



# **THE PUBLIC PROCUREMENT AND DISPOSAL ACT 2005**

**What You Need to Know**

**KENYA ANT-CORRUPTION COMMISSION**



**On the Frontline against Corruption**

# THE PUBLIC PROCUREMENT AND DISPOSAL ACT, 2005

## What You Need to Know

A Guide for Public Officers and Members of the Public



**KENYA ANTI-CORRUPTION COMMISSION**

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Department of Education  
Directorate of Preventive Services



**On the Frontline against Corruption**

## **Caution**

The opinions and illustrations in this Publication do not purport to be final/judicial interpretations of the Public Procurement and Disposal Act 2005. All efforts have been made to simplify the Act for general readership. However, this Manual, on its own, is not a substitute for the Public Procurement and Disposal Act 2005. Users of the Manual are therefore encouraged to read the Act as well. All characters and “cases” featuring in this Manual are imaginary and are used solely for purposes of illustration.

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## **ABBREVIATIONS**

EAC	East African Community
GJLOS	Governance, Justice, Law and Order Sector
KACC	Kenya Anti-Corruption Commission
PPDA	Public Procurement and Disposal Act

## FOREWORD

Public Procurement is one of the major preoccupations of any government striving to deliver goods and services to its people. Indeed, procurement permeates the entire spectrum of the development process of a country. It is therefore no wonder that Governments all over the world are the major purchasers of goods and services. This also means that public procurement entails the application of colossal amounts of money running into billions of any designated currency.

Unfortunately, it also means that if the procurement process is riddled with corruption, it results in the loss/diversion of colossal amounts of taxpayers' money to unscrupulous people. This in turn reverses the development process with the attendant consequences of poverty, insecurity, poor infrastructure, inadequate or total lack of health services among others.

Sadly the foregoing scenario has characterized the procurement process in Kenya over the years. Almost eighty (80) percentage of real, perceived and alleged grand corruption in Kenya is procurement related. In an attempt to address the scourge of corruption in Public Procurement, the Government developed and issued the Procurement Supplies Guide of 1978. This guide achieved little in terms of stemming the rampant abuses in public procurement. With the problem of corruption still raging, the Government developed and issued the Exchequer and Public Audit (Public Procurement) Regulations of 2001. This was the most far reaching effort by the Government to provide a legal framework for the regulation of Public Procurement.

But the Regulations could still be circumvented through various acts and omissions of "Bid Rigging" by Private and Public Sector Operatives. After many consultations between the Government, Development Partners and the Private Sector, the Public Procurement and Disposal Act (hereinafter the PPDA) of 2005 was enacted by Parliament. This Act and the Regulations thereunder are a response to the scenario described above. It makes provision for an efficient system for the procurement of goods, services, works and the disposal of stores and equipment.

The Kenya Anti-Corruption Commission has developed this Guide to explain fully the highlights of key provisions of the Act, which will assist Public Officers and members of the Public to understand the key Principles of the Act. This will help them embrace appropriate behaviour and attitude change to stem corruption in public procurement. The Guide will also serve as an aid in the development and teaching of short courses for officers in the public, private, civil society and religious sectors. I commend this Guide to the readership of all. Widespread knowledge of the Procurement Law is the first, yet gigantic step in the fight against Procurement related corruption. Fighting corruption and other malpractices in Public Procurement is the responsibility of each and every Kenyan.



**Prof. PLO Lumumba, Ph.D**  
**Director/Chief Executive**  
**Kenya Anti-Corruption Commission**



## 1.0 INTRODUCTION

### 1.1 What is Procurement?

The Public Procurement and Disposal Act defines the term 'Procurement' as:

“ the acquisition or obtaining by purchase, rental, lease, hire purchase, license, tenancy, franchise (permission) or by any other contractual means of any type of works, assets, services or goods including livestock or any combination.”

Public Procurement occurs when a public organization uses public resources to buy goods and services such as hiring or obtaining by any other contractual means of goods, construction works and services. Public funds are drawn from State budgets, local authority budgets, foreign loans and grants and money raised by public bodies in their daily undertakings. The goods and services may range from pins, paper or cleansing services to large projects such as the construction of roads, power stations and airports.

### 1.2 Purpose of the Act

The purpose of the Act is summarized in its opening paragraph, which states:

*“an Act of Parliament to establish procedures for efficient public procurement and for the disposal of unserviceable, obsolete or surplus stores, assets and equipment by public entities and to provide for other related matters.”*

Section 2 of the Act expands this purpose and identifies the specific objectives of the Act as:

- a) To maximize economy and efficiency;
- b) To promote competition and ensure that competitors are treated fairly;
- c) To promote the integrity and fairness of procurement procedures;
- d) To enhance transparency and accountability;
- e) To restore public confidence in the procurement process; and
- f) To facilitate the promotion of local industry and economic development.

