



**Ethics and Anti-Corruption Commission**

# **An Evaluation of Corruption in Public Procurement**

## *A Kenyan Experience*



*Research & Transformation  
Department*

**February 2015**



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## Acronyms

<b>ACECA</b>	-	The Anti-Corruption and Economic Crimes Act, 2003
<b>ADB</b>	-	Asian Development Bank
<b>EACC</b>	-	Ethics and Anti-Corruption Commission
<b>GoK</b>	-	Government of Kenya
<b>ICT</b>	-	Information Communication Technology
<b>IFMIS</b>	-	Integrated Financial Management Information System
<b>KACC</b>	-	Kenya Anti-Corruption Commission
<b>KISM</b>	-	Kenya Institute of Supplies Management
<b>KPLC</b>	-	Kenya Power & Lighting Company Ltd
<b>OECD</b>	-	Organization for Economic Co-operation and Development
<b>PEs</b>	-	Procuring Entities
<b>PPDA</b>	-	Public Procurement and Disposal Act, 2005
<b>PPDR</b>	-	Public Procurement and Disposal Regulations, 2006
<b>PPOA</b>	-	Public Procurement Oversight Authority
<b>UN</b>	-	United Nations

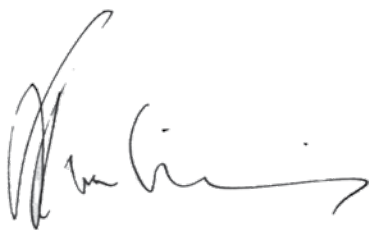
## Foreword

**P**ublic procurement in Kenya and the world at large plays an important role in the economic development of the country. Public procurement is the implementation vehicle by which service delivery is achieved. Whether it is the construction of mega infrastructure or procurement of school textbooks, public procurement is used. It is the means through which the government spends the taxes it collects from economic activities of a country. Billions of shillings are spent through public procurement. A public procurement system that is economically inefficient will undermine any government programmes for economic growth and poverty reduction,

The Government of Kenya has over the years put in place measures to reform public procurement in the country. Among the reforms undertaken include the enactment of Public Procurement Regulations in 2001 and the Public Procurement and Disposal Act of 2005. The Public Procurement and Disposal Act, 2005 created the Public Procurement Oversight Authority (PPOA), the Public Procurement Advisory Board (PPAB) and the continuance of the Public Procurement Complaints, Review and Appeals Board (PPCRAB) as the Public Procurement Administrative Review Board (PPARB). The PPAB and PPARB are autonomous bodies. In 2014, The Government launched an e-procurement portal under the IFMIS platform as a monitoring tool to enhance accountability and efficiency and reduce paper work in public procurement. Other significant reforms in public procurement include the amendments to the PPDA in 2009; introduction of new regulations to bring the County governments on Board and the 2013 amendments of the Regulations to enhance application of preferences and reservations and enhance efficiency in the supply chain cycle.

Due to the huge financial flows involved in public procurement, the sector is the most prone to corruption. Major corruption scandals in this country have revolved around public procurement. Billions of shillings have been lost through under deals in procurement which takes years to trace and recover. When goods or works or services supplied to the government are sub-standard, not delivered despite payment being done, are over-priced; the citizens, the tax payers, being the recipient of government services end up losing a lot more. Further, corruption in public procurement stifles economic growth, increases poverty, promotes tribal kingpins and diminishes development of the country.

This report highlights practices and areas in public procurement that has allowed corruption to thrive in the sector and recommend interventions that will help reverse the trend. More importantly, the report recommends the rolling out of e-procurement to be fast tracked as this will seal some of the loopholes that have been exploited over the years to benefit a few people. As billions of shillings are lost through corrupt deals in public procurement, we call upon all stakeholders to keenly read this report and implement its findings for the betterment of Kenya both today and for our future generations.

A handwritten signature in black ink, appearing to read 'Mumo Matemu', with a long horizontal flourish extending to the right.

**Mumo Matemu, MBS**

**Chairperson**

**Ethics and Anti-Corruption Commission**

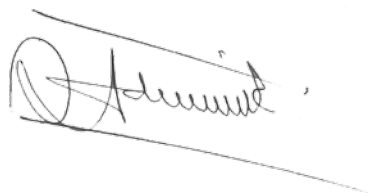


## Preface

Being the lead anti-corruption body in the country, the Ethics and Anti-Corruption Commission has a role to advise the government and the general public at large on loopholes that have enabled corruption to thrive in various sectors of the economy and consequently lead in advocating for the sealing of the identified loopholes. Public procurement was identified as one of the most vulnerable sectors to fraud and corruption due to the huge amount of resources the government spends in delivering its core mandate of providing essential services to the citizenry. The Commission thus undertook a study in public procurement in 2013 in order to evaluate the extent of corruption in the sector and advise on interventions to employ.

This report provides a holistic review of areas and processes that are prone to abuse by corrupt public officials and suppliers. Issues of processing of payments for suppliers, price setting by both public institutions and suppliers, the decision making process in award of public tenders, confidentiality of vital procurement data, and access to public tenders opportunities are some of the key areas that the study identified as prone to corruption. To address these issues, the study proposes a number of recommendations. This include vetting of suppliers and procurement officers, revamping of market surveys done by public entities, ensuring independence of procurement units, enhanced use of intelligence mechanisms to gather information on corruption cases in public procurement and fast tracking the rolling out of e-procurement. The implementation of this report will thus go a long way in improving transparency and accountability in public procurement.

Lastly, I wish to express sincere gratitude to all the people who facilitated the undertaking of this survey and the compilation of the report. Specifically, I wish to appreciate all the procurement officers and suppliers who volunteered information during the survey, the research assistants who gathered the information and the Commission staff who organized the survey, compiled and peer reviewed the report. The staff includes Nancy Namage, Willis Wasala, Jackson Mue, Daniel Kang'ethe (Main Author), Sophie Muturi, Naomi Monari, Janet Bett, Collins Aluda, Diana Mwangi and Diana Ogula.

A handwritten signature in black ink, appearing to read 'Halakhe D. Waqo', is written over a horizontal line.

**Halakhe D. Waqo, ACLArb**

**Commission Secretary/Chief Executive Officer**

**Ethics and Anti-Corruption Commission**

## Executive Summary

**A**n effective procurement system plays a strategic role in governments in stemming mismanagement and waste of public funds. Of all government activities, public procurement is one of the most vulnerable to fraud and corruption. Bribery in public procurement is estimated to be adding 10-20 per cent to total contract costs. In spite of the legal and institutional reforms carried out in the public procurement sector in Kenya, corruption continues to thrive in the sector.

The overall objective of the 2013 EACC Public Procurement Study is to identify areas that have enabled corruption to thrive in public procurement in Kenya and recommend measures to revert the situation. A total of 573 suppliers and 377 public procurement practitioners were randomly selected and interviewed in 13 sampled counties. To ensure the suppliers sampled are involved and knowledgeable on public procurement, they were identified from the list of pre-qualified suppliers and tender registers from public institutions. In addition, a total of 369 public procurement files were perused in the 13 counties visited.

The following are the highlights of the key findings of the study:

**a) Procurement practices**

- From the 369 procurement files examined, 58 per cent had applied open tendering while quotations constituted 31 per cent of the files. Proposals, restricted and direct procurement only constituted about ten per cent of the procurement files.

- About 31 per cent of procurement officials indicated to have terminated procurement process midway between one and five times in 2012 and 2013. The reasons given for the terminations included insufficient funds (25%), changes in prices of goods (14%), non adherence to timelines by suppliers (15%), non delivery of goods (10%), poor quality (9%) and incorrect specifications of goods supplied (8%).
- On price to quote during public procurement, most procurement officials indicated to do market research. However, we noted quite a big proportion of procurement officials who indicated they establish the market rate price for both common user and non-common user goods they intend to procure by asking a few random suppliers, sometimes just asking one supplier. This is of interest because when suppliers were asked how their firms establish the price to use while seeking public tenders, a combined 26.7 per cent of suppliers (151 suppliers) indicated they consider the prevailing market price but add big profit margin (103 suppliers) and or factor in bribes (48 suppliers) to pay in order to win public tenders.

**b) Extent of adherence to Public Procurement Disposal Act (PPDA) and other regulations**

- When suppliers were asked if they were aware of the existence of PPDA of 2005, PPDR of 2006 and other regulations governing public procurement, 51 per cent indicated to be aware while 48 per cent were not. Among those who were aware, 40 per cent were of the opinion that their level of understanding of the Act and the regulations was high while 60 per cent said it was low.

- The study revealed several Heads of Procurement sections with college education and less than five years experience and some with only “O”- or “A” - level of education though with more than 11 years experience. It was noted that there was a substantial proportion of graduate officers involved in procurement who were neither heads of procurement section, Procurement Officers or Assistants yet with more than one year up to above 20 years experience.
- On training, majority of procurement officers with less than one year experience had not undertaken any procurement related course. However, we noted that there were Procurement Officers and Assistants with 11 to above 20 years experience who had not yet been trained.

**c) Transparency and accountability in the procurement cycle**

- There were 49 (13%) procurement officers and 131 suppliers (23%) who recalled incidents where a procurement decision was influenced by external people. These people were identified as politicians, senior civil servants, management and suppliers themselves. Politicians and senior civil servants mostly expressed their support for a particular supplier(s) for contract award while suppliers mostly used bribes to influence procurement decisions.

- It was reported by 42 (7%) suppliers that they accessed procuring entities' estimated price to be used in tender evaluation before they submitted their bids, 33 (6%) suppliers during the course of bid submission, and 147 (26%) suppliers after they had submitted their bids. These suppliers confided that this information was passed on to them by mostly procurement officials (37%) and other suppliers bidding for the same contract (28%). The public institution's management also fell to the temptation of divulging this crucial information as reported by 11 per cent of suppliers.
- Open tenders attracted few bids from suppliers. From the procurement files perused, out of the 209 public tenders using open tender method, 61 per cent (127 files) attracted between one and six private bids. Twelve of these tenders attracted only one bid despite the goods/service in question not being technical in nature.
- Access to procurement records by suppliers is wanting. Only 35 per cent of suppliers (195 suppliers) said to have had access to these records while 52 per cent (291 suppliers) denied having access and 12 per cent (69 suppliers) did not have any clue if the documents are accessible.
- Conflict of interest is a serious issue in public procurement. A total of 267 suppliers (46%) confessed to know firms either owned directly or through proxy by public officers. These firms would submit bids to do business with the government and win. The public officers owning these firms range from clerks, senior civil servants, procurement officers themselves to cabinet secretaries.

- Most corruption and other malpractices in procurement go unreported. A total of 228 bribery and other malpractices went unreported compared to a partly 73 cases that were reported. The main reason for not reporting cases was the fear by suppliers of losing lucrative business opportunities with public institutions.

**d) Recommendations**

The following are the recommendations derived from the findings of this study:

- Carry out thorough vetting of suppliers;
- Carry out regular vetting of procurement officers;
- Enhance use of intelligence mechanism to gather information on corruption cases in public procurement;
- Ensure independence of Procurement Units in Public Institutions;
- Revamp market research;
- Borrow best practices from other countries;
- Ensure sufficient funds before commencement of procurement;
- Fast track the rolling out of e-procurement;
- Ban same supplier developing specifications and supplying the goods/service/works;
- Ensure competition in open tenders in public institutions;
- Enforce confidentiality clauses on release of procurement information;
- Streamline training and promotion of procurement practitioners.

# Chapter 1

## 1.0 Introduction

Public procurement plays an important role in economic, political and social dimension in any one country. It is estimated that public procurement represents a significant percentage of the Gross Domestic Product (GDP) generating huge financial flows, estimated on average at 10-15 per cent of GDP across the world (OECD, 2009). In Kenya, it is approximated that the Central Government Procurement (CGP) as a percentage of GDP was 7.5 per cent in 2004 and 9.3 per cent in 2005 while CGP as a percentage of Total Government Expenditure (TGE) was approximated at 33.1 per cent in 2004 and 36.8 per cent in 2005. In 2004, Kenya's CGP was almost Kshs 95 billion. This makes Kenya's CGP the single biggest item of public spending ahead of salaries and wages (Owegi & Aligula, 2006).

Public procurement means the acquisition by purchase, rental, lease, hire purchase, license, tenancy, franchise, or by any other contractual means of any type of works, assets, services or goods including livestock or any combination by a public entity. A public entity, henceforth referred to as Procuring Entity (PE), includes the central government, courts, constitutional commissions, local authority, state corporations, Central Bank, co-operative society, public school, university and college (Republic of Kenya, 2005). The importance of this sector calls for a good understanding of the process by the government, procuring entities, suppliers and other stakeholders. Unfortunately, for most developing countries, this is not the case. Although several developing countries, Kenya included, have taken steps to reform their public procurement systems, the process is still shrouded by secrecy, inefficiency, corruption and undercutting. In all these cases, huge amounts of resources are wasted (OECD, 2003).



A study by the World Bank in 2012 indicates Kenya stands out for its high level of business related corruption. Overall, 71 per cent of firms say they need to give gifts to obtain government contracts, and the average amount paid is 12 per cent of the value of the contract. Likewise, 79 per cent say they have to give gifts to public officials to “get things done”. On both counts, corruption rates are much higher than in the world and Sub-Saharan Africa as a whole. Firms report on average 4 per cent of the value of their sales is directed towards bribe payments. The report, by rough calculation, approximate the total kickbacks paid on government contracts as 36 billion Kenyan shillings, and other bribe payments paid by firms total 69 billion Kenyan shillings (World Bank, 2012).

The Ethics and Anti-Corruption Commission (EACC) is mandated to combat and prevent corruption through enforcement of the law, educating the public and enlisting their support against corruption and providing preventive services through promotion/development of good practices to seal opportunities and loop holes that facilitate corruption. This study seeks to inform the government on areas of improvement in public procurement that will help reduce corruption in the sector. The report gives more weight to transparency, accountability and integrity, key ingredients to a corrupt free procurement system in any country. Chapter 2 presents the methodology used to collect data and analyze; Chapter 3 looks at the procurement practices in Kenya vis-à-vis Hong Kong and highlights best practices from a select number of countries worth emulating; chapter 4 presents the results and discussions while chapter 5 concludes and gives policy recommendations for implementation.

## **1.1 Problem Statement**

Of all government activities, public procurement is one of the most vulnerable to fraud and corruption. Bribery in government procurement is estimated to be adding 10-20 per cent to total contract costs. Due to the fact that governments around the world spend about USD 4 trillion each year on the procurement of goods and services, a minimum of USD 400 billion is lost due to bribery (OECD, 2009).

The Ethics and Anti-Corruption Commission received a total of 3,124 reports relating to public procurement between 2006 and 2013. Of these reports, 1,680 related to fraudulent acquisition and disposal of public property, 1,126 on public procurement irregularities, 251 on conflict of interest, and 67 on bid rigging. This scenario is corroborated by the 2009 KACC National Enterprise Survey that indicated that most businesses pay bribes to win public contracts (53% of respondents) whereas 40 per cent of the respondents indicated that 6-10 per cent of the tender prices go to unofficial payments (KACC, 2010).

The high number of corruption reports has necessitated the need to conduct an empirical study to explore the loopholes and extent of corruption in public procurement so as to have an in-depth understanding of the problem. The findings of this study will lead to policy recommendations to address the problem.

## **1.2 Study Objectives**

The overall objective of this study is to evaluate the loopholes and extent of corruption in public procurement. The specific objectives were to:

- i) Document the procurement practices in public institutions;
- ii) Evaluate the extent of adherence to PPDA and other regulations;
- iii) Assess transparency and accountability in the procurement cycle;
- iv) Identify anti-corruption measures in public procurement; and
- v) Identify challenges faced in public procurement

## **Chapter 2**

### **2.0 Methodology**

This study applied various methods of data collection that included literature review, face to face interview and extraction of procurement information from public entities. The face to face interviews were conducted with both suppliers and procurement practitioners in public entities.

### **2.1 Sampling procedure**

A total of 15 counties were randomly sampled in the country. Eight Ministries, 15 county governments, 10 state corporations, seven high courts, 29 public education institutions and 16 public hospitals were selected as procuring entities. For each selected procuring entity, a total of three interviews were conducted with public procurement officers. Five suppliers were randomly selected from the list of pre-qualified suppliers and tender registers from the sampled procuring entities. Subsequently, 377 public procurement officers and 573 suppliers were interviewed.

In addition, the research teams randomly selected procurement files in public institutions from which they extracted procurement information. A procurement file contains historical information relating to a particular procurement. A total of 369 procurement files in the 15 counties visited were scrutinized. The data was collected between 28th May 2013 and 16th June 2013.

## **2.2. Secondary data**

Literature on best procurement practices was reviewed for Hong Kong, Federal Republic of the United States of America, South Korea and Mexico that have helped in ameliorating public procurement malpractices in their countries. In reviewing literature on best practices, the study focused on e-procurement, procurement legislation, social witnesses in public procurement and enforcement-led strategy to fight corruption and unethical practices.

## **Chapter 3**

### **3.0 Public Procurement Practices**

Kenya has over the years made significant strides in reforming public procurement in the country, all in an effort to make the system more transparent, fair and less prone to corruption. Despite these remarkable efforts, corruption continues to permeate all facets of public procurement process. However, there are a number of countries which have trended the same path of reforming the sector with remarkable success. We highlight a few of these countries and draw lessons from them. Most of these countries' successes have been overly studied and their workings replicated in most other countries. This chapter looks at Kenya's procurement practices vis-à-vis those of Hong Kong and also picks out a few other practices from a select few countries.

### **3.1 Procurement Practices in Kenya**

#### **3.1.1 Policy, legal and institutional arrangements**

Procurement of public goods and services in Kenya is entrenched in the Constitution in article 227. The enactment of the Public Procurement and Disposal Act (PPDA) of 2005 and the Public Procurement and Disposal Regulations (PPDR) of 2006 ensured a sound and comprehensive legal framework for public procurement. The PPDA clearly establishes the procurement methods to be applied, advertising rules and time limits, the content of tender documents and technical specifications, tender evaluation and award criteria, procedures for submission, receipt and opening of tenders, and the complaints system structure and sequence.

The PPDA and Regulations cover goods, works and services for all procurement using national funds. Both documents are published and widely distributed within government. The legal framework is complemented with a series of Standard Tender Documents (STDs) covering procurement of goods, works and services (PPOA & Ramboll Management A/S, 2007).

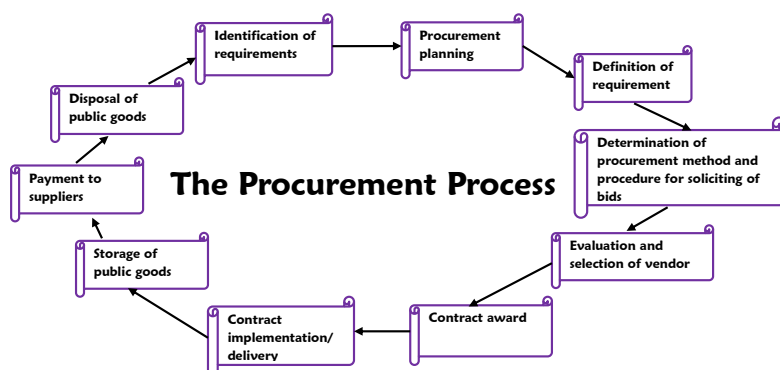
PPDA established a number of institutions to regulate public procurement in Kenya. These include the Public Procurement Oversight Authority (PPOA), Public Procurement Oversight Advisory Board (PPOAB) and Public Procurement Administrative Review Board (PPARB). PPOA whose first board was appointed in 2007 is established as the supreme public procurement oversight body in the country. The Act spells out the responsibilities of the Authority which include to ensure that procurement procedures are complied with; to monitor the public procurement system and recommend improvements; to assist in the implementation and operation of the procurement system; and to initiate public procurement policy and amendments to the PPDA.

The Advisory Board advises the Authority generally on the exercise of its powers and the performance of its function; approves the estimates of the revenue and expenditures of the Authority and recommends the appointment or termination of the Director-General. The PPARB was established by the Exchequer and Audit (Public Procurement) Regulations, 2001 and continued under PPDA.

The Review Board was established to promote and uphold fairness in the Public Procurement system through judicious and impartial adjudication of matters arising from disputed procurement proceedings and as a major alternative to the court system. The Review Board also offers general legal advice to the Procurement Stakeholders in relation to conflicts and proceedings during filing and/or hearings of the Review. The board is autonomous and comprises of six members nominated from various professional associations as prescribed in Regulations 68 (1) (a) and three other members appointed by the Cabinet Secretary responsible for finance (PPARD, Undated).

### **3.1.2 The procurement process**

The Kenyan procurement process involves several steps that can best be illustrated in a cycle. The process involves identification of requirements; procurement planning; definition of requirements; determination of source; evaluation and selection of vendor; contract award; contract implementation; storage; payment for goods and services; and disposal.





The Public Procurement and Disposal Act and Regulations describe in details the entire procurement process from identification of requirements to disposal of goods. There are five different types of procurement that includes open tendering, restricted tendering, direct procurement, request for proposals and request for quotations. Open tendering offers a fair and competitive type of procurement and is the preferred method.

### **3.1.3 Corruption in Kenyan procurement**

Operations of Procurement in Kenya 2008 study by the Kenya Institute of Supplies Management (KISM) found out that corrupt practices are evident in the procurement process. These practices permeate the systems and occur at every level of the procurement process. Confidential interviews with enterprises indicated that in some instances it is the only way they are able to participate in the process. Officials all give the impression that their procurement processes are above board, yet meetings with suppliers waiting in corridors outside the offices give a totally different perspective.

These enterprises often indicate that this is the cost of doing business with public entities (KISM, 2008). Further, PPOA undertook an assessment of the procurement system in Kenya whose findings indicated that Kenya's public procurement system is assessed to be slightly stronger on the legislative and regulatory framework but weak in integrity, transparency, procurement operations and market practices (PPOA & Ramboll Management A/S, 2007).

In addition, numerous mega scams such as Anglo-Leasing Security Contracts, maize importation, mismanagement of Free Primary Education (FPE) funds, sale of Grand Regency Hotel, Triton Oil Scam, sale of Kenya's Embassy in Japan and many other irregular deals in Government all relate to corruption and impunity in public procurement (Lewa, 2007). These scandals are estimated to have cost the country billions of Kenya shillings.

The Ethics and Anti-Corruption Commission received 117 reports relating to public procurement irregularities in the 2013/2014 financial year. This represents 6 per cent of all reports taken up for investigation by the Commission. The country is considered among the most corrupt in the world and was ranked number 136 out of 175 with a score of 27 in the 2013 Transparency International Corruption Perceptions Index (Transparency International , 2014).

The following are a few examples of some corruption cases involving procurement in the Country.

*An allegation of embezzlement of funds by Nairobi City Council (NCC) officers and others in the procurement of 48.3 hectares cemetery land in 2008. The land was purportedly sold at Kshs. 283 million but the seller received only Kshs. 110 million. The difference of Kshs. 173 million was embezzled by various parties. The Commission Valuer placed a Kshs. 80 million value on the land. Prior to the purchase, an advert was placed on the papers on 18th and 22nd September 2008 requesting expression of interest of bidders with land whose soil depth was a minimum 1.8 meters. None of the bidders achieved this requirement. In addition to this requirement that was not meant, the company that won the tender did not own the land that they sold to the City Council but had fraudulently included the real owner of the land as one of the directors of the company. The evaluation committee did not do due diligence of searching company details with the Registrar of Companies. Further, the evaluation criteria in the tender documents were defective. Mandatory requirements were allocated 40 points while other non-mandatory requirements had 60 points. The case resulted to three criminal cases and ten civil suits. So far out of the Kshs. 173 million embezzled, Kshs. 55 million in cash has been recovered.*

*An allegation of irregular procurement of laptops worth Kshs. 26 billion at the Ministry of Education in 2013. It is alleged that the company that won the tender was favored and did not have the financial capacity to supply the laptops. The company received preferential treatment as it was able to receive more detailed information compared to other bidders. In addition, the company altered the price of the laptops in the final quotation way beyond its original price. Further, the company did not have a distribution network of its own to supply the over one million laptops.*

### **3.1.4 Strategies in place to fight corruption in public procurement**

The country has in place a number of strategies that are meant to address the runaway corruption in procurement. They include:

#### **i) A strong legal framework**

Public procurement system in Kenya has undergone significant developments from being a system with no formal regulations in the 1960s to use of Treasury Circulars in the 1970s to 1990s. In 2005, the Public Procurement and Disposal Act (PPDA) was enacted followed by the Public Procurement and Disposal Regulations (PPDR) in 2006. Further, public procurement is entrenched in the Constitution of Kenya. These legislations provide a strong legal framework on which the fight against corruption in public procurement is anchored.

- ii) Public Procurement Oversight Authority and Public Procurement Administrative Review Board**

The Authority offers general oversight of public procurement in the country to ensure that procurement procedures are complied with in accordance to the PPDA and to monitor the public procurement system and recommend improvements. The Review Board was established to promote and uphold fairness in the Public Procurement system through judicious and impartial adjudication of matters arising from disputed procurement proceedings and as a major alternative to the court system.
- iii) Ethics and Anti-Corruption Commission**

The Ethics and Anti-Corruption Commission is the lead agent on the fight against corruption in the country. On average, the Commission receives between 4,000 and 5,000 complaints per year out of which 6 per cent involves public procurement irregularities which the Commission investigates and recommends prosecution of the suspects.
- iv) Tender publishing portals and e-procurement**

In August 2014, e-procurement platform was officially launched in the country. The platform is expected to enhance transparency and accountability in the procurement process thereby minimizing corruption in the sector. However, the platform is in its nascent stage and its full benefits are yet to be realized.

## **3.2 Procurement Practices in Hong Kong**

Hong Kong was one of the most corrupt countries in the 1960s and early 70s. Corruption was widespread and regarded as a way of life. The turn around for the country can be traced back after the establishment of the Independent Commission against Corruption (ICAC). Within five years of operation, all the overt and syndicated corruption was eradicated (Man-wai, Resource Material Series No. 86).

### **3.2.1 Policy, legal and institutional arrangements**

Hong Kong recognizes the crucial importance of clear and comprehensive procurement regulations in curbing corruption in public procurement. Government procurement is conducted under the Stores and Procurement Regulations (SPR), issued as administrative regulations under the Public Finance Ordinance (PFO). Financial circulars supplement these provisions. The SPR set out the steps on the whole procurement process including drawing up requirements and specifications of stores/services required, issue of public notice of tender invitation, information to be included in the tender documents such as tender specifications and assessment criteria to facilitate suppliers to prepare response offer, tender evaluation, tender negotiation, issue of public notice of tender award and contract management and monitoring.

The Prevention of Bribery Ordinance (PBO) has penal provisions for bribery. The procurement rules in the SPR are binding on all government bureaus and departments except financially autonomous public bodies, which are empowered to define their own procurement procedures. This regulatory framework covers the entire procurement process, from needs assessment to contract management and monitoring (ADB/OECD, 2006).

The Secretary for Financial Services and the Treasury has the overall responsibility of ensuring that all Government procurement activities are conducted in accordance with the established regulations and procedures set out in the SPR and relevant supplemental circulars.

### **3.2.2 The procurement process**

Hong Kong procurement process follows the same cycle/steps as the one described in the Kenyan context. In Hong Kong, open and competitive tendering is the norm. Selective tendering may be used where the nature of the contract requires tenders from qualified suppliers, especially where there is a frequent need for tenders for such services or articles and not all contractors or suppliers in the market can provide the required services or articles. In these cases, procuring departments may therefore establish lists of prequalified suppliers. They have to publish up-to-date lists of approved contractors and the application method yearly. To ensure open and transparent competition, in which as many suppliers as possible can participate, single-source or restricted tendering is generally allowed only with the prior approval of the Permanent Secretary for Financial Services and the Treasury. The specific circumstances under which this approach can be chosen are described in detail in the SPR.

The SPR prescribe the content of tender documents, provide mandatory standard contract forms, and the tender terms and general conditions of contract. The standard tender form contains an anti-bribery clause allowing the Government to terminate the contract without incurring any liability for compensation if the contractor or any of its employees or agents is found to have committed an offense under the PBO or any subsidiary legislation made there under. Tender evaluation and notification procedures are outlined in detail in the SPR. The selection criteria are not explicitly defined, as these depend on the requirements deemed fit for each particular tender. Factors such as price, life-cycle costs, performance reliability, quality, and after-sale support may be taken into account.

Transparent and non-discriminatory qualification criteria and proceedings are a critical precondition of transparency in public procurement. Apart from selective tendering, for which a list of approved contractors may be maintained, there may be circumstances that require prequalifying suppliers on the basis of their financial and technical capability to undertake a particular

project or supply a particular product. If such a prequalification exercise is required, the criteria may concern only the contractors' ability to meet the requirements of the tendered contract. All suppliers are informed of the tender result, including the identity of the successful bidder. The tender sum and the date of award of the contract are published in the Government Gazette and on the Internet. The reason for the selection of the winning bid is not always stated but unsuccessful suppliers are informed of the reason why their tenders were unsuccessful (ADB/OECD, 2006).

### **3.2.3 Corruption in Hong Kong procurement**

Information on corruption in public procurement that would have enabled comparison with Kenya is not readily available. However, Hong Kong is considered one of the least corrupt countries in the world. The country was ranked number 15 out of 175 with a score of 75 in the 2013 Transparency International Corruption Perceptions Index (Transparency International, 2014). In the same year, ICAC received 2,652 complaints (excluding elections), of which 1,649 (62 per cent) concerned the private sector while 808 (30 per cent) related to government departments and 195 (8 per cent) involved public bodies. Since corruption in public procurement involves public bodies, from the ICAC reports we can deduce that there are few corruption reports in public procurement (only 36 per cent of all corruption reports from all sectors to ICAC were involving public entities).

### **3.2.4 Strategies in place to fight corruption in public procurement**

Most of the success factors of the Hong Kong model have been applied in Kenya. However a few are yet to be applied. (Man-wai, Resource Material Series No. 86) lists the success factors:

**i) Enforcement-led approach to fighting corruption**

Like many other Anti-Corruption Agencies (ACA) around the world, the ICAC uses the three-pronged strategy of fighting corruption that entails deterrence, prevention and education. The three strategies are equally important. However, the ICAC places priority in resources on enforcement. It devotes over 70 per cent of its resources to investigate corruption and to prosecute offenders. The reason is that any initiatives in corruption prevention and education are doomed to fail in a corrupt country where the corrupt officials are still around and powerful. Any successful fight against corruption must start with effective enforcement on major targets, so as to get rid of the obstacles, and demonstrate to the public the political will and determination to fight corruption at all costs, as well as demonstrate the effectiveness of the anti-corruption agencies. Without that, the ACA is unlikely to get the public support which is a key to success. Successful enforcement also assists in identifying problem areas for corruption prevention review and can clear any human obstacles in the review. The successful enforcement stories also provide basis for public education and act as deterrence for the other corrupt officials.



**ii) An effective deterrence strategy**

The ICAC's strategy to ensure effective enforcement consists of the following components:

- An effective public complaint system to encourage reporting of corruption by members of the public and referrals from other institutions. ICAC has a report centre manned on 24 hours basis and there is a highly publicized telephone hotline to facilitate public reporting;
- Effective confidentiality system and protection of whistleblowers and witnesses;
- A quick response system to deal with complaints that require prompt action. At any time, there is an investigation team standing by, ready to be called into action;
- The ICAC adopts a zero-tolerance policy. So long as there is reasonable suspicion, all reports of corruption, irrespective of whether it is serious or relatively minor in nature will be properly investigated;
- There is a review system for the purpose of check and balance to ensure all investigations are professionally and promptly investigated, free from political interference;
- Any successful enforcement will be publicized in the media to demonstrate effectiveness and to deter the corrupt.

**iii) Review mechanism**

ICAC enjoys wide investigative power. There is an elaborate check and balance system to prevent abuse of such power. The Operations Review Committee, with majority of its members from the private sector, acts as watchdog on ICAC. The Committee reviews each and every corruption report and investigation to ensure all complaints are properly dealt with. In addition, there is an independent Complaint Committee where members of the public can lodge any complaint against the ICAC and/or its officers and there will be an independent investigation.

**iv) Equal emphasis on public and private sector corruption**

ICAC places equal emphasis on public and private sector corruption. The rationale is that for a corruption free society both sectors need application of similar standards of integrity. This creates an enabling business environment. This is especially important if corruption in public procurement, which entails both public and private sector entities, is to be addressed effectively.

**v) Effective legal framework**

The ICAC cases are prosecuted by a selected group of public prosecutors to ensure both the quality and integrity. The Judiciary of Hong Kong is the strong supporter of fighting corruption, who ensured that the ICAC cases are handled in courts by highly professional judges with fairness. The conviction rate for ICAC cases is very high, around 80%.

## **VI) Top political will, independence and adequate resources**

The most important factor in fighting corruption is political will. In Hong Kong, there is clearly a top political will to eradicate corruption, which enables the ICAC to be independent. ICAC is directly responsible to the very top, the Chief Executive of Hong Kong. This ensures ICAC is free from any interference in conducting their investigations. The strong political support was translated into financial support, with an annual budget of US\$90M in 2008, accounting for 0.38 per cent of the national budget.

In comparison, the Kenyan ACA has a budget of about US\$20M in 2013, accounting for a mere 0.001 per cent of the national budget.

## **3.3 Other Practices in a few Select Countries**

### **3.3.1 Online e-procurement system: a case example from South Korea**

The National wide integrated Korea Online E-Procurement System (KONEPS) enables online processing of all procurement from purchase request to payment. The system covers all stages of the procurement process from pre-bidding to contract management and payment. The system helps monitor payments and prevent risks to integrity during payment. Payment is automatically completed online within two working hours upon payment request to avoid overdue payment. Through the digitalized systems, costumer organizations and companies are involved in the scrutinizing the way public funds are managed in the procurement process (OECD, 2007).

The online system allows all public institutions to register, offer, process and close bids. It contributes significantly to improving objectivity in the contractor selection process. For example, bidders use standard electronic bidding documents. In 2004, electronic bidding KONEPS accounted for 92 per cent of the total bidding for public procurement.

The Korean online system has become an exemplarily case throughout the world of how innovative technology can be used to help in transparency and accountability in public procurement. In addition, the system has greatly enhanced the quality and increased the number of business transactions between public institutions and private entities. It is estimated that this electronic procurement system saves USD 3.2 billion in public expenditures annually. The system has received high acclaim from the international community. Notably, it received the first UN Public Service Award in June 2003. The system has been highly adopted by the international community including Hong Kong, Vietnam, Pakistan, and Sri Lanka (Joongi, 2006).

### **3.3.2 Social witnesses in the area of public procurement: a case example from Mexico**

Social witnesses are a recent innovation in public procurement legislation in Mexico. It was initially a voluntary programme that became legally binding in 2009 under certain conditions. The programme has made significant contribution towards transparency and integrity in public procurement processes in Mexico.

A social witness is a representative of civil society, such as a trusted individual, organization or company with appropriate experience, knowledge and recognized moral qualities, that participates in selected public procurement processes as an external observer. The criteria for becoming a registered social witness are rigorous and, besides experience and knowledge, potential conflicts of interests and criminal convictions are considered.

The responsibilities of social witnesses can be far-reaching, from review of draft tender documents, to participation in the opening of the bids and evaluation meetings, to on-site visits at the place of performance. A social witness is allowed to propose any improvements regarding the tender procedure that might foster efficiency, transparency, impartiality and the fight against corruption, such as those concerning minimum selection or award criteria. Social witnesses must issue a publicly available report on the procurement procedure, which contains their assessment as well as recommendations. Social witnesses are required to alert authorities if they detect any irregularities in the procurement process.

Experience and research have shown that the social witness programme has a positive impact on transparency, competition and objectivity in public procurement, and is therefore a valuable tool in the fight against corruption (United Nations Office on Drugs and Crime, 2013).

### **3.3.4 Qui Tam provisions in the False Claim Act: a case example from United States (U.S)**

The False Claim Act of 1863 was enacted to allow private citizen to institute proceedings against people and business that have directly or indirectly defrauded the federal government of U.S. A suit filed by an individual on behalf of the government is known as a “qui tam” action and the person bringing the action is referred to as a “relator”. The government is required to investigate the allegations in the complaint. The False Claim Act is becoming a preferred method of anti-corruption enforcement because the burden of proof is much lower than in criminal cases. The whistleblower would bear all the legal costs of bringing the company to court and in return would receive 30 per cent of the settlement if the government did not join the case and 15-25 per cent if it did. Though in earlier years the law was not popularly applied, this has changed since the law was strengthened in 1986. For example, in 2003 fiscal year \$2.1 billion was recovered of which \$1.48 billion (70%) was recovered from qui tam cases (Drielsma, undated).

## **Chapter 4**

### **4.0 Results and Discussions**

This chapter presents the findings of the study. The findings are aligned to the objectives. Objective one is presented in section 4.1 that gives a summary of the data, and section 4.2 that documents the procurement practices in the counties. Section 4.3 checks the extent of adherence to Public Procurement Disposal Act and other regulations under objectives two. Objective three is tackled by section 4.4 of assessing transparency and accountability in the procurement cycle. The last objective is addressed in section 4.5 that documents the anti-corruption measures in place and section 4.6 that highlights the challenges faced in procurement.

### **4.1 Descriptive Statistics**

The study includes views from 377 public procurement officials/practitioners. This translates to 70 per cent success rate from the initial sample. Nairobi County contributed 68 officers, Mombasa 60, Machakos and Embu each had 26 officers (Table 1). The practicing procurement officers were selected from various sampled procuring entities with 105 coming from various ministries in the 15 counties, 59 from public secondary schools, 49 from state corporations and 46 from middle level public colleges (Table 2).

A total of 573 suppliers who had ever expressed interest or done business with the Kenya government were interviewed. This amounted to 64 per cent success rate, a situation emanating from the fact that the sample was drawn with an assumption that most Ministries undertake their own procurement at the district level. However, only at the Nairobi ministerial head offices does this happen while procurement for ministries is centrally done at the district level. Mombasa County had 89 suppliers, the largest number followed by Machakos with 65 while Kwale County

with ten suppliers had the least number of selected suppliers (Table 1). There was concerted effort to ensure those interviewed were knowledgeable on the particular firm's procurement by interviewing the owners of the firm (39%), procurement officials (25%) and the Chief Executive Officers (17%).

In addition, the study relied on data extracted from a total of 369 procurement files in the 15 counties visited. Nairobi County, with 77 files, had the largest number of extracted files followed by Uasin Gishu with 48 files, Kisumu and Nakuru each had 36 files (Table 1). The study extracted information on the type of goods being procured, type of procurement, the quantity and unit price of the goods, date the contract was awarded and the name of the supplier, when the goods were delivered, when payment of the goods were effected, and lastly the total number of suppliers who had placed bids for the contract. The files involved procurement by 32 public entities.

The information extracted from the procurement files indicated that majority of goods were procured through open tendering (57%) followed by quotations with 30 per cent. Restricted tendering, direct procurement and request for proposals accounted for ten per cent of all the procurement investigated. The largest procurement captured was the purchase of 1,800 farm inputs worth KShs. 1.7 billion by the Ministry of Agriculture, Livestock and Fisheries, Nairobi Head office followed by purchase of 1,000 circuit breakers for Kshs. 275 million by Kenya Power & Lighting Company, Nairobi Head office.

*Table 1: Sampled suppliers, public procurement officials and Procurement files examined per County.*

<b>County</b>	<b>Suppliers interviewed</b>	<b>Procurement officials interviewed</b>	<b>Procurement files examined</b>
Nairobi	31	68	77
UasinGishu	39	18	48
Kakamega	35	22	27
Kisumu	47	19	36
Kisii	26	12	22
Mombasa	89	60	15
Kilifi	24	23	16
Machakos	65	26	17
Embu	58	26	10
Nakuru	38	24	36
Nyeri	30	20	24
Narok	25	16	18
Isiolo	25	17	18
Kwale	10	8	5
Kiambu	31	18	-
<b>Total</b>	<b>573</b>	<b>377</b>	<b>369</b>

The firms interviewed placed on average a total of 8.63 bids to supply goods/service/works to public institutions in the period from 2011 to 2013. Out of the total bids applied, the firms were able to secure contracts averaging 3.98 bids and averages of 4.23 bids were not successful. Further, the bulk of the suppliers had submitted between one and ten bids in total in the three years under review. About 21 per cent of all firms interviewed had between two and less than 50 per cent of their bids they had submitted translating into contract while another 20 per cent of firms had between 50 and 95 per cent of their bids being successful. About 18 per cent of firms had all the bids they submitted turning positive. In one case, a firm had all the 50 bids



it applied translating into contract to supply goods between 2011 and 2013. On the contrary, 23 per cent of the firms had not won any tender despite expressing interest in the three years. In one case one firm had submitted 31 bids in the period and lost all the bids. These are red flags of possible cases of bid rigging.

Overall, out of a total of 345 successful bids by suppliers in the three years, majority (34%) were secured by firms which had been in existence between six to ten years. Most of these firms were engaged in building and construction, food processing, pharmaceuticals, education, electricity, energy and water services.

*Table 2: Sampled suppliers and procurement officials by public institution*

Public Institution	Suppliers	Procurement officials
	interviewed	Interviewed
Middle level colleges	49	46
County Governments	72	38
Courts of Law	6	14
Hospitals	96	51
Ministries	154	105
Secondary schools	96	59
State Corporations	52	49
Universities	32	14
Unknown	16	1
<b>Total</b>	<b>573</b>	<b>377</b>

## 4.2 Procurement Practices

### 4.2.1 Corruption perception

The study sought to find out the perceived spread of corruption in public procurement by both public procurement officials and suppliers doing business with public institutions. The two groups were in agreement that corruption is fairly widespread in public procurement in the country (Figure 1).

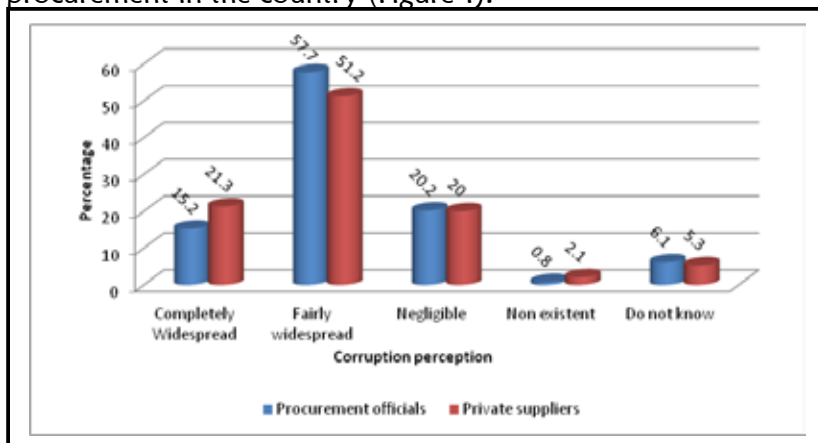


Figure 1: Perception of public procurement officials and suppliers on spread of corruption in public procurement.

### 4.2.2 Type of procurement used in practice

The bulk of procurement officials (73.1%) indicated to most frequently use open tendering method followed by quotations (22.9%). Restricted and direct tendering was only quoted by 2.7 and 1.3 per cent of public officials as the most frequent method of procurement. The main reasons fronted by those who preferred using quotations to procure their goods/services was that the goods they were procuring did not require open tendering, convenience and cash constraints. Interestingly, there are those who considered quotations as a competitive method of procurement.

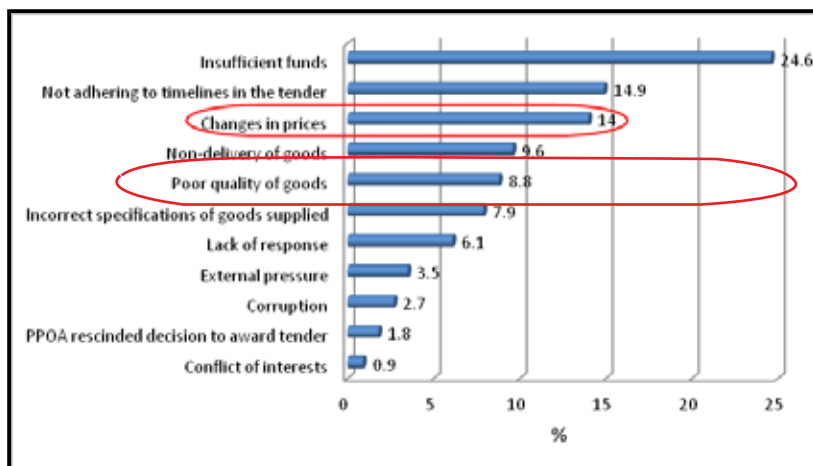
From the 369 procurement files viewed by the research teams, 58 per cent had applied open tendering while quotations constituted 31 per cent of the files. Proposals, restricted and direct procurement only constituted about ten per cent of the procurement files. A keen look at the various public institutions whose files were perused indicated a similar trend except a few such as Kenyatta National Hospital, Mbaraki Secondary School, Kenya Medical Training College, Kakamega County Government and Transport Ministry that majority of the files perused had used quotations to procure for goods. Due to its competitive nature, the Public Procurement and Disposal Act, 2005 states that open tendering is the preferred method of procurement.

#### **4.2.3 Termination of procurement process**

Procurement officials were asked if their institutions had terminated procurement before completion in 2012 and 2013. Most of them (61%) indicated not to have terminated procurement process. However, 31 per cent indicated to have terminated procurement process midway in the two years for between one and five times. The reasons given for the terminations included insufficient funds, changes in prices of goods, non adherence to timelines by suppliers, non delivery of goods, poor quality and incorrect specifications of goods supplied (Figure 2). We note that most procurement officers indicated lack of sufficient funds and changes in prices of goods as key reasons why they had to terminate procurement.

PPDA section 26(6) and Public Procurement Code of Ethics for Procuring Entity states that a procuring entity shall not commence any procurement procedure until it is satisfied that sufficient funds have been set aside in its budget to meet the obligations of the resulting contract (Republic of Kenya, 2005).

Interestingly, suppliers themselves isolated supply of substandard goods (39%) and delay in supplying goods (21%) as the main reasons why public institutions terminated procurement.



*Figure 2: Reasons forwarded by public institutions for terminating procurement process before completion. These institutions had mostly terminated between 1-5 procurements between 2012 and 2013.*

#### **4.2.4 Price setting**

The study sought to find out how prices are determined during procurement. Public institutions are required to undertake market survey to determine the prevailing market price of goods and services they intend to procure. Most procurement officials indicated to do this (Figure 3). However, most procurement officers indicated that they establish the market price for goods and services that they intend to procure by asking a few random suppliers who have been invited to bid. On the other hand, suppliers were asked how their firms establish the price to use while seeking public tenders, 26.7 per cent of suppliers (151 suppliers) indicated they consider the prevailing market price but add above 20 per cent profit margin (103 suppliers; 18%) and or factor in bribes (48 suppliers; 8%) to pay in order to win the tenders (Figure 4).

This shows the proclivity of procurement officials to ask their own suppliers the market price while they (suppliers) are well aware this information will be used to determine the reserved price in a future procurement is not an intelligent idea. A revamp of the whole idea of market survey is necessary. In addition, the study noted that suppliers collude to fix prices to quote during public tendering. About seven per cent of suppliers interviewed (39 suppliers) indicated they benchmarked the price to quote with that of other suppliers bidding for the same contract (Figure 4).

The Public Procurement Code of Ethics for Procuring Entities states that staff of the procurement unit shall endeavor to protect their procuring entities from risks of stock out, overstocking, overpricing and undeserving payments (PPOA, 2011). While the Public Procurement and Disposal Regulations 22(2) states when estimating the value of the goods, works or services, the procuring entity shall ensure that the estimate is realistic and based on up-to-date information on economic and market conditions (GoK, 2006).

## **4.3 Extent of Adherence to Public Procurement Disposal Act (PPDA) and other Regulations**

### **4.3.1 Knowledge and adherence to PPDA**

When suppliers were asked if they were aware of the existence of PPDA of 2005, PPDR of 2006 and other regulations governing public procurement, 51 per cent indicated to be aware while 48 per cent were not. Among those who were aware, 40 per cent were of the opinion that their level of understanding of the Act and the regulations was high while for 60 per cent said it was low. Should suppliers be more sensitized on the Act?

To gauge the level of adherence to the Act, a question was posed to both suppliers and procurement officials who indicated knowledge of PPDA what was their honest opinion on the level of adherence to the Act and other procurement regulations by public institutions. Whereas over 80 per cent of procurement officials believed their institutions had a high adherence level, only 43 per cent of suppliers rated the adherence as high, 34 per cent as low and 23 per cent had no idea. This disparity indicate a problem that PPOA need to keenly look into.

### **4.3.2 Procurement plan**

The study sought to find out from procurement officials if their public institutions have procurement plan for 2011/2012 financial year. Majority of the officers indicated to have the plan (82%) and 13 per cent did not have. When asked to rate the level of implementation and adherence to their 2011/2012 procurement plans, majority gave an above 60 per cent rate of implementation (Figure 5). The reasons given for this high rate of implementation and adherence to their plan are as displayed in Figure 6.

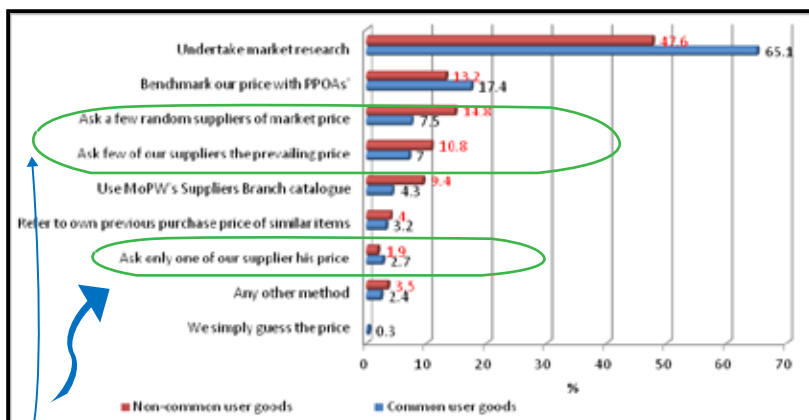


Figure 3: How public institutions determine the market rate price for common and non-common user goods to procure. Note a large combined proportion of procurement officers who indicated they only ask a few suppliers the market price of goods/services.

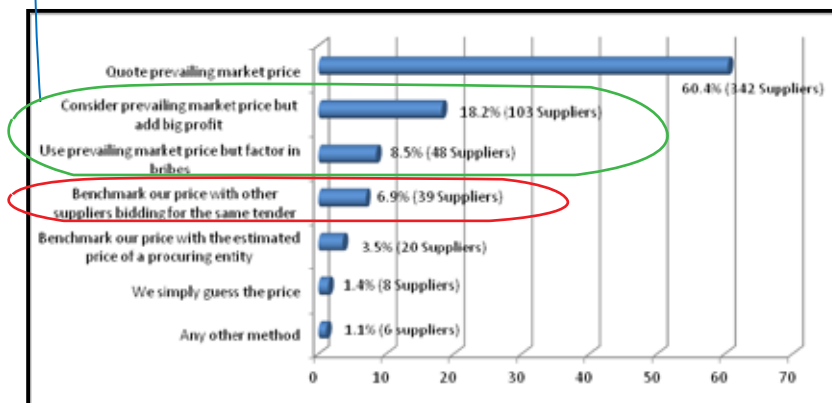


Figure 4: How suppliers determine the price to quote when placing tenders with public institutions. Note that suppliers, on the other hand, add big profit margins and/or bribes while setting prices of goods/services they trade with public institutions.

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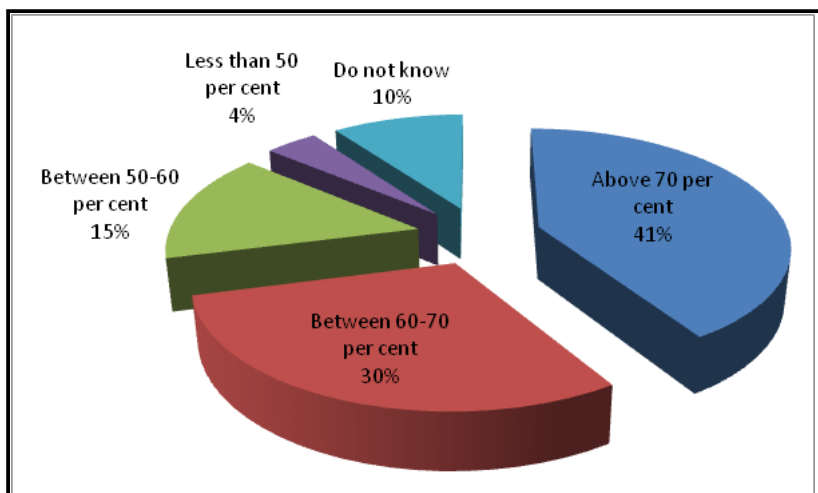
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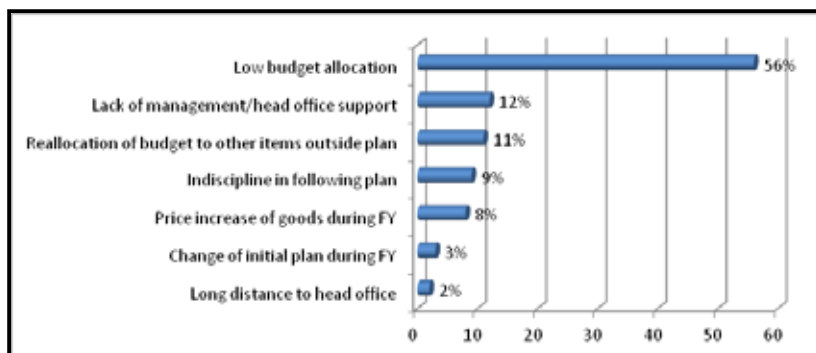


*Figure 5: Level of implementation and adherence to 2011/12 procurement plans.*



*Figure 6: Reasons given by procurement officials for above 60 per cent implementation of 2011/12 procurement plan.*

For the 19 per cent of procurement officials who indicated less than 60 per cent implementation of 2011/12 procurement plan (Figure 5) the main reason was low budget allocation (Figure 7). This corroborates the results of section 4.2.3 where procurement officials indicated lack of sufficient funds as the main reason why they had to terminate most procurement before they were complete (Figure 2).



*Figure 7: Reasons given by procurement officials for below 60 per cent implementation of 2011/12 procurement plan.*

### **4.3.3 Public procurement official's competence**

Out of the 377 procurement officers interviewed in public institutions, 80 were Head of Procurement section, 90 were Procurement Officers, 83 Procurement Assistants, and four Internal Auditors while 120 were support staff in procurement sections but engaged in procurement process.

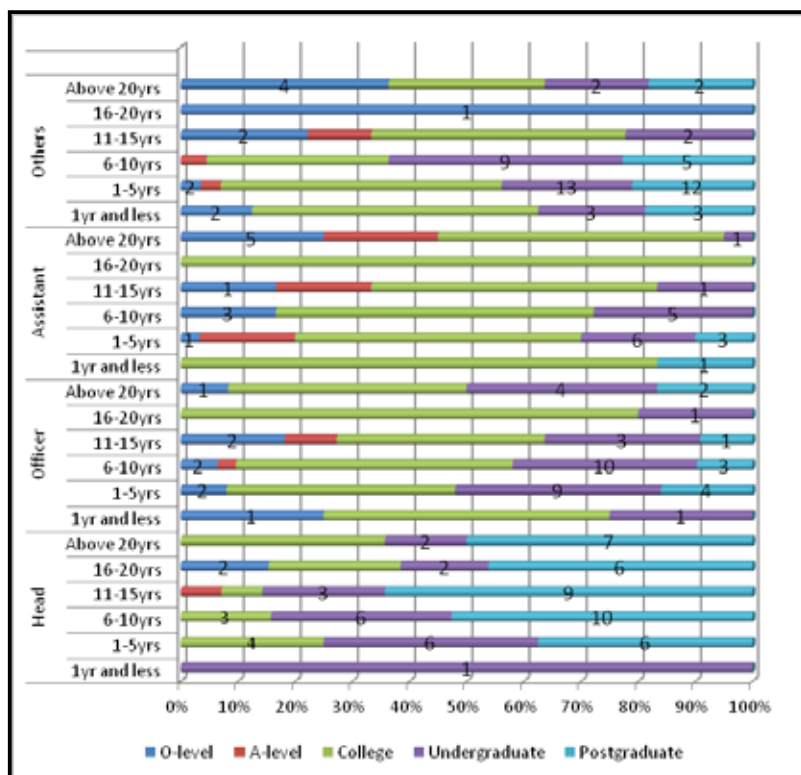


Figure 8: Public procurement officer's positions against level of education and years of experience in procurement.

Public procurement officer's highest level of education, their position, and years of experience in procurement and whether they have ever undertaken any procurement related course are displayed in Figures 8 and 9. We note several Heads of Procurement sections with college education and less than five years experience and some with only O or A – level of education though with more than 11 years experience (Figure 8). The proportion of graduates' heads of public procurement sections (both undergraduate and postgraduate) is highest for those with one to 15 years of experience. The same trend is observed more or less with procurement officers and assistants. Worth noting are a substantial proportion of graduate officers involved in

procurement who were neither heads of procurement section, procurement officers or assistants yet with more than one year experience up to above 20 years (Figure 8).PPDA 26(9) and PPDR 8(2) mandates the PPOA to stipulate the qualifications and experience required of procurement professionals.

On training, majority of procurement officers with less than one years experience had not undertaken procurement related course. These proportion decreases as the number of years of experience increase across the procurement ranks. However, we note Procurement Officers and Assistants with 11 years to above 20 years experience who had not yet been trained (Figure 9). There is also a big proportion of other officers not falling in the rank of procurement assistants, officers or heads of section involved in procurement and are untrained. These are mostly support staff in procurement sections.

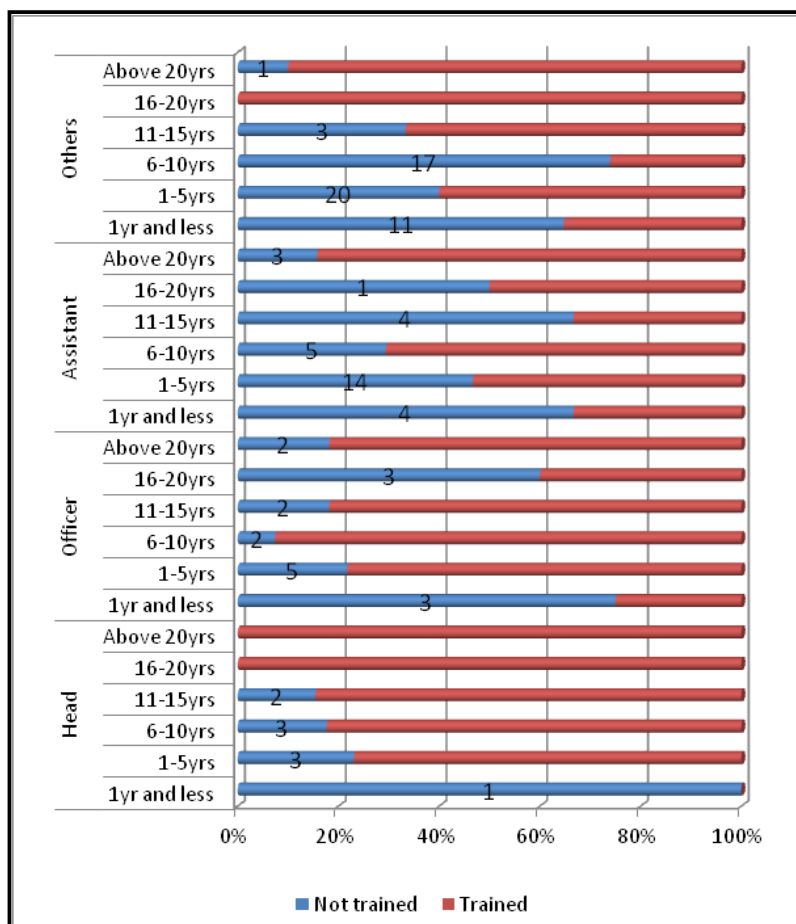


Figure 9: Public procurement officer's positions against years of experience in procurement and if they have undertaken procurement related course(s).

#### **4.3.4 Suggestions of PPDA's provisions that need review**

The study sought suggestions from both suppliers and public procurement officials on which areas of PPDA and other regulations they feel need review. The list below provides the suggestions. However, quite a number of suppliers (38%) and procurement officers (18%) felt there are no provisions of the Act that require review.

*Table 3: Suggested areas of improvement in the Act and regulations.*

<b>Procurement Officers</b>	<b>Suppliers</b>
✓ Signing of contracts-long process	✓ Provisions on evaluation
✓ Bureaucracy	✓ Classification of goods and services
✓ Disposal of goods	✓ Time specifications
✓ Price fluctuations	✓ Terms of payment
✓ Implementation and evaluation	✓ Opening of tenders
✓ Cash purchase	
✓ Rejection of goods	
✓ Complaints	
✓ Technical issues	
✓ Inadequate planning	
✓ Conflict of interest	
✓ Collusion between suppliers	
✓ Inspection of goods	
✓ Local companies consideration	

## **4.4 Transparency and Accountability in the Procurement Cycle**

Corruption thrives on secrecy. Transparency and accountability have been recognized as key conditions for promoting integrity and preventing corruption in public procurement (OECD, 2007). The Constitution of Kenya 2010 lists transparency and accountability as one of the national values and principles of governance. It goes further to list participation of the people as an additional national value and principle of governance (GoK, 2010). People participate when they are allowed to and when information about what, how and when to participate is readily available. Further, these values are embedded in Vision 2030 that states that the Government will intensify efforts to bring about an attitudinal change in public service that values transparency and accountability to the citizens of Kenya. The 2030 Vision is “transparent, accountable, ethical and results-oriented government institutions” (GoK, 2007).

### **4.4.1 External influence**

External influence refers to influence by people both within and without the concerned procurement unit or relevant committees dealing with procurement who are not authorized to interfere with the public procurement process. When procurement officers were asked if they recall any instance where a procurement decision was influenced by external persons, 49 of them (13%) were of the affirmative. In comparison, a total of 131 suppliers (23%) confirmed to be aware of instances when a procurement decision was influenced by external actors. We then went further and asked these procurement officers and suppliers to identify the external actors who influenced procurement decisions. Figure 10 below lists the actors.

Politicians and senior civil servants led the pack an indication of them having vested interest in whatever procurement they influenced. Interestingly, 33 per cent of suppliers (43 in number) indicated to be aware of cases where other suppliers influenced procurement decisions in public institutions (Figure 10). As an anti-corruption agency, we need to reach out to suppliers to encourage them to report cases of unethical conduct by their pals in the trade. Procurement decisions in public institutions were influenced by politicians, senior civil servants, and management of various state corporations having particular suppliers being favored for award of particular tenders. Intimidation of procurement officials followed by conflict of interest was other tools used to influence procurement decisions. We also note about 21 respondents identified bribes as one means through which suppliers influenced tenders to be awarded to them (Figure 11).

The Public Procurement Code of Ethics for Procuring Entities clearly states that no employee (of a public institution) shall unduly influence or exert pressure on any member of a committee or any other member of a procuring entity to take a particular action which favors or tend to favor a particular bidder and that staff of the procurement unit shall not allow their activities to be unfairly influenced by unauthorized persons from any quarter (PPOA, 2011).



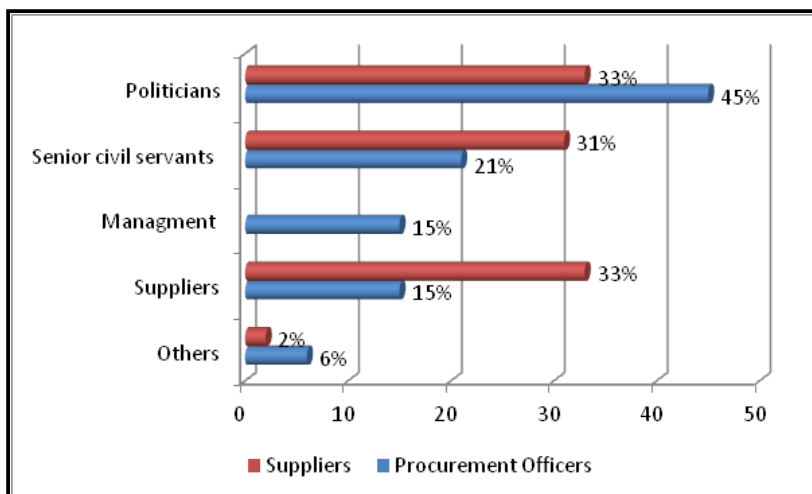


Figure 10: External people alleged to have influenced procurement decisions in public institutions.

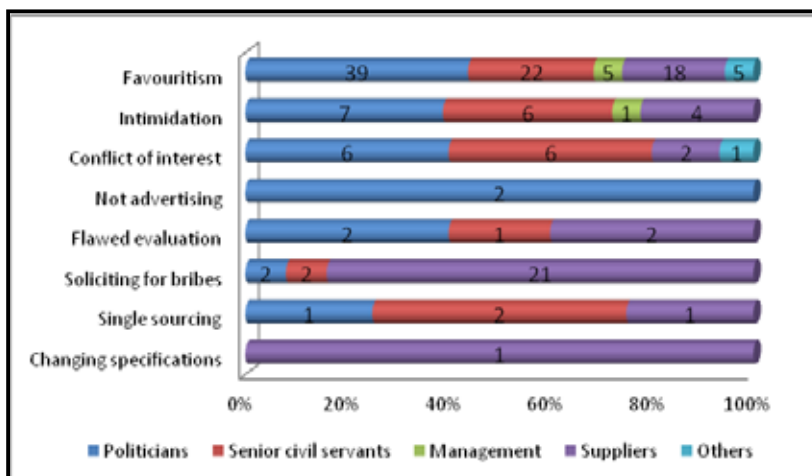
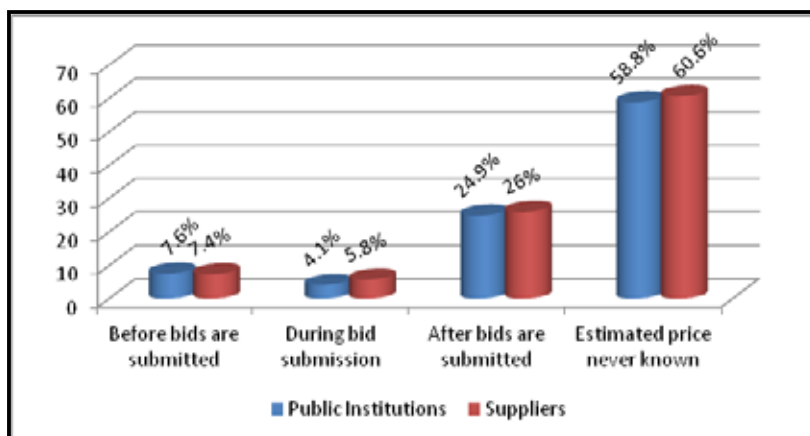


Figure 11: How procurement decisions were influenced by external people.

#### **4.4.2 Access to procuring entity estimated price**

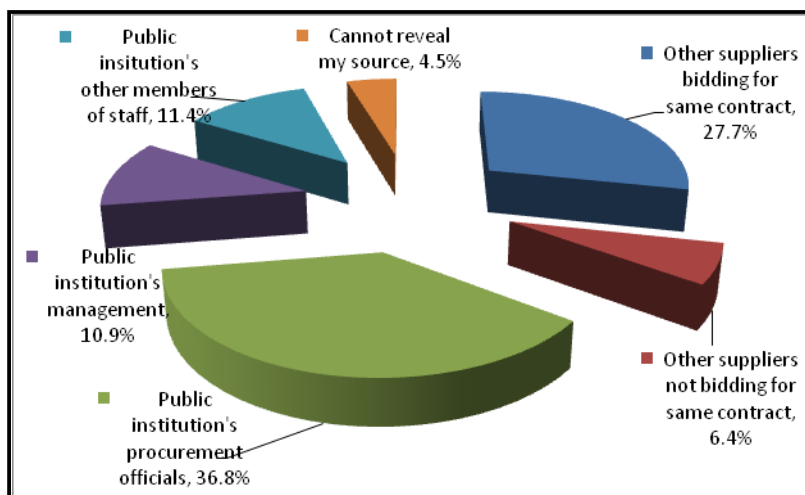
The study sought to find out from procurement officials in the sampled public institutions when they make public their predetermined estimated price of goods they intend to procure. To allow for comparison, suppliers were asked when they got to know the estimated price of goods they intend to supply to public institutions. Majority of suppliers (60%) and procurement officers (58%) stated that they never got to know the estimated price.

However, a few said they got to know the estimated price before, during and after bids had been submitted (Figure 12). To be precise 42 suppliers indicated they knew of the public institution's estimated price before they submitted their bids to the institution, 33 during the course of bid submission and 147 after they had submitted their bids. There was biased release of information to preferred bidders which is against the purpose of PPDA that promote integrity and fairness of procedures. In addition, when suppliers were asked how they determine price to quote during public tendering, 3.5 per cent (20 suppliers) indicated they benchmark their price with the estimated price of public institution they intend to do business with (Figure 4, Section 4.2.4).



*Figure 12: Access to public institution's estimated price.*

The study further sought from those suppliers who had indicated knowledge of public institution's estimated price in a particular tender how they had gained access to this vital information. Figure 13 below show people who divulged this information. Interestingly, procurement officials of the public institutions seeking tenders were the majority of people who were giving out this information as identified by 36.8 per cent of suppliers. Public institution's managements were also culprits in divulging this information. This indicated possible collusion between public officers and suppliers for monetary gain. These is against PPDA section 44(1) (c) which states that during or after procurement proceedings, no procuring entity and no employee ... shall disclose information relating to a procurement whose disclosure would prejudice legitimate commercial interests or inhibit fair competition (Republic of Kenya, 2005).



*Figure 13: People who supplied private firms with information on the estimated price of goods to be procured by public institutions.*

#### **4.4.3 Development of specifications**

The study found out that 10.5 per cent of the suppliers had participated in developing specifications of goods/works for public institutions. Out of these, 60 per cent of the suppliers participated in the tender to supply goods and services they had previously developed specifications for. These suppliers also gave 26 examples of procurements instances where they had developed specifications and participated in the tendering in which 23 bids were successful (88% success rate). This example illustrate that bidders involved in the development of specifications have an advantage over other competitors which is contrary to section 87 PPDA Act of 2005.

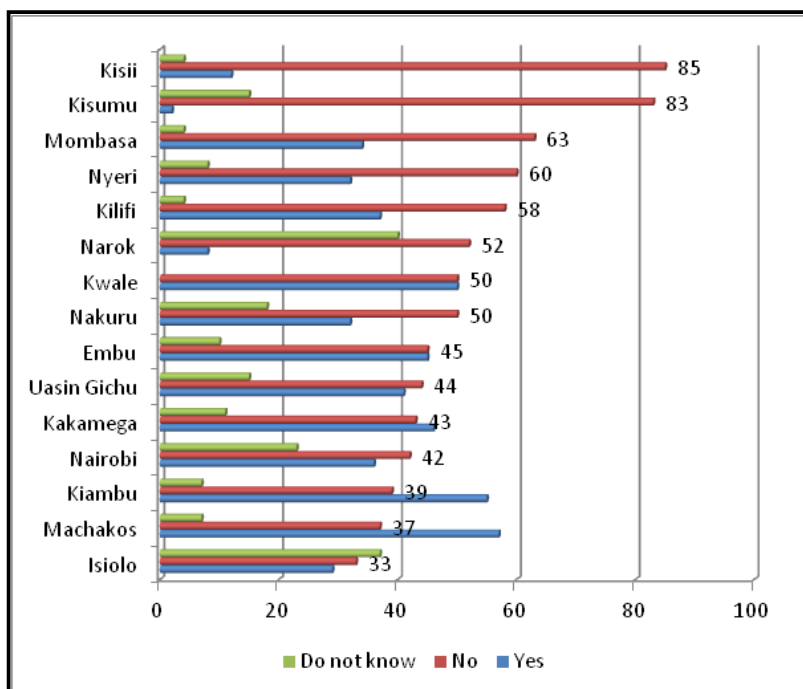
Table 4 lists the examples of goods and services where suppliers were both involved in development of specifications and later supplied the goods or services. We note several goods that are not technical but are listed. Most probable reason why suppliers picked on these examples is that they were consulted by procuring entities about the goods/service before the tender was advertised.

*Table 4: List of examples of goods or service which suppliers developed specifications and supplied the good or service. Goods marked with an asterisk (\*) are not technical thus could not have had specifications developed.*

<b>Goods/services involved (No. of Contracts)</b>
*Spring files(2); *Biro pen(2); Structures construction(1); Machinery(1)
Laptops(2); UPS(2); *Fruits(2); *Grains and Cereals(2);*Groceries(2)
Office Suppliers(1); Tires, tubes and vehicle spare parts(1); Plumbing and water services(1)
*Milk(1); *Grains and groceries(3); Uniforms(1); fruits (1)*
Insurance services(6)
*Cement (1)
Uniforms (1)
Transport services (3)
Insurance services (3)

#### **4.4.4 Documentation and access to information**

Attracting a sufficient number of bidders in public procurement through processes that are open and fair is a key concern (OECD, 2007). The big question is what is a sufficient number of bidders that need to be attracted in any particular public procurement? The study sought to establish available and ease of access to information on procurement by suppliers. First, the study sought to find out from suppliers how they get to know about bidding opportunities, evaluation and selection of vendor to supply goods/service in public institutions, the bulk of them identified newspapers (76%) as the source of information and rated the medium as overly effective in communication. Notice boards were also another major source of information especially in Isiolo, Mombasa, Kakamega, Kisii and Nyeri Counties. The medium was also overly rated as effective.



*Figure 14: Accessibility of public procurement documents for scrutiny to Suppliers.*

When public procurement officers were asked if they avail their records to suppliers and the public for scrutiny, an overwhelming 70 per cent said yes and only 27 per cent said no while the rest had no idea. However, in comparison, only 35 per cent of suppliers (195 suppliers) said to have had access to these records while 52 per cent (291 suppliers) said they had not had access and 12 per cent (69 suppliers) did not have any clue if the documents are accessible. On further investigations by counties, the seriousness of the situation becomes more apparent (Figure 14). In Kisii, Kisumu, Mombasa, Nyeri, Kilifi, Narok, Kwale, and Nakuru counties, more than half of the suppliers interviewed said procurement records are not available for them to look at. Only in Kiambu and Machakos counties where a slightly higher proportion of suppliers indicated to access procurement records as compared to those who did not.

The proportion of suppliers, though small, who said they did not know if procurement documents were available for scrutiny is a further indicator that documents in these counties are not readily available for scrutiny by one of the key stakeholders in procurement. Lots of secrecy is a breeding ground for corruption and an inhibitor to transparency and fairness.

PPDA section 45 (3) states after a contract has been awarded or the procurement proceedings have been terminated, the procuring entity shall, on request, make the records for the procurement available to a person who submitted a tender, proposal or quotation or, if direct procurement was used, a person with whom the procuring entity was negotiating (Republic of Kenya, 2005). In addition, the Public Procurement Code of Ethics for Procuring Entities states that public procurement activity shall be undertaken bearing in mind the requirement for meeting the closest public scrutiny (PPOA, 2011) Uptake of computerized information management system in the procurement process by county

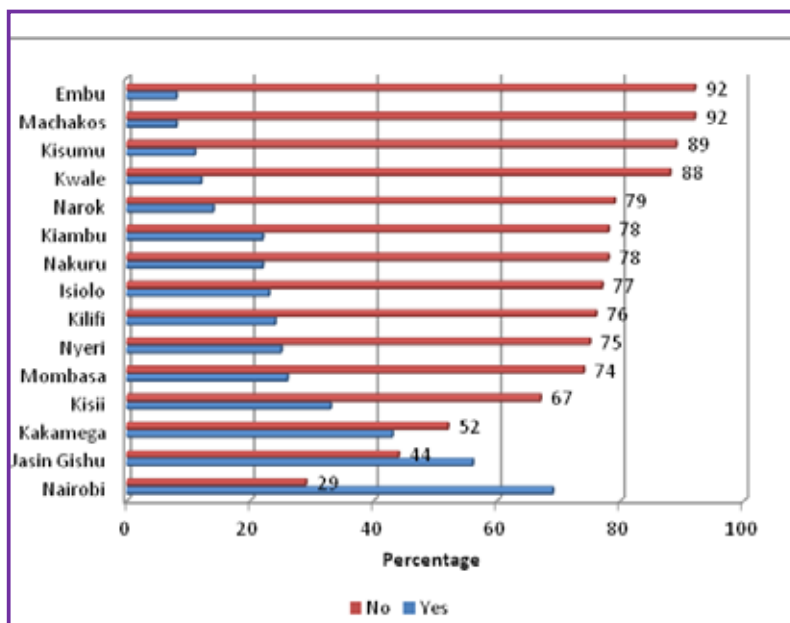


Figure 15: Uptake of computerized information management system in the procurement process by county.

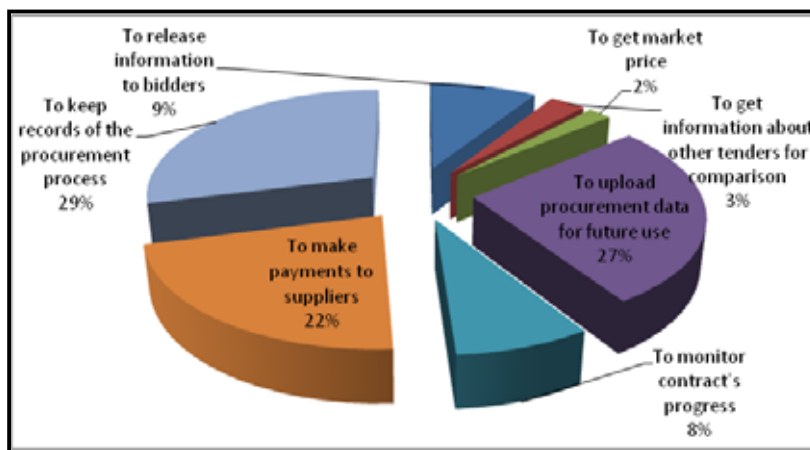


Figure 16: Major use of computerized information management system in procurement.



Almost all procurement officials in public institutions (97%) indicated that above 60 per cent of the procurement process is documented and that the records are accurate. However it seems most of these records are in paper form as the level of technological uptake in managing public procurement is low with only 31 per cent of procurement officials indicating to be using computerized information management systems in managing the procurement process while 68 per cent do not use such systems. It was only in the capital city of Nairobi where most public procurement computerization has been adopted (Figure 15).

PPOA, National Treasury and other stakeholders need to fast track the rolling out of e-procurement since it is widely recognized that computerized systems improve transparency and accountability since they record information per user. In fact the user of these systems in the survey indicated the ICT systems they engage enhance transparency (75%) due to their ease of document access while at the same time being secure, help in tracking information and improves accuracy of information stored.

The approximate level of usage of the computer systems was rated above 60 per cent in any particular procurement process by about 66 per cent of public procurement officials who uses these systems. The computerized procurement systems were mainly used to store procurement records and data, to make payments to suppliers and to a small extent to release information to bidders and monitor contracts progress (Figure 16). Some of the ICT systems identified as being used in public procurement include: I.F.M.I.S, LAIFONS, SAGE, FUNSOFT, ABNO and SAP. There is need to harmonize these systems so that PPOA, EACC, law enforcement agencies and other stakeholders can be able to access the information regularly for purposes of monitoring and investigations thus enhancing transparency. Rolling out of e-procurement in all procurement units will help ameliorate this situation.

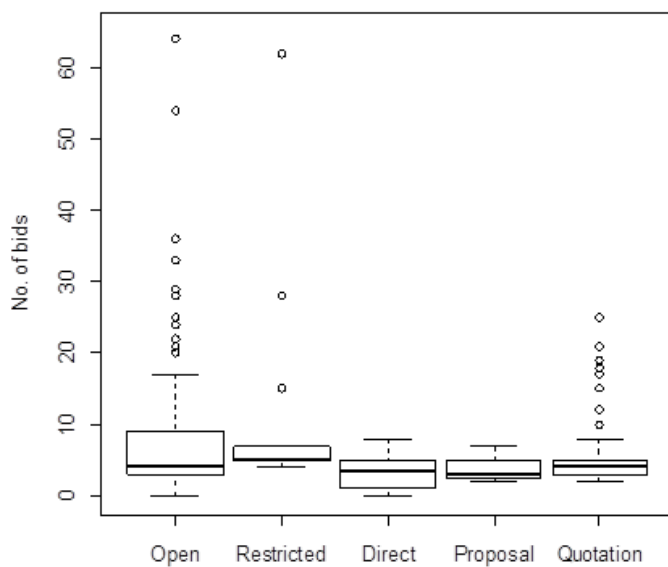


Figure 17: Box plots of different types of procurement and the distribution of the number of private bids each attracted. An outlier with 126 bids for open tendering is not shown.

We looked at the distribution of the number of suppliers who expressed interest and submitted their bids in each of the 369 public procurement files that were examined during the study. The results are best presented by box plots<sup>1</sup> in Figure 17. Looking at the position of the different boxes representing the various types of procurement in comparison to each other, we note that all the boxes are more or less at the same position between zero and ten bids. Further, the box representing open tendering is shifted slightly to the lower end indicating the bids for open tendering are positively skewed, that is, the majority of public institutions using open tendering attracted few bids. In fact out of 209 public tenders using open type of procurement, 61 per cent (127 files) attracted between one and six suppliers. Twelve of this attracted only one supplier. There was nothing technical about these contracts to warrant attracting only one supplier; the contracts involved supply of such things as firewood, milk, grains among others (Table 5).

This casts aspersions as to how fair, transparent and competitive is open tendering by public institutions. We can therefore conclude that based on the 369 public files sampled, open tendering did not attract a large number of bids in many public institutions as it should. In addition, we note from Table 5 that most open procurement tenders that attracted one bidder are in Counties far from Nairobi. This could be as a result of weak supervision where the officials feel they can bend rules without attracting the attention of supervising authorities or more probable the lack of information on available tenders by suppliers. PPOA need to have a look at this.

We however note that open tendering has many outliers depicting several. Though few, public institutions that attracted more than 20 bids in a number of tenders (figure 17).

<sup>1</sup> A box plot is a graphical plot that shows the overall shape of a set of data by a box and whiskers. The central box shows 50% of the data that is between the lower and upper quartiles. The box is usually oriented so that the whiskers are vertical and extend from the ends of the box to the minimum and maximum of the data. The median is represented by a horizontal line across the box. Very extreme points (outliers) are plotted separately as points, circles or asterisks (Dewey, 1992) (Venables, 2002). The bottom 25% of the data sample is represented by the space between the lower whisker and the box, the middle 50% within the box, and the remaining 25% is contained between the box and the upper whisker. The location of the box within the whiskers can provide insights on the normality of the sample's distribution. If the box is shifted significantly to the lower end, it is positively skewed; if the box is shifted significantly to the high end, the sample is negatively skewed.

One extreme example is a tender to supply grains and cereals by the Ministry of Labour Nairobi Head office that attracted 126 bids by suppliers.

*Table 5: Type of goods bought by open tendering but which had attracted only one bidder.*

*Please note none of these goods are technical to warrant attracting only one bid.*

	County	Type of Goods	Price	Total Value	Contract Year
1	Isiolo	Grains & cereals	-	35,719	March, 2013
2	Isiolo	Hand wash liquid (250ml)	-	20,000	Nov, 2012
3	Isiolo	Firewood	-	15,000	Nov, 2012
4	Nyeri	Milk	35	128,660	Nov, 2012
5	Kisumu	Firewood	18,000	216,000	Jan, 2013
6	Kisumu	Biro pen	700	56,000	Jan, 2013
7	Kakamega	Hardcover book 4 quire each	500	50,000	Feb, 2013
8	Kakamega	Office supplies	400	40,000	Feb, 2013
9	Kakamega	Text books	-	1,304,626	Dec, 2012
10	Kakamega	Uniforms	1900	2,687,450	Dec, 2012
11	Kisii	Pralidoxinemyssylate (PAM)	3,500	175,000	May, 2013
12	Nairobi	Building materials	-	133,850	May, 2012

#### 4.4.5 Conflict of interest

Instances where private companies owned, either directly or by proxy, by public officers and doing business with the government represent one of the biggest if not the main huddle in the fight against corruption. These companies are always a step ahead of their competitors in terms of knowledge of business opportunities in the government, knows the right people to see in order to influence procurement decisions to award tenders, facilitate quick payment of goods sometimes even before or when the goods are not delivered and in colluding with officials to inflate tender prices among many other ills. The situation is further exacerbated when the public officials are procurement officials themselves or other junior staff working in the Procurement Department.

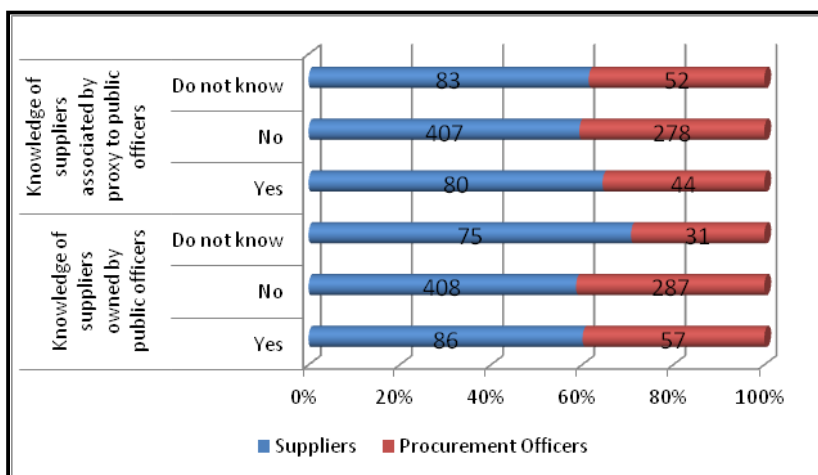


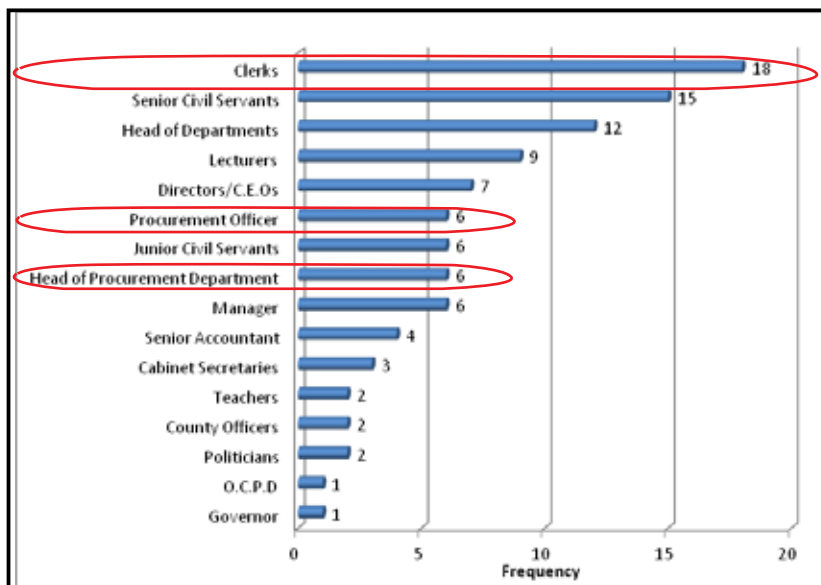
Figure 18: Number of suppliers known to be owned by public officers either directly or by proxy.

The study found out that a combined total of 267 suppliers and procurement officers indicate to know suppliers doing business with public institutions but owned either directly or through proxy by public officers (Figure 18). Assuming each of the 267 respondents knew only one such supplier, we are talking of 267 private companies with conflict of interest.

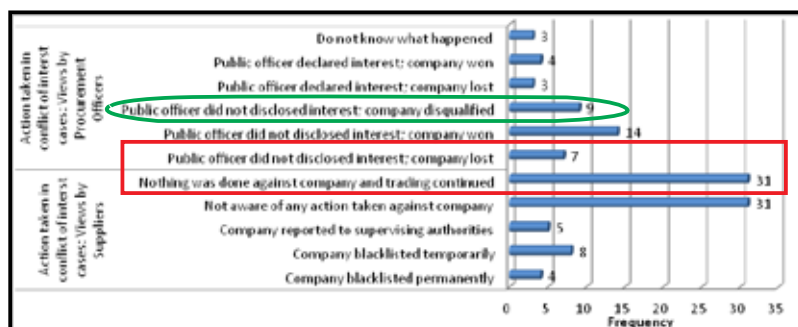
The study further identified the public officers owning these companies as clerks, senior civil servants, and cabinet secretaries among other (Figure 19). Clerks were identified by 18 respondents. It is highly possible that these officers work in Procurement Departments and get to know of business opportunity in the public institution they work for and set up companies to take advantage of the opportunities. Procurement officers, including the heads of procurement departments, were also identified as owners of private companies doing business with public institutions. These are more serious cases of conflict of interest as the officers have an opportunity to award themselves public tenders thus inhibiting fair competition. Procurement officers need more thorough vetting to eliminate those owning companies and trading with their employers.

When asked what action was taken against those suppliers they know to be owned by public officers, most suppliers (62 suppliers) indicated to either not know of any action taken against the suppliers or no action was taken and they continue trading normally. Interestingly, 14 procurement officers indicated companies they knew to be owned by public officers but who did not declare their interest but the companies went ahead and competed for public tenders and won (Figure 20). This corroborates with what suppliers were saying that no action is taken on these firms. Measures need to be put in place to identify these companies and abrogate them from participating in public tenders.

Further, public officers identified to be doing business with their employers need to be taken to court to act as a deterrent for other public officers. So far no such persons have been taken to court.



*Figure 19: Number and position of public officers alleged to own private companies, either directly or by proxy, doing business with public institutions.*



*Figure 20: Action taken against those companies known to be owned by public officers and doing business with public institutions.*

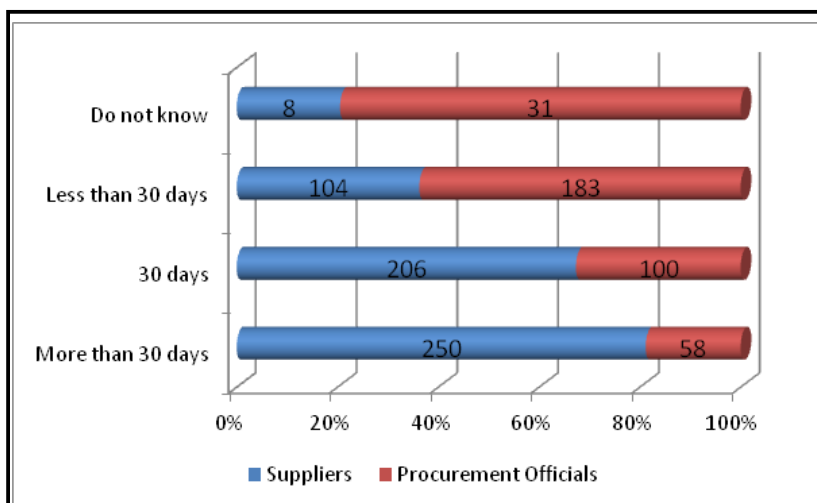
The PPDA and Public Officer Ethics Act criminalize conflict of interest. Public Officer Ethics Act section 12(4) states that a public officer SHALL NOT AWARD A CONTRACT, or influence the award of a contract, to himself; a spouse or relative; a business associate; or a corporation, partnership or other body in which the officer has an interest (Republic of Kenya, 2009). On the other hand, PPDA section 43(1) state that an employee or agent of a procuring entity ... who has a conflict of interest with respect to a procurement SHALL NOT TAKE PART IN THE PROCUREMENT PROCEEDINGS and shall not, after a procurement has been entered into, take part in any decision relating to the procurement or contract (Republic of Kenya, 2005).

The Act (PPDA) does not categorically abrogate award of public tenders to private companies where a public officer may have interest but rather recommend the public officer in question to declare his interest and eschew from procurement proceedings after which the private company with conflict of interest can be awarded public contracts. On the other hand, the Public Officer Ethics Act is clear on award of contract to companies where a public officer has interest. Bearing in mind that most procurement practitioners use PPDA as a daily reference Act and not POEA, the two Acts needs harmonization to avoid conflict in interpretation.

#### **4.4.6 Processing of payments**

The PPOA's Public Procurement Code of Ethics for Procuring Entities states that procuring entities shall not delay payments which are due to the contracts, suppliers, providers of services, consultants or others (PPOA, 2011). Delay in processing payments for suppliers is a tactic mostly employed by procurement officials with the sole purpose of soliciting for bribes from suppliers in order to facilitate quick processing of payment. The delay may further push suppliers to offer bribes even when not asked for, if only it would help unlock their payment. Postponement of payment may also lead to price reviews so as to increase the economic value of the contract (OECD, 2007).

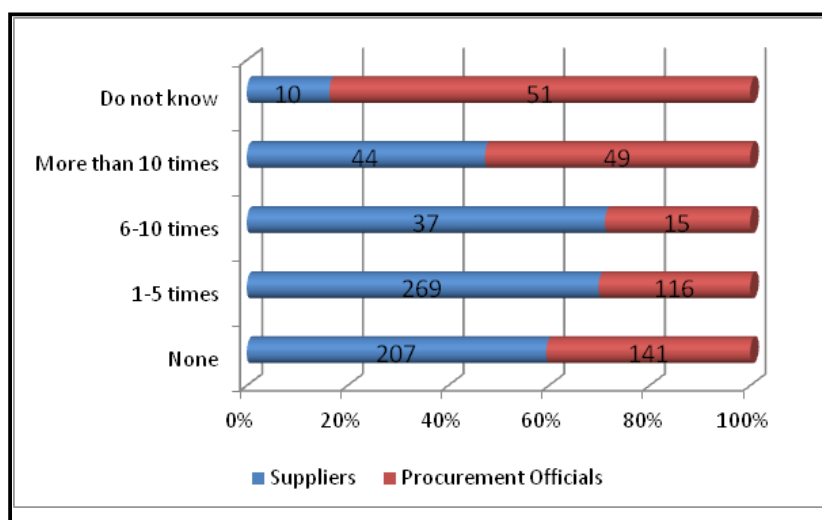




*Figure 21: Duration taken to make payment for routine items.*

The study sought to find out, especially amongst suppliers, whether there was delay in processing of their payments by public institutions they had supplied goods/services. Figure 21 indicate 250 suppliers who alleged that it takes more than the stipulated 30 days to process payment for routine goods. From Figure 22, we note, contrary to what procurement officials were saying, that there were numerous suppliers who claimed their payments were delayed more than one time in 2012 and 2013. There were 44 suppliers who said their payments were delayed more than ten times in the two years, 37 suppliers between six and ten times, and 269 suppliers had their payment delayed between one and five times in 2012 and 2013.

This is a serious issue and an indicator of corruption in the procurement process in government. Most suppliers indicated bureaucracy and a lack of funds as the main reasons for the delays. Again the issue of lack of funds arises as the main reason for payment delay similar reason to why public institutions terminate procurement before completion (Section 4.2.3). The provision of PPDA section 26(6) and Code of Ethics for Procuring Entities of requiring procuring entities to be more vigilant in ensuring funds are sufficient before commencement of any procurement need to be enforced and observed.



*Figure 22: Number of times in 2012 and 2013 that processing of payment was delayed.*

#### **4.4.7 Other procurement malpractices**

In this subsection we look at other procurement malpractices that affect public procurement in Kenya as identified by both procurement officers and suppliers. The study also identified measures in place, if any, to mitigate the effect of the malpractices identified in public institutions.

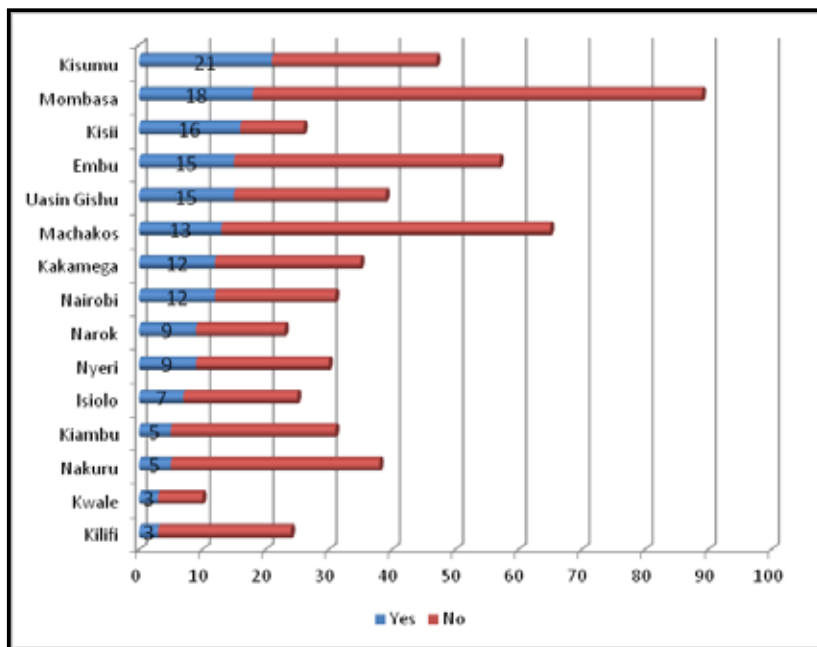
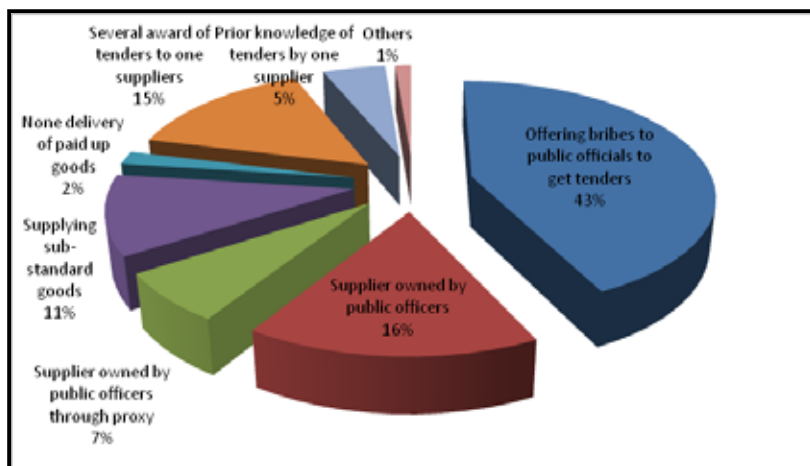


Figure 23: Number of suppliers claiming to know other suppliers trading with public institutions but whose integrity is questionable.

When suppliers were asked if they knew of any other supplier(s) doing business with public institutions but whose integrity is questionable, a total of 163 suppliers (29%) claimed to know such suppliers. Kisumu, Mombasa and Kisii were the top three counties where most of these suppliers are located (Figure 23). When further probed on what integrity issues they were referring to, a myriad of malpractices were identified key among them the issue of offering bribes to public officials in order to get tenders (69 suppliers representing 43%) and conflict of interest (37 suppliers representing 16% for direct ownership and 7% for proxy ownership). It is also worth noting that 24 suppliers (15%) reported knowledge of one particular supplier that was being awarded several public tenders (Figure 24). The preferential award of public tenders was reported by most suppliers in Kisii, Embu, and Kisumu Counties.

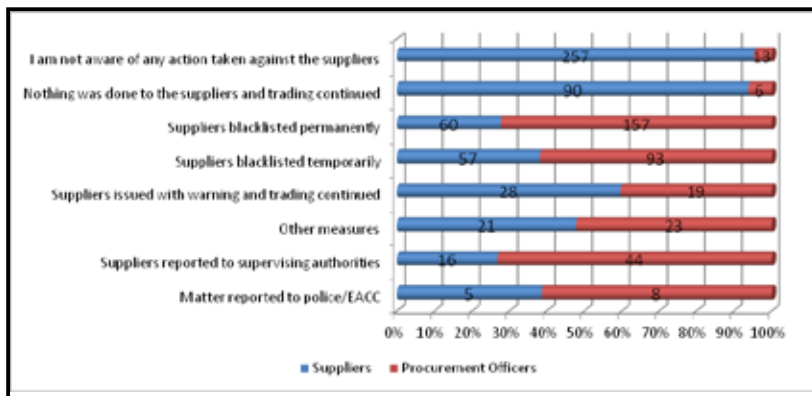


*Figure 24: Other procurement malpractices affecting public procurement as identified by suppliers.*

When public officers were asked if they have any measures in place to establish the integrity of suppliers, an overwhelming 84 per cent indicated they do have. They identified doing background checks on the suppliers, ensuring the suppliers have proper documents, physically visiting the suppliers' address checking their financial well being and having suppliers fill integrity pledge forms. The procurement officials gave these measures an above 80 per cent effectiveness in checking integrity of suppliers.

However, with continued corruption in the sector, the converse can only be true. This becomes more lucid when both suppliers and procurement officers were asked what action was taken against those suppliers whose integrity is wanting. Whereas most suppliers reported to either not to be aware of any action taken against rogue suppliers (257 suppliers) or that nothing was done against them and trading with them continued unabated (90 suppliers), most procurement officers reported action to have been taken against those suppliers with integrity issues by being blacklisted either permanently or temporarily or reported to supervising authorities (Figure 25).

It is also worth noting that only a small portion of both procurement officers and suppliers reported to have witnessed rogue suppliers being reported to either the Police or E.A.C.C (Figure 25).



*Figure 25: Action taken against rogue suppliers as reported by other suppliers and procurement officers.*

#### **4.4.8 Nature of complaints and reporting**

Closely related to integrity issues and a key component of accountability are complaints raised by suppliers concerning the procurement process. When suppliers were asked if there were instances they felt aggrieved during the course of doing business with public institutions, 188 (33%) out of the total 573 suppliers interviewed indicated they were aggrieved. Their complaints included delay in payments, bribery, favoritism, termination of contracts, and poor service delivery (Figure 26).

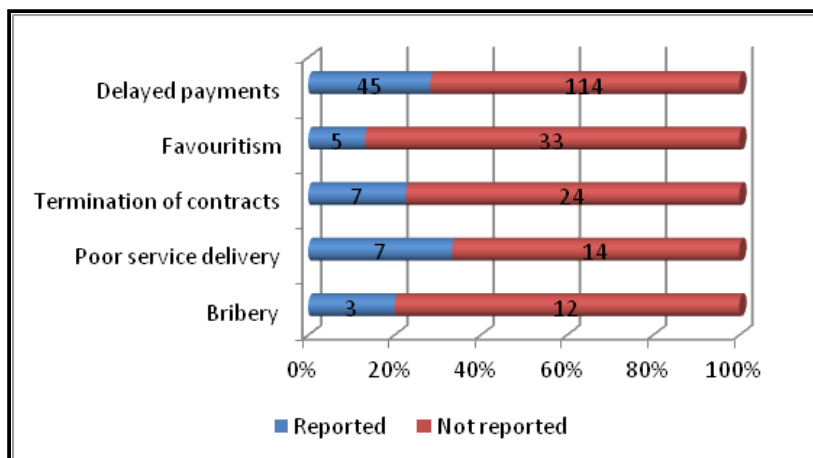


Figure 26: Complaints encountered by suppliers in the course of doing business with public institutions and if they reported them or not.

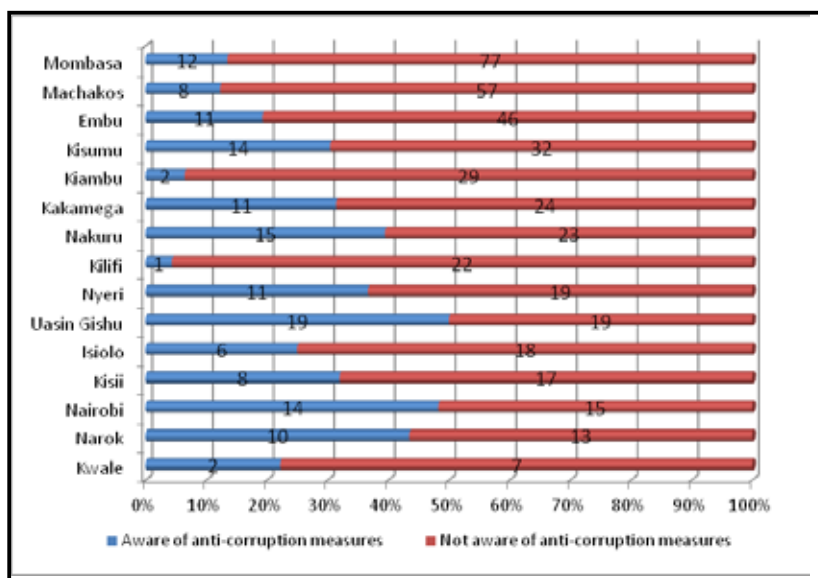
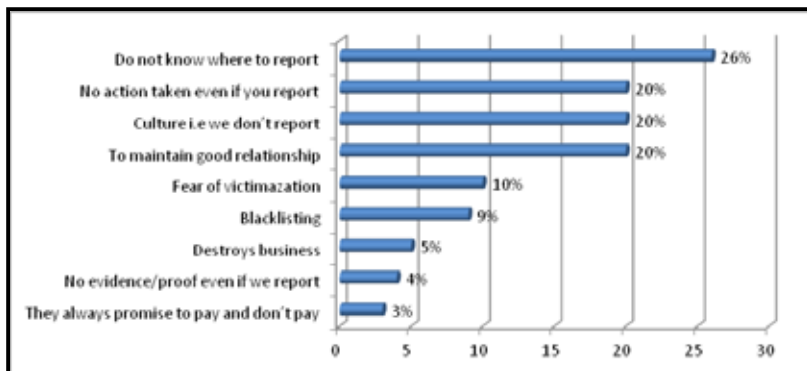


Figure 27: Breakdown of complaints involving delay in payments to suppliers by county and those that were reported and those that were not reported.

Figure 27 shows the number of cases that were reported and those that were not reported. We note that the bulk of cases went unreported (73 cases reported, 228 cases not reported). Delay in payments constituted the largest proportion of complaints by suppliers though most of them (114) were not reported. There were 15 bribery complaints of which only three were reported. We breakdown delay in payments to suppliers by county and Mombasa (24 cases), Nyeri (17 cases), Machakos (16 cases), Nairobi (16 cases), Kisumu (13 cases) and Nakuru (15 cases) led in terms of both total number of cases and number of unreported cases (Figure 27).

When the study sought from suppliers why they did not report cases of procurement malpractices known to them, most of them indicated lack of knowledge on where to report, inaction by public institutions even after a report is made; desire to maintain good relationship and interestingly a culture of not reporting.

Though expressed in different formats, the desire to maintain good relationship with public institutions they trade with, destroys business, fear of victimization and blacklisting more or less meant the same thing: suppliers were unwilling to report as this would result on them losing business with public institutions, thus becoming the major reason why suppliers were unwilling to report (44% that is 56 suppliers; Figure 28). In fact, the same fear was expressed by those suppliers we contacted during the study as we sought information on malpractices they see or experience in public procurement. These suppliers were aggrieved while interacting with Ministry of Health (21 suppliers), Kwale County Government (15 suppliers), National Treasury (10 suppliers), while County Government of Kakamega and Malindi Secondary School each had nine suppliers with complaints.



*Figure 28: Reasons forwarded by suppliers for not reporting malpractices encountered in procurement. Though expressed differently, fear of losing business with public institutions was the major reason for none reporting.*

For the few cases that were reported (73 cases), 28 cases did not have any action taken on them, 13 cases resulted in payment being effected, three were taken to court while two cases resulted to dismissal of the officers involved and one received a warning letter. For the suppliers who reported their cases, only the handling of 17 cases resulted to satisfaction while 43 cases resulted to dissatisfaction. The main reasons given for the dissatisfaction were that no action was taken against their complaints (25 cases) and that the process was long (15 cases).



## **4.5 Amount of bribes paid**

The suppliers and public procurement officers interviewed in this study provided information on sample contracts entered with the government between 2011 and 2013. The contracts were worth a combined amount of approximate Kenya Shillings 1.6 billion. From the contracts, an approximate Kenya Shillings 13 million was paid as bribes by suppliers to government officials in order to facilitate the tenders. This translates to about one per cent of the total contract value. This amount of bribe is quite low contrary to expectations primarily due to the fact both suppliers and procurement officers were very reluctant to give details of contract they paid facilitation money during the field visits.

Future research should consider using different approach to capture this vital information. The research by (Tran, 2011) and (Tran, Anh; Cole, Shawn; 2011) provide evidence of how government contracts are often inflated both to hide bribes and to evade corporate income tax. The reasoning behind this method is that larger and more sophisticated firms tend to carefully record bribe payments as part of their normal tracking of expenditures, especially since bribes are often paid at different stages of the procurement process, while contracts are being negotiated and implemented. Further, the analysis of section 4.2.4 reveals a combined 26.7 per cent of suppliers (151 suppliers) that indicated that when determining the price to quote during public tenders, they usually consider the prevailing market price but add big profit margin (103 suppliers) and or factor in bribes (48 suppliers) to pay in order to win the public tenders.

## **4.6 Anti-Corruption Measures in Place**

The study sought to find out from both suppliers and procurement officials on the anti-corruption measures in place in public institutions. Only 25 per cent of suppliers interviewed (144 suppliers) were aware of any anti-corruption measures in place in the public institutions they trade with while 75 per cent (418 suppliers) are not aware of any such measures. Mombasa, Machakos and Embu Counties were leading in proportion of those suppliers who were not aware of any anti-corruption measures in the public institutions they trade with (77, 57 and 46 suppliers respectively; Figure 29). In Kilifi County, only one supplier was aware of anti-corruption measures in public institutions while 22 suppliers were not aware. In Kwale, only two suppliers were aware while seven were not and in Kiambu only two were aware while 29 suppliers were not aware (Figure 29).

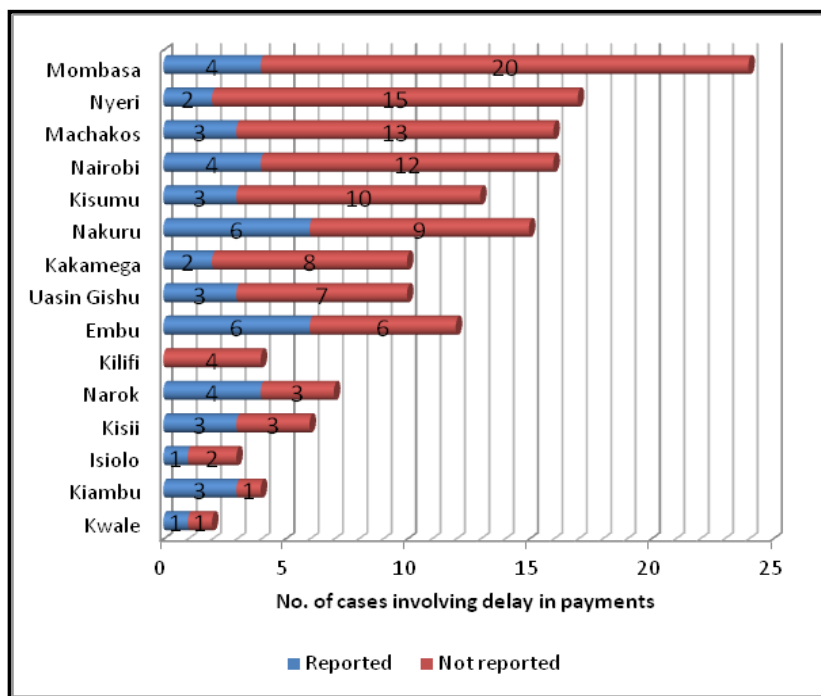
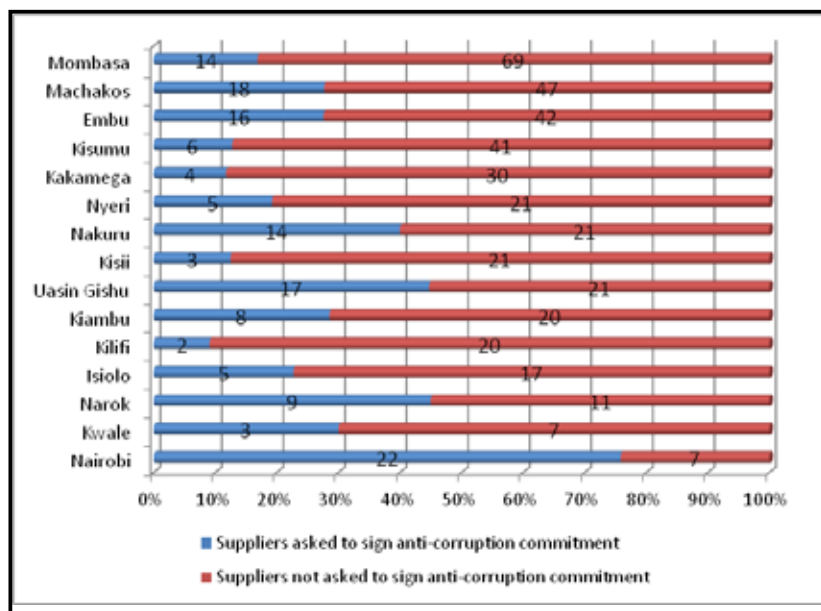


Figure 29: Knowledge of anti-corruption measures in public institutions by suppliers.

When suppliers were asked if they sign an anti-corruption commitment prior to entering business contract with public institutions, 146 out of 567 suppliers (26%) indicated they do sign anti-corruption commitments while 395 suppliers (70%) are not asked to sign. Figure 30 illustrate this per each county visited. Nairobi had the highest proportion of suppliers signing the commitments compared to those who did not while Mombasa, Machakos and Embu Counties had the highest proportion of suppliers who were not asked to sign anti-corruption commitments.

These are the same counties that had the highest proportion of suppliers who were not aware of any anti-corruption measures in public institutions (Figure 29). Most of the 146 firms that indicated they sign the commitment (84%) indicated an above 60 per cent adherence to the commitment.



*Figure 30: Number of suppliers asked to sign anti-corruption commitment prior to entering contract with public institutions.*

Lastly, both procurement officers and suppliers were asked to say if the anti-corruption measures in place in public institutions they work for and trade with, are effective in fighting corruption and suggest any improvements on the same. Table 6 lists the anti-corruption measures most mentioned.

Table 6: Most common anti-corruption measures in place in public institutions as indicated by suppliers and procurement officials.

Procurement Stage	Anti-corruption measures in place	Suggested improvements
<b>Identification of requirements</b>	<ul style="list-style-type: none"> <li>Identifying needs done by concerned departments</li> <li>Required goods/services prioritized</li> <li>Proper market research</li> </ul>	<ul style="list-style-type: none"> <li>Provide proper communication channels</li> </ul>
<b>Procurement planning</b>	<ul style="list-style-type: none"> <li>Proper utilization of the concerned department</li> <li>Proper adherence to the evaluation process</li> <li>Required goods/services prioritized</li> <li>Proper market research</li> </ul>	<ul style="list-style-type: none"> <li>Proper utilization of the concerned departments</li> </ul>
<b>Definition of requirements</b>	<ul style="list-style-type: none"> <li>Ensuring proper specification</li> <li>Proper adherence to the evaluation process</li> <li>Proper market research</li> </ul>	<ul style="list-style-type: none"> <li>Frequent training</li> </ul>
<b>Evaluation and selection of vendor</b>	<ul style="list-style-type: none"> <li>Evaluation committee</li> <li>Ensuring only qualified members are in tender and evaluation committee</li> <li>Accept bids from qualified vendors of integrity</li> <li>Transparency</li> </ul>	<ul style="list-style-type: none"> <li>Increase transparency</li> <li>Rigorous evaluation of suppliers</li> </ul>
<b>Contract award</b>	<ul style="list-style-type: none"> <li>Relevant committees in place</li> <li>Best bids given priority</li> <li>Transparency</li> </ul>	<ul style="list-style-type: none"> <li>Increase transparency</li> <li>Select qualified suppliers only</li> </ul>

<b>C o n t r a c t implementation/ delivery</b>	<ul style="list-style-type: none"> <li>• Inspection of goods and strict compliance to specifications</li> <li>• Supervision of suppliers</li> <li>• Payments only done if the required goods are delivered</li> <li>• Presence of acceptance and inspection committee</li> </ul>	<ul style="list-style-type: none"> <li>• Rigorous evaluation of suppliers</li> <li>• Increase transparency</li> </ul>
<b>Payments</b>	<ul style="list-style-type: none"> <li>• Thorough scrutiny of invoices, LPO, delivery note</li> <li>• Use of cheques to make payments</li> <li>• Conduct audits</li> <li>• Payment done after delivery of the right goods and within stipulated days</li> <li>• Use of ICT (e.g. IFMIS)</li> <li>• Ensure proper documentation</li> </ul>	<ul style="list-style-type: none"> <li>• Prompt payment</li> <li>• Shorten audit periods</li> <li>• Provide proper communication channels</li> </ul>
<b>Disposal</b>	<ul style="list-style-type: none"> <li>• Presence of disposal committee</li> <li>• Adherence to Disposal Act</li> </ul>	<ul style="list-style-type: none"> <li>• Ensure proper utilization by user departments</li> </ul>

## 4.7 Obstacles and Challenges faced in Procurement

Table 7 lists the obstacles and challenges faced in public procurement as identified by suppliers and procurement officers. A big number of suppliers (276) identified delay in payments as one key challenge they encounter in the course of doing business with public institutions. This challenge is predominant in all public institutions though public secondary schools, hospitals, colleges and county governments were singled out as where this challenge is more pronounced (Table 7). On the other hand, procurement officers singled out lack of sufficient funds as a major obstacle in procurement.

*Table 7: Obstacles and challenges faced in public procurement.*

Challenges	Public Institutions where challenge most dominant	Suggested measures to put in place	Responsible persons/ institutions to implement the measures
<b>As identified by suppliers</b>			
Delay in payments	<ul style="list-style-type: none"> <li>• Public schools</li> <li>• Hospitals</li> <li>• Colleges</li> <li>• All institutions</li> <li>• County Governments</li> </ul>	<ul style="list-style-type: none"> <li>• Ensure prompt payments</li> <li>• Treasury to release money early</li> <li>• Fairness</li> </ul>	<ul style="list-style-type: none"> <li>• Treasury</li> <li>• Management</li> <li>• Procurement Department</li> </ul>
Favoritism	<ul style="list-style-type: none"> <li>• Public schools</li> <li>• Hospitals</li> <li>• County Governments</li> </ul>	<ul style="list-style-type: none"> <li>• Fairness &amp; transparency</li> <li>• Ensure prompt payments</li> </ul>	<ul style="list-style-type: none"> <li>• Management</li> <li>• PPOA</li> <li>• Tender committees</li> </ul>

Bureaucracy/long process	<ul style="list-style-type: none"> <li>• Hospitals</li> <li>• Colleges</li> </ul>	<ul style="list-style-type: none"> <li>• Shorten process</li> <li>• Ensure prompt payments</li> </ul>	<ul style="list-style-type: none"> <li>• Management</li> <li>• PPOA</li> <li>• Treasury</li> <li>• Procurement Department</li> </ul>
Inflation/changes in prices of goods	<ul style="list-style-type: none"> <li>• Public schools</li> <li>• All institutions</li> <li>• Colleges</li> <li>• County Governments</li> <li>• Hospitals</li> </ul>	<ul style="list-style-type: none"> <li>• Institutions should be flexible</li> <li>• Prompt payments</li> <li>• Factor market conditions</li> </ul>	<ul style="list-style-type: none"> <li>• Management</li> <li>• PPOA</li> <li>• Treasury</li> </ul>



<b>As identified by procurement officers</b>			
Lack of enough funds		<ul style="list-style-type: none"> <li>• Increase budget allocation</li> <li>• Amend PPOA Act</li> </ul>	<ul style="list-style-type: none"> <li>• Treasury</li> <li>• PPOA</li> <li>• Procurement Department</li> </ul>
External interference		<ul style="list-style-type: none"> <li>• Adherence to PPOA Act</li> </ul>	<ul style="list-style-type: none"> <li>• Procurement Department</li> <li>• Treasury</li> <li>• PPOA</li> </ul>
Inadequate staff		<ul style="list-style-type: none"> <li>• Recruit more staff</li> </ul>	<ul style="list-style-type: none"> <li>• Government</li> </ul>
Ignorance of procurement procedures		<ul style="list-style-type: none"> <li>• Frequent trainings</li> <li>• Adherence to PPOA Act</li> </ul>	<ul style="list-style-type: none"> <li>• Procurement Department</li> <li>• PPOA</li> </ul>
Over pricing/under pricing of goods & services		<ul style="list-style-type: none"> <li>• Frequent trainings</li> <li>• Increase budget allocation</li> <li>• Improve remuneration</li> </ul>	<ul style="list-style-type: none"> <li>• Government</li> <li>• PPOA</li> <li>• Procurement Department</li> </ul>
Conflict of interest		<ul style="list-style-type: none"> <li>• Adherence to PPOA Act</li> <li>• Employ professionals</li> </ul>	<ul style="list-style-type: none"> <li>• HR managers</li> <li>• Procurement Department</li> <li>• PPOA</li> </ul>

## **Chapter 5**

### **5.0 Conclusion and Recommendations**

Despite the various reform initiatives by the Kenya Government, corruption remains a serious setback in public procurement. Both procurement officers working in public institutions and suppliers interviewed in this study concur that corruption is widespread in public procurement. Among the 573 suppliers interviewed, 15 of them indicated to have encountered bribery demands in the years 2011 to 2013. However, 12 of these demands went unreported to any authority. Other proxy indicators of corruption that suppliers reported to have encountered in the three years is favoritism, delay in processing payments and lack of transparency. The three vice had a combined 210 cases in the three years under review. Though suppliers were reluctant to divulge information on corruption in public procurement, the few cases indicates a problem that needs concerted effort of all stakeholders in public procurement to fight the vice.

The recommendations described below emanate directly from the findings of the 2013 EACC Public Procurement Study that when implemented will help in ameliorating public procurement in the country. The recommendations cover areas that require policy development and policy implementation, that is, areas where implementation of existing policies can be improved. A format adopted from (World Bank, 2013).

## **5.1 Policy development**

### **5.1.1 Carry out thorough vetting, institute criminal proceedings and blacklist suppliers**

Several results of this study casts aspersions on the integrity of some of the suppliers trading with public institutions. Section 4.2.3 lists some malpractices by suppliers that led to termination of procurements by public institutions. These include non-delivery of goods, delivery of poor quality goods, and incorrect specifications of goods supplied. In section 4.4.5, a total of 267 suppliers (46%) confessed to know firms either owned directly or through proxy by public officers. These firms would submit bids to do business with the government and win. In addition, Section 4.4.7 reveals that suppliers would frequently offer bribes to public officials in order to secure public tenders.

These results coupled with the huge amount the government loses through corruption and other malpractices in public procurement, calls for the government to be undertaking thorough vetting of suppliers before engaging them in business contracts. Key institutions to lead in the vetting process should include NSIS, EACC, PPOA and the Police Service.

These institutions need to develop a vetting framework for suppliers. Criminal proceedings should be instituted against those suppliers found to have engaged in serious malpractices. In addition to criminal proceedings, the government, specifically EACC, needs to develop a policy of blacklisting suppliers found giving bribes for a specific period. Singapore blacklists such suppliers for five years.

### **5.1.2 Carry out regular vetting of procurement officers**

Procurement officers do a commendable job in procuring goods and services for the government enabling it in turn offer essential services to the public. Despite this, the government continues to lose millions of shillings in procurement. Of all government activities, government procurement is one of the most vulnerable to fraud and corruption. The study findings indicated that bribes are offered to public officials (Section 4.4.7); some private companies are owned directly by procurement officers or using proxy to dissemble their interests in the companies (Section 4.4.5); procurement officials divulge crucial information especially on estimated price to suppliers thus inhibiting fair competition (Section 4.4.2); staff of procurement units allow their activities to be unfairly influenced by unauthorized persons (Section 4.4.1); procuring entities commence procurement before ascertaining that there are sufficient funds to meet the obligations of the resulting contract (Section 4.2.3); procurement officers undertake skewed market research (Section 4.2.4); not ensuring competitive bidding for public contracts (Section 4.4.4) and some are not well qualified to practice as procurement practitioners (Section 4.3.3).

In light of these malpractices and bearing in mind how much the government loses in public procurement, there is need for the government to vet all its staff working in procurement units and those found wanting retired from public service and, for serious allegation, prosecuted. The process will not be complete without touching on management of public institutions since procurement units answer directly to them. Action should be taken against members of management implicated in serious allegations. The vetting should be on a regular basis.

### **5.1.3 Enhance use of intelligence mechanism to gather information on corruption cases in public procurement**

The study findings shows suppliers have lots of information that could help unlock corruption cases in public procurement leading to successful prosecution. Some of the information include: a total of 267 suppliers (46%) confessed to know firms either owned directly or through proxy by public officers (Section 4.4.5); About 43 suppliers indicated to be aware of cases where other suppliers influenced procurement decisions in public institutions (Section 4.4.1); know people who divulge crucial procurement information that prejudice legitimate commercial interests or inhibit fair competition (Section 4.4.2); know suppliers offering bribes to public officers in order to influence procurement decision (Sections 4.4.1 & 4.4.7) among others.

Further, the study discovered that these suppliers are unwilling to report these malpractices largely due to the fear of losing lucrative business opportunity with public institutions (Section 4.4.8). Whereas EACC and the Police should put in place measures to encourage reporting by suppliers either anonymously or otherwise, considering supplier's genuine fear, use of intelligence to gather these information from suppliers need to be enhanced.

### **5.1.4 Ensure independence of Procurement Units in Public Institutions**

One of the reforms implemented in public procurement is the restructuring of procurement sections to ensure independence and non-interference by detaching them from the general structure of organizations and having them report directly to management. However, it seems this is not working. Influential people with vested interests continue to meddle with the working of these sections. Section 4.4.1 depicts an array of influential people who influenced procurement decisions in public institutions. These include politicians, senior civil servants, suppliers and management themselves who are presupposed to ensure the independence of procurement units.

The most common format used to interfere with the working of the sections was through favoring particular suppliers and intimidating procurement staff. Suppliers mostly used bribes to influence procurement decisions. This calls for the government to develop measures to deal with interference in the workings of procurement units. The Code of Ethics for Procuring Entities calls on employees of public institutions not to exert pressure on procurement officials or committees to favour a particular bidder while staff of procurement units should not allow their activities to be influenced by any unauthorized persons. PPDA section 135(d) criminalize exertion of pressure or unduly influencing a procurement decision to favour a particular bidder. We call upon EACC, Police and PPOA to enforce these regulations.

### **5.1.5 Revamp market research**

Public institutions are required to undertake market research to determine the prevailing market price of goods/services they intend to procure. The analysis of section 4.2.4 brings to doubt how public institutions undertake market research. A substantial proportion of procurement officials indicated they establish the market rate price of goods they intend to procure by either asking a few random suppliers or few, including only one, of their supplier(s) the market price of the goods. This is of interest because when suppliers were asked how their firms establish the price to use while seeking public tenders, a total of 26.7 per cent of suppliers (151 suppliers) indicated they consider the prevailing market price but add big profit margin (103 suppliers) and or factor in bribes (48 suppliers) to pay in order to win the tenders. In addition, we note that suppliers collude to fix prices to quote during public tendering. About seven per cent of suppliers interviewed (39 suppliers) indicated they benchmarked the price to quote with that of other suppliers bidding for the same contract. This shows the proclivity of procurement officials to ask suppliers the market price while they (suppliers) are well aware this information will be used to determine the reserved price in a future procurement is not an intelligent idea.

A revamp of the whole idea of market research is necessary. Market research should be mandatory for all procuring entities. PPOA need to develop guidelines and do capacity building for undertaking market research. In addition and most importantly, drawing of the sample of suppliers to get market prices from should be scientific to reduce bias. The sample should include suppliers who do not do business with public institutions and, if possible, not disclose the intended purpose of the research or to whom it is meant. Lastly market research should be done regularly and should not be a one-time event. In fact, Public Procurement and Disposal Regulations 22(2) requires procuring entities to ensure estimates of value of goods is realistic and based on up-to-date information on economic and market conditions.

### **5.1.6 Borrow best practices from other countries**

Whereas over the years Kenya's procurement process has heavily borrowed from other countries with good systems, there still remain other success cases and measures employed by other countries that are yet to be domesticated. Chapter 3 highlights a few best practices from a select few countries. Hong Kong's Anti-Corruption Agency strategy of employing over 70 per cent of its resources to investigate corruption and prosecute offenders is worth emulating. Effective enforcement helps get rid of obstacles likely to be erected by corrupt individuals, help in getting public support and most importantly act as deterrence for other corrupt officials. Mexico has independent social witnesses who act as independent observers during a few selected public procurement processes. The United States has Qui Tam provisions in the False Claim Act that allows private citizens to institute criminal proceedings against public officials and private businesses suspected to be engaged in corruption during public procurement. The private citizen benefits from part of the recovered public money.

These best practices and others need to be integrated into our fight against corruption, most of which happen in public procurement.

## **5.2 Policy implementation**

### **5.2.1 Ensure sufficient funds before commencement of procurement**

The results of section 4.2.3 indicate that most public institutions terminated procurement process before their completion because of insufficient funds and changes in prices of goods, services or works in the course of the process. The other key challenge facing public procurement was delay in effecting payment to suppliers after they have rendered services to public institutions. In section 4.4.8, suppliers reported a total of 159 cases where their payments were delayed. The main reason given for these delays was the lack of sufficient funds (Section 4.4.6).

In addition, in section 4.3.2, procurement officials cited low budgetary allocation as the main reason for less than 60 per cent implementation of the 2011/12 procurement plan. PPDA section 26(6) and Public Procurement Code of Ethics for Procuring Entity clearly ask procuring entities to ensure sufficient funds are available before they commence any procurement procedure. The management of public institutions needs to ensure they adhere to this provision. PPOA needs to offer supervision in enforcing this requirement. In addition, with properly designed and regular market research, procuring entities will caution themselves from price fluctuations.

### **5.2.2 Fast track the rolling out of e-procurement**

Almost all procurement officials in public institutions (97%) indicated that above 60 per cent of the procurement process is documented and that the records are accurate. However it seems most of these records are in paper form as the level of technological uptake in managing public procurement is low with only 31 per cent of procurement officials indicating to be using computerized information management systems in managing the procurement process while 68 per cent do not use such systems. It was only in the County of Nairobi where most public procurement computerization is domiciled. The results of



section 4.4.4 further indicates that counties further from Nairobi had more open procurement of non-technical goods that had attracted only one bidder. This could possibly be a case of weak supervision.

The findings of this study further shows that different county procurement offices have different information management systems. It is widely recognized that computerized systems improve transparency and accountability. PPOA has started rolling out an e-procurement system as part of the National Treasury's Integrated Financial Management Information System (IFMIS). The system will enhance transparency, cost savings, supervision and improve transactional effectiveness in public procurement. PPOA, National Treasury and other stakeholders need to fast track the rolling out of e-procurement.

### **5.2.3 Ban same supplier developing specifications and supplying the goods/service/works**

We asked all the 573 suppliers we visited if they had ever participated in developing specifications of goods/works for public institutions and 60 of them (10.5 %) indicated they had participated. We further asked those who had participated if they later participated in the tender to supply the goods/service they had previously developed specifications and 39 (60%) indicated to have participated. This is against procedures since those who develop specifications have an advantage when it comes to competing for the tenders to supply the same goods/works/service. To illustrate this, out of a total of 26 examples of procurements that were given by suppliers who had developed specifications and participated in the tenders, 23 of them were successful (88% success rate). Out of the 23 successful tenders, 15 of them (65%) were won through open tendering; a lucid picture of how having been involved in specification development gave the particular suppliers added advantage to win tenders. PPDA section 87 categorically restricts entering into this type of related contracts. PPOA need to oversee the implementation of this restriction.

### **5.2.4 Ensure competition in open tender in public institutions**

Open tender type of procurement is by design meant to enhance competition among suppliers and thus promote transparency and accountability while at the same time allowing the tax payers get the best value for their money. Due to its competitive nature, the Public Procurement and Disposal Act, 2005 states clearly that open tendering is the preferred method of procurement. However, the study findings paint a different story. Findings in Section 4.4.4 show that majority of public institutions that applied open tender attracted between one and six suppliers. Some even attracted only one supplier in a tender to supply goods/works that were not technical to warrant attracting one supplier. Several reasons/factors may have contributed to this scenario; either the information about the available tenders is not well disseminated or public institutions in cohort with the said suppliers collude to systematically lock out other suppliers. To further support this, Section 4.1 indicate that out of the 573 suppliers interviewed, 23 per cent (132 firms) had not won any public tender despite submitting bids between 2011 to 2013. In one case, a private supplier had submitted 31 bids during the period and lost all the bids. In contrast, another firm had all the 50 bids it had applied translating into contracts to supply goods during the same period of time. This is usually a red flag of bid rigging.

Public institutions need to thoroughly publicize tenders and customize the publicity to suit their locality. Regular monitoring by PPOA and EACC on open tenders is needed with more focus on tenders attracting one or two suppliers for non technical goods/works and award of different tenders to one particular supplier over time.

### **5.2.5 Enforce confidentiality clauses on release of procurement information**

Transparency and accountability have been recognized as key conditions for promoting integrity and preventing corruption in public procurement. When some suppliers access crucial information that gives them an edge over other suppliers competing for the same tender; transparency is compromised. One such information is the estimated price of goods/services/works that public institutions intend to procure. The analysis in section 4.4.2 shows this information usually leaks to suppliers. From the analysis, 42 suppliers indicated they knew of the public institution's estimated price before they submitted their bids to the institution, 33 suppliers during the course of bid submission and 147 suppliers after they had submitted their bids. In addition, in section 4.2.2, when suppliers were asked how they determine price to quote during public tendering, 3.5 per cent (20 suppliers) indicated they benchmark their price with the estimated price of public institution they intend to do business with. This is against regulations as those private companies that access this information before submitting their tenders have an added advantage of lowering their tender price below the estimated one thus giving them undue advantage against their competitors. PPDA section 44(1) (c) categorically criminalize release of information that may inhibit fair competition. EACC, Police and PPOA need to enforce this.

### **5.2.6 Streamline training and promotion of procurement practitioners**

The results of section 4.3.3 display disparate trends in terms of training and ranking vis-à-vis years of procurement experience among public procurement officers. Several Heads of Procurement sections had only college education and less than five years experience and some with only O- or A - level education though with more than 11 years experience. There is a substantial proportion of graduate officers (both undergraduate and postgraduate) involved in procurement who were neither heads of procurement section, procurement officers or assistants yet with more than one year experience up to above 20 years

experience. PPDA section 26(9) and PPDR 8(2) mandates the PPOA to stipulate the qualifications and experience required of procurement professionals. On training, majority of procurement officers with less than one years experience had not undertaken any procurement related course. These proportion decreases as the number of years of experience increase across the procurement ranks. However, there were Procurement Officers and Assistants with 11 years to above 20 years experience who had not yet been trained. There is also a big proportion of other officers not falling in the rank of procurement assistants, officers or heads of section but involved in procurement but untrained.

The Directorate of Personnel Management (DPM) in collaboration with PPOA to streamline training and promotion of procurement practitioners. All practitioners need procurement training while promotion should take into consideration qualification and years of experience.

### **5.3 Further research**

Bearing in mind the limitations of indirect measures of corruption (Tran, 2011) and (Tran, Anh; Cole, Shawn;., 2011), suggest a more direct method of measurement by gathering data on documented bribe payments from internal records of firms. The authors complement this bribe data with extensive qualitative interviews with CEOs to reach a clearer understanding of the motivation for the payments they observe. The authors provide suggestive evidence of how government contracts are often inflated both to hide bribes and to evade corporate income tax.

The reasoning behind this method is that larger and more sophisticated firms tend to carefully record bribe payments as part of their normal tracking of expenditures, especially since bribes are often paid at different stages of the procurement process, while contracts are being negotiated and implemented. Specifying the timeline and amount of bribe payments also has the advantage of providing firms with some guidance on how much to inflate other expenses, to avoid paying income taxes

on bribe payments since these cannot be deducted. Researchers were able to access these data under conditions of non-disclosure of the identity of either the payers or the payees of the bribes.

The advantage of relying on documented bribes is that data quality is likely to be high and it may allow the researchers to correctly identify who is involved in the deals, at what time, and for what reason. When matched to overall procurement data such as information on the quality and competitiveness of alternative bids for each tender, it can provide a clearer snapshot of both the magnitude and the determinants of corruption, relative to any of the other indirect measures.

There are however three main challenges with implementing this method. The first constraint is one of scale and generalizability. Only the most corrupt firms or those operating in more corrupt sectors are likely to keep track of bribes paid, giving us a biased indicator of the level of corruption in the economy. Second, it is difficult to replicate this method at a larger scale across time and firms, given the challenge of convincing several companies to share their records consistently with the researchers. This may lead to significant sampling bias. More importantly, there may be substantial variation in how firms record bribe payments and how they cover them up in different accounting categories. These patterns may not be fully understood by the researcher. Despite the shortcomings, this direct approach would help us better understand corruption in public procurement. The methodology would be complemented by considering the following other studies on the same (Cai, Fang, & Xu, 2011); (Bertrand, Djankov, Hanna, & Mullainathan, 2007); (Sequeira & Djankov, 2010) among others.

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