Money; (ii) Transparency of the procurement process; and (iii) Accountability of participants in the procurement process.

Procuring agencies are required to conform to the operating principles to attain the following objectives: (a) Open and effective competition; (b) Ethics and fair dealing according to the highest standards of probity and professionalism; (c) Promotion of national industry, taking into account the international obligations of Kenya; and (d) Promotion of other Government policies.

6.2.1 Value for Money

Value for Money is the core principle underlying public sector procurement. It is evaluated on a whole-of-life basis of the good or service being procured and is influenced by a number of factors: (a) the procurement method adopted; (b) maturity of the market for the property or service sought; (c) performance history of each prospective supplier; (d) relative risk of each proposal; (e) financial considerations including all relevant direct and indirect benefits and costs; (f) the anticipated price that could be obtained at the point of disposal; (g) maintenance; and (h) evaluation of contract options (e.g. contract extension option).

Any procurement activity represents a cost for buyers and suppliers. Therefore the procurement method chosen should not impose any unnecessary costs or burdens for buyers

or suppliers. Officials conducting procurement should ensure the procurement method adopted represents Value for Money and be satisfied that the best possible outcome has been achieved taking into account all relevant costs and benefits over the whole of the procurement cycle. Accepting the lowest price is not necessarily an indicator of best Value for Money.

Where they exist, Strategic Common Use Arrangements are to be used by procuring agencies to assist in the achievement of Value for Money by delivering cost-effective services. Similarly with the disposal of public property, agencies are required to ensure that the best value is obtained for whatever is being disposed of by whatever method adopted to so do. Given that competition is a key element of the policy framework, all potential suppliers should have the same opportunities to compete and must be treated fairly based on their legal, commercial, technical and financial abilities, taking into account, government policy for domestic industry. Procurement Agencies need to strike a balance between the costs reasonably incurred in promoting competition and the benefits to be obtained. In this context, the costs of bid evaluation, the time taken in the procurement process, and the benefits to be gained from an increase in the number of bidders are all matters for consideration. Procurement by an agency includes not only the acquisition of services or property for its own use but also for third parties.

6.2.2 Transparency

Transparency provides the assurance to the public that the procurement processes are appropriate and therefore should be an inherent characteristic of all processes and procedures, plans, actions or decisions relating to procurement. Greater accountability and transparency can be achieved only through an increased dissemination of information. Disclosure is the mechanism by which agencies make their procurement activities visible and transparent. Agencies will be required therefore to comply with the reporting obligations specified by the Regulator including compliance with the following reporting mechanisms: (a) report publicly-available procurement opportunities in an adequate and timely fashion in the Purchasing and Disposals Gazette and in electronic format where possible; (b) the evaluation criteria for any particular procurement should clearly identify the relative importance of all relevant factors and provide a sound basis for a procurement decision; (c) agencies evaluate each offer by applying only the evaluation criteria and methodology notified to bidders; (d) where market circumstances limit competition, agencies recognize this and use procurement methods that take account of it; and (e) bidders are provided with reasonable opportunities to meet any prequalification requirements for participation.

Other reporting and disclosure obligations will include: (i) Disclosure of information consistent with the Freedom of Information Act, 1999; (b) Disclosure of discoverable information that is relevant to a case before a court.

6.2.3 Accountability

Accountability means that officials are responsible for any plans, actions, decisions and outcomes that involve spending public money. The accountability framework is as follows: (a) Ensuring the effectiveness of the system; (b) Accountable for managing institutions and achieving the budget/policy outcomes; (c) Accountable for management of agencies and exercise of delegations; and (d) Accountable for advice/management of programmes and quality of service

Each procurement agency is required to appoint an officer who will be responsible and accountable for the overall management of the procurement activities of the Agency. However, the ultimate responsibility resides with the Chief Executive. Procuring agencies should include provisions in their tender documentation and contracts that alert prospective suppliers and contractors to the public accountability requirements of the State, including disclosure to Parliament and its Committees. As part of their responsibilities, agencies must consider, on a case-by-case basis, the inclusion of a provision in contracts to enable the Auditor General access to contractors' records and premises to carry out appropriate audits in respect of the particular contract.

6.2.4 Disposal of Public Assets

These Operating Principles and Objectives will apply not only to the acquisition of property and services involving public money, but also to disposal of public assets including lands, buildings, intellectual property rights, and other assets real and financial, fixed and moveable, owned or managed by the State or State agencies whether by sale, lease, concession or license.

6.2.5 Sanctions

The firmness of the Operating Principles is attained by a mandatory legal requirement of compliance in every transaction involving expenditure of public money, and supported by prescribed penalties in the event of non-compliance. Because of the high standard of care required of those spending public money as defacto stewards of the public interest, the penalties in event of breach should be unequivocal, and the process of investigation swift. Failure to observe the operating principles of Value for Money, Transparency and Accountability will result in remedies available to the public under the Proceeds of Crimes Act, 2000.

6.2.6 National Competitiveness and Industry Development

The State, through its agencies, is a major purchaser of property and services, and as such can act as a force to promote national competitive advantage and to develop competitive local industries including small and medium enterprises (SMEs). To facilitate this policy objective, domestic industry will be given a 10% price differential over foreign suppliers of goods and services. This will be supported by the Government's commitment that procuring agencies will ensure that as a first option all of their requirements for goods and services are produced, generated or provided by domestic firms, once they satisfy the criteria of competitive quality, price, standards, and delivery schedules. Resort to imported goods and services will be entertained only where domestic suppliers are unable to meet the requirements of procuring agencies.

The Government will therefore ensure that a proportion of public agencies contracts are reserved for small and medium sized enterprises. Agencies should be aware therefore of Government's Policy on the development of the small business sector, and in particular Government's "Fair Share Programme" which seeks to set aside contracts of a specified value solely for the small business sector. When setting selection criteria, procuring agencies should ensure that they encourage participation by SMEs as direct suppliers or as subcontractors.

Unless there is a strong reason to do otherwise, agencies should not attribute weightings to particular criteria that might discriminate against small businesses.

In all procurement projects, agencies are required to clearly identify in the tender documentation, all preferences for the domestic industry as well as, and where appropriate, opportunities for SME participation. Agencies should ensure that the relevant industry is fully and consistently briefed on the nature of the evaluation criteria, and that they have an opportunity to comment and seek clarification from the agency.

6.2.7 Complaint Mechanism

The new procurement model provides for the introduction of a complaints mechanism. The complaints process will accommodate complaints from or about procuring officers or potential suppliers or executive directives that result in activities contrary to the Operating Principles, Objectives, Guidelines, and Processes, by a person or a group of persons with an interest in the contract or process under examination.

Pre Award Complaints: Where a complaint concerning the procurement process arises before a contract is awarded, a complaint can be made to the Regulator within a specified period. The Regulator will investigate the complaint and arbitrate. In so doing, the Regulator will have the discretion to suspend the process during the course of the investigation, and for investigative purposes exercise the powers of a Commission of Enquiry to which the Commission of Enquiry Act applies. The Regulator may make a finding of corrupt practice by virtue of a breach of the Operating Principles and Guidelines, and void the process. The Regulator may also operate as a mediator and mediate a settlement to the satisfaction of all parties which may include a revision or strengthening of certain contractual terms.

Post Award Complaints: Where a complaint concerning the procurement process arises after the contract is awarded, the contractual requirements are enforced and operate even during the course of the investigation. However, the Regulator may assess damages upon the offending party which will be payable to all those who have a direct interest in the decision, including the unsuccessful bidders. The Regulator may also void the contract and order a prohibition, for some specified period of time, from further dealings with the private party both individually and in his corporate incarnation. The consequent investigative report is also to be referred to other relevant institutions including the DPP, the Auditor General and the Parliament.

Frivolous complaints: In the event the Regulator is of the view that the investigation is initiated by a frivolous complainant or collusion, the Regulator can find accordingly and impose a surcharge on the frivolous complainant as well as order a prohibition from future dealings up to a specified period.

7.0 CONCLUSION

Ethics management is an important aspect of democratic development, efficient and effective public administration. Ethics, is an indispensable aspect of policy formulation, policy analysis and policy implementation, because these processes entail decision making processes. No matter how big and what role the state is playing both policy makers and civil servants have

discretionary powers and make decisions that affect the general public. Their decisions ought to be based on some form of ethics (Ekullu, 2005).

The war on corruption in public procurement must be won. To consolidate the gains and push the anti-corruption movement to its logical conclusion, Kenya, leaders must demonstrate the political will and further strengthen criminal procedure legislation by implementing the Inspector of Government recommendations, bolster the capacity of anti-corruption agencies, enhance public awareness, building strong PPDA and lastly step up investigation and prosecution activities sacking and prosecution of officials. However this is a challenge for policy makers who have to mobilize the required resources and will in order to make the process transparent for all.

There is also an urgent need to review of the procurement law and regulation concerned with evaluation of bid documents; and the follow up of the procurement audits, which are the measures needed to provide the confidence and effectiveness of the public procurement system. The PPDA should continue building capacity in the district contracts committee through training and ensure that the evaluation of bids is done with fairness and transparency to promote accountability and value for money in procurement of public goods, services and works.

The issue of culture as a background to the current persistent corruption within public procurement should be addressed. A campaign highlighting public resource wastage due to corruption should be launched by government in conjunction with Civil Society Organizations. Statistics on how many people die due to lack drugs, how many women die due to maternal complications arising out of inaccessible health facilities, number of child who die at birth and a general breakdown of infrastructural facilities within the country could be highlighted as a reason to save resources and avoid corruption.

Public procurement process in Kenya is heavily decentralized. Public bodies perform the function independently within a framework of national laws and national guidelines. These should be enhanced to promote open and transparent competition as a means of achieving value for money and eliminating corruption. Efficient and effective procurement policy, procedures and practices by local government can have a significant impact on the accountability and value for money aspects of the purchase of goods and services by the State. Efforts to achieve this should be the ultimate goal by all governments

Finally a procurement culture that promotes and demonstrates high standards of accountability must be emphasized including the following: Responsibility for procurement decisions is readily identifiable through a clearly defined delegation matrix; adequate records are maintained to enable internal and external scrutiny of procurement decisions; procurement procedures guide officers through procurement activities inline with the relevant government and supply policies; contract award details are made public as required by policy; and Processes are in place to provide feedback to unsuccessful bidders and to manage provider complaints through administrative reviews.

8.0 POLICY RECOMMENDATIONS

This section presents recommendations for policy and practice. The section presents strategies for promotion of ethical and professional standards in public procurement in Kenya

8.1 Suppressing corruption in the public procurement system

Corruption has got harmful social and economic effects as it undermines efficient distribution of the resources and fair distribution of income. Corruption in any economy reduces economic efficiency and has a negative impact on growth and development. Corruption hits the public sector hardest, because it decreases the income of the state, limits the possibility of financing public services, makes public procurement more expensive, and diminishes the efficiency of public administration and the measures of the economic policy. As corruption further taxes the economy, it increases the costs of business, undermines competitiveness and increases the business risk. While respecting and acknowledging the goals and principles of the system of public procurement, the prevention of corruption in the system of public procurement is based on the following measures:

8.1.1 Strengthening the legal framework

The aim of strengthening the legal framework is to ensure that all procedures in which the state is a partner or a contractual party are subject to strict rules, thus reducing the risk of corruption. It is therefore necessary to regulate the overall system of public procurement, which, along with the conclusion of public contracts for products, works and services, includes concession contracts and public-private partnerships. By amending the legislative framework of public procurement, stricter rules and conditions for the participation of economic operators at competition tender procedures will apply if they are in any way (in terms of interests, ownership or family relations) connected with the contracting authority. In addition, the provisions on the nullity of public contracts will be amended if the conclusion of such contracts is a consequence of corruption by the tenderer or the responsible person in the tenderer. Transparent procedures contribute to reducing corruption risks.

8.1.2 Ethical standards for public service should be clear

This means that public servants need to know the basic principles and standards they are expected to apply to their work and where the boundaries of acceptable behavior lie. This also means that: (a) ethical standards should be reflected in the legal framework; (b) ethical guidance should be available to public servants; (c) public servants should know their rights and obligations when exposing wrongdoing; (d) political commitment to ethics should reinforce the ethical conduct of public servants; (e) the decision-making process should be transparent and open to scrutiny; (f) there should be clear guidelines for interaction between the public and private sectors; (g) managers should demonstrate and promote ethical conduct; (h) management policies, procedures and practices should promote ethical conduct; (i) public service conditions and management of human resources should promote ethical conduct; (j) adequate accountability mechanisms should be in place within the public service; and (k) appropriate procedures and sanctions should exist to deal with misconduct.

REFERENCES

- Burt, N. D. & Dobler, D. W., (2001). *World Class Supply Management*, 6th Ed. MacGraw-Hill, New York, United States.
- Burt, N. D., Dobler, D. W. & Starling, S.L.(2003). *World Class Supply Management*, 7th Ed. MacGraw-Hill, New York, United States.
- Carter, C. (2000). “Precursors of Unethical Behavior in Global *Supplier Management*, (36: 1), pp. 45-56.
- Cooper, R.W., Frank, G.L. & Kemp, R.A. (1997). “The Ethical Environment Facing the Profession of Purchasing and Materials Management,” *International Journal of Purchasing and Materials Management*, (33:2), 1997, pp. 2-11.
- Ekullu, E. (2005). *Proceedings of the workshop on African Union Convention on Preventing and Combating Corruption and related offences African parliamentarians network against corruption.*
- Forker, L.B. & Gresham, R.L. (1989). “Ethical Practices in Purchasing.” *International Business Studies*, 26 (4): 859-881.
- Forker, L.B. & Janson, R.L. (1990). “Ethical Practices in Purchasing.” *Journal of Purchasing and Materials Management*, 26 (1): 19-26.
- Mishra, A. (2006). “Persistence of Corruption: Some Theoretical Perspectives.” *World Development*, 34 (2): 349-358.
- OECD (2007). *How to Fight Corruption Effectively in Public Procurement in SEE Countries*. Paris France: Author.
- Pidaparthy, V. R. S. (2003). “Supply Side Issues in Procurement Corruption: Is the Developed World Responding Adequately to the Needs of the Developing World?” *Journal of Development and Social Transformation*.
- Ramsey, J. (1989). “No Bribes Please We’re Professionals.” *Purchasing & Supply Management*: 31-3.
- Shah, A., (2006). *Corruption and Decentralized Public Governance*. (World Bank Policy). [Online]. Available at www.worldbank.org.
- Thai, K. V. (2006). “Public Procurement Corruption.” *News and Views*. A Publication of Illinois Association of Public Procurement Officials, Inc. *Chapter of the National Institute of Government Purchasing Inc*. Vol. 22, Issue 4.
- Transparency International, Kenya (2006). *Curbing Corruption in Public Procurement*. [Online]. Available at <http://www.transparency.org>. (Accessed May 30, 2007).
- Transparency Uganda (2007). *Tackling Corruption: A Reference Handbook for*

Anticorruption Activities in Uganda. Kampala, Uganda: Author.

Trevino, L. & Nelson, K. (1999). *Managing Business Ethics* (4th ed.). New York: John Wiley & Sons.

Turner, G.B., Taylor, G.S. & Hartley, M.F. (1994). “Ethics Policies and Gratuity Acceptance by Purchasers.” *International Journal of Purchasing and Materials Management*, 30 (3): 43-47.

World Bank (2004). *Guidelines: Procurement under IBRD Loans and IDA Credits*. Washington D.C.: World Bank.

World Bank (2007, March). *Program Document Sixth Poverty Reduction Support Credit* (PRSC 6). Washington D.C.: World Bank.

The IISTE is a pioneer in the Open-Access hosting service and academic event management. The aim of the firm is Accelerating Global Knowledge Sharing.

More information about the firm can be found on the homepage:

<http://www.iiste.org>

CALL FOR JOURNAL PAPERS

There are more than 30 peer-reviewed academic journals hosted under the hosting platform.

Prospective authors of journals can find the submission instruction on the following page: <http://www.iiste.org/journals/> All the journals articles are available online to the readers all over the world without financial, legal, or technical barriers other than those inseparable from gaining access to the internet itself. Paper version of the journals is also available upon request of readers and authors.

MORE RESOURCES

Book publication information: <http://www.iiste.org/book/>

Academic conference: <http://www.iiste.org/conference/upcoming-conferences-call-for-paper/>

IISTE Knowledge Sharing Partners

EBSCO, Index Copernicus, Ulrich's Periodicals Directory, JournalTOCS, PKP Open Archives Harvester, Bielefeld Academic Search Engine, Elektronische Zeitschriftenbibliothek EZB, Open J-Gate, OCLC WorldCat, Universe Digital Library, NewJour, Google Scholar