This Act, therefore, in a nutshell, aims at preventing the occurrence of corrupt practices in procurement processes and at the same time enhancing transparency and accountability in the procurement systems.

### **1.3 The Public Organizations Covered**

The Act applies with respect to procurement or disposal of items by the following public bodies:

- i.) The Government or any Department of the Government;
- ii.) The Courts;
- iii.) Constitutional Commissions;
- iv.) Local Authorities;
- v.) State Corporations;
- vi.) Central Bank of Kenya;
- vii.) Co-operative Societies;
- viii.) Public Schools;
- ix.) Public Universities;
- x.) Colleges or other educational institutions maintained or assisted out of public funds;
- xi.) An organization approved as a public entity for the purpose of this Act.

### **1.4 Past Initiatives by the Government in the Procurement System**

Before 1974, public procurement in Kenya was largely undertaken by foreign organizations like the Crown Agents on behalf of the government. This was mainly because the needs of colonial and independent Kenya were largely met from foreign sources, as local sources were still not adequate. However, respective ministries assumed the role and function of procurement of goods and services.

The East African Community (EAC) developed guideline under the title East African Supplies Manual for use in procurement. This manual in effect replaced the functions of the Crown Agents. With the collapse of East African Community in 1977, Kenya developed its own Supplies Guide in 1978 to be used alongside the E.A.C. Manual.

Since 2001, the Ministry of Finance was charged with the responsibility of issuing guidelines and overseeing the procurement process. However, the supplies guide did not work well because of numerous and conflicting circulars from the Ministry. The Ministry then decentralized procurement to various Ministries, but reverting to the Central Tender Boards for procurement beyond a certain amount of money.



## 1.5 Case for New Supplies Guidelines

Due to massive corruption and manipulation of procurement procedures, the Government in conjunction with the World Bank initiated a process of reviewing the procurement laws with the aim of addressing these ills. A Task Force was formed to undertake this work and a Bill was drafted for debate in Parliament in line with the Task Force's recommendations.

As a result of delays in passing the Bill, the Ministry of Finance formulated and approved the Exchequer and Audit (Public Procurement) Regulations of 2001. Later in 2005, Parliament enacted the Public Procurement and Disposal Act after many amendments.

## 2.0 BODIES CREATED UNDER THE ACT

The Act establishes three main bodies to regulate public procurement in Kenya. These are:

- 2.1 Public Procurement Oversight Authority
- 2.2 Public Procurement Oversight Advisory Board
- 2.3 Public Procurement Administrative Review Board

### 2.1 The Public Procurement Oversight Authority – Section 8

The Public Procurement Oversight Authority is established under section 8 of the Act as a body corporate with perpetual succession and a common seal capable of suing and being sued and holding and alienating moveable and immoveable property. The authority is a permanent body, which will outlive staff and officers. It can only be dissolved by Parliament.

#### 2.1.1 The Director General and Staff of the Authority

- a) The Authority is headed by a Director-General who is also its Chief Executive Officer and is responsible for the direction and management of the Authority. The Director-

General is appointed by the Public Procurement Oversight Advisory Board with the approval of Parliament.

- b) The Authority may employ its own staff or hire consultants, experts or independent investigators for the proper performance of its functions.

### **2.1.2 Functions of the Authority - Section 9**

Under the provisions of the Public Procurement and Disposal Act 2005, the Authority is mandated to carry out the following functions:

- a) **Procurement Policy Formulation Function:** to develop public procurement policy and propose amendments to the Act and Regulations.
- b) **Law Enforcement Function:** to ensure compliance with the procurement procedures under the Act and Regulations.
- c) **Implementation Function:** to assist in the implementation and operation of the system by:
  - (i) Preparing and distributing manuals and standard documents on procurement to public bodies;
  - (ii) Advising procuring bodies;
  - (iii) Training people involved in procurement; and
  - (iv) Ensuring that professionals are engaged by procuring bodies to undertake procurement.
- d) **Monitoring and Evaluation Function:**
  - i. Monitor public procurement system;
  - ii. Report its overall functioning to the Minister for Finance;
  - iii. Recommend for improvement of the procurement system (if any);
  - iv. Maintain an up to date register of contractors in works, goods, and services in order to know at all times the workload and performance record of each contractor;
  - v. Publish the procurement contracts awarded by public bodies.
- e) **Budget and Reporting Function:** The Authority under the direction of the Director-General shall:

- Prepare its budget estimates and submit to the Advisory Board for approval.
- Prepare four (4) Quarterly Reports and Annual Report and submit to the Advisory Board and Minister for Finance for approval. The Minister shall then table the Report in Parliament.

The Reports shall:

- Describe the activities of the Authority within that period,
  - Give an overview of the functioning of the public procurement system,
  - Assess the extent of positive bias to local participation,
  - Provide a list of procurement for which a procurement procedure was specially permitted under section 92 of the Act, and
  - Furnish the financial statements of the Authority in the Annual Report for the year to which the Report relates.
- f) **Other functions:** The Authority to perform any other functions and duties as provided for under the Act.

## 2.2 Public Procurement Oversight Advisory Board – Section 21

The Public Procurement Oversight Advisory Board is established under section 21 of the Act and is composed of the Director-General and nine (9) other members appointed by the Minister for Finance and approved by Parliament from people nominated by the prescribed organizations.

### 2.2.1 Functions of the Advisory Board – Section 23

- Advisory Function:** advises the Authority on the exercise of its powers and the performance of its functions.
- Oversight Function:** approves the estimates of the budget of the Authority.
- Appointment / Termination Function:** recommends the appointment or termination of the Director-General in line with the Act.
- Record Keeping Function:** maintains and avails to public bodies a list of the disqualified persons.
- Performs such other functions and duties as are provided for under the Act.



## 2.3 Public Procurement Administrative Review Board

The Public Procurement Administrative Review Board is established under section 25 of the Act to replace the Public Procurement Review and Appeals Board. The Appeals Board was established under the Exchequer and Audit (Public Procurement) Regulations of 2001.

The Public Procurement Oversight Authority provides administrative services to the Review Board.

The Board's function is to deal with complaints and disputes submitted by bidders who claim to have suffered loss, risk or damage resulting from the procuring entities' decisions.

## 3.0 PROCUREMENT PROCEDURES

### (a) Internal Procurement Requirements for Public Organizations

These are the arrangements within public bodies, which aim at ensuring that procurement decisions are made in an organized and planned manner so as to achieve the objectives of the Act. The objectives of the Act in creating the 3 bodies was to achieve efficiency, transparency and accountability in public procurement.

The Act has provided certain rules and regulations, which public organizations must follow. These rules and regulations are provided for under Part III of the Act and require that:

- i. Public bodies must establish internal procedures for the making of procurement decisions on their behalf. These procedures should be consistent with the Act and Regulations.
- ii. Public bodies should ensure that all procurement is done within the approved budget which should be planned for in advance through an annual procurement plan.
- iii. Public bodies should ensure that all procurement undertaken comply with the internal rules.



- iv. Public bodies should ensure that all procurement is handled by separate and different offices with respect to procurement initiation, processing and receipt of goods, works (constructions and installations) and services.
- v. Public bodies should establish a Tender Committee and Procurement Unit with qualified and competent persons to undertake procurement and make decisions on their behalf.
- vi. Public bodies should only start any procurement procedure after ascertaining that there are sufficient funds set aside in the budget for that procurement.
- vii. It is the responsibility of every employee or member of a public body to ensure that the Act, the Regulations and any directions of the Public Procurement Oversight Authority are complied with. Members of public bodies and those individuals in procuring entities who do not comply are held personally responsible for their actions.
- viii. Contractors, suppliers and consultants are also required to comply with the provisions of the Act and the Regulations.
- ix. A public body, which intends to procure items, may appoint a procurement agent to undertake procurement on its behalf. Such appointment should be done on a competitive basis. The agent has to be registered with the Authority and must comply with the provisions of the Act and the Regulations.

## **(b) General Procurement Rules**

Part IV of the Act provides for the General Procurement Rules that each public body, which intends to obtain items by way procurement, must follow. The following Rules have been provided for under this Part:

### **(I) Types of Tenders**

- i) **Open Tender:** This should be used most of the time unless an alternative method is allowed by the Act under the circumstances or if the thresholds in the regulations so allow.
- ii) **Restricted Tender:** These are not open to all willing bidders. Instead a few pre-identified bidders are invited to bid. This method would be used where the nature of goods, works or services is of complex and specialist kind. It can also be used when economy and efficiency do not justify preparation and evaluation of a large number of bids. In situations where there are only a few known suppliers of goods, works and services, this method could also be used.

- iii) **Direct Purchasing:** This method could be used where there is an urgent and unforeseen need for goods, works or services such as during an emergency. As an alternative procurement procedure to Open Tender, this should only be used where the procuring body gets the written approval of its Tender Committee and records in writing the reasons for using such alternative procurement procedure or method.

It should also be noted that in all these situations, the prescribed standard tender documents should always be used by public bodies when tendering.

## **(II) Splitting and Inflating Tenders**

The law provides that procuring entities should not split tenders in order to circumvent requirements. Neither is inflating of tenders permitted. Specifically, the Act provides that:

- (i) No splitting of tenders to avoid the ceiling set by tender requirements or use of procurement procedure.
- (ii) Standard goods, works and services with known market prices should be procured at such prevailing market prices.
- (iii) Unreasonable hiking of prices by public officials in procurement should be disallowed (Section 30(4)). Any such hikes contravene this provision and in addition to any other punishment provided for by the Act or the Regulations, responsible officers shall be required to pay the procuring organization for the loss resulting from the officers' action.

## **(III) Qualifications for Awards of Contracts**

Only qualified and competent persons or firms should be awarded contracts for procurement by public bodies. A person or firm is qualified and competent where they:

- i) Have the necessary qualifications, capacity, experience, resources, equipment and facilities to provide what is being procured;
- ii) Have the legal capacity to enter into a contract for the procurement;
- iii) Are not insolvent (in debt), in receivership, bankrupt or in the process of being wound up (closed) and is not the subject of legal proceedings relating to the winding up;
- iv) Are not a Public Servant or relative of a Public Servant or a body in which a Public Servant has an interest; or
- v) Are not debarred from participating in procurement;
- vi) Have a statement showing that the person is not debarred from participating in procurement proceedings and a declaration that a person shall not participate in any

corrupt practice should be included in a tender, proposal or quotation submitted by a person to a procuring body.

#### **(IV) Pre-qualification**

The pre-qualification procedure is the process used by a public body in order to identify qualified and competent persons for any procurement to be undertaken by the public body. It is now officially disallowed for Public Servants / Officers or their relatives or companies to seek procurement Contracts with the organizations or entities they work for. This requirement is meant to remove Conflict of Interest.

#### **(V) Specific Requirements**

Specific requirements relating to goods, works or services being procured should be prepared by the procuring bodies and these should:

- i. Be clear, complete and correct;
- ii. Be based on national or international standards;
- iii. Not refer to a particular trademark; name, patent, design, type, producer or service provider or origin unless there is no other way of describing the requirements and such requirements allow for equivalents to what is referred to.

#### **(VI) Termination of Procurement Proceedings**

The Public Procurement and Disposal Act provides for termination of contracts as follows:

- i) Procurement proceedings shall be terminated by a procuring body without entering into a contract;
- ii) A notice of termination should be given to those who had tendered either with or without reasons for so doing;
- iii) The tenders can be returned unopened if termination takes place before their opening and no liability shall be attached to the termination;
- iv) The Review Board or a Court of Law cannot review a termination under this section. However, such termination must be communicated to the Authority by writing a report on the termination.

## **(VII) Forms of Communication**

The form of communication between the procuring body and a tenderer shall be:

- i) In writing if the procedure used is open or restricted tendering;
- ii) A request for proposals in writing where the procedure used is direct procurement;
- iii) Electronic communication may be used instead of written communication only under the written directions of the Authority.

## **(VIII) Influence on Evaluation**

No inappropriate influencing of evaluation or comparison of tenders either before or after the deadline for submitting the tenders, proposals or quotations is permitted.

## **(IX) Participating in Procurement**

There shall be no discrimination in the procurement process unless provided for by the Act and Regulations. However, the Minister responsible for Finance can prescribe for preferences and reservations in public procurement and disposal in order to promote economic and social development. Such preferences and reservations must not be discriminatory in respect of the targeted groups, must allow competition amongst the eligible and be monitored and evaluated. The preferences and reservations shall apply to:

- i) Tenderers such as the disadvantaged groups, micro and medium enterprises;
- ii) Works, services and goods or any of their combination;
- iii) Identified regions; and
- iv) Such other categories that may be given.

## **(X) Preferences**

- i) An exclusive preference to be given to Kenyan citizens where the funding is fully from the Government of Kenya or a Kenyan body and the amounts are below the prescribed value.
- ii) A prescribed margin of preference to be given to tenderers offering goods manufactured, mined, extracted or grown in Kenya or to contractors having a certain percentage of shareholding by the locals.

## (XI) Corrupt, Fraudulent and Collusive Practices



In order to ensure a smooth and transparent procurement process the Act prohibits procuring entities and their agents from:

- i) Involvement in any corrupt practice, fraud or misrepresentation in the process or
- ii) Collusion with any party to win or rig the bid or tender.

## (XII) Conflict of Interest

There should be no conflict of interest by those handling the procurement process. The interests of relatives (spouse, child, parent, brother, sister, brother or sister in law, father or mother in law) whether direct or indirect are considered to be the interests of the person handling the process.

## (XIII) Confidentiality

A Public Officer handling the process must maintain confidentiality where the disclosure would hinder law enforcement, not be in public interest and/or prejudice the legitimate commercial interests and bring unfairness in competition. However, disclosure can be made in relation to:

- i) Law enforcement purpose or investigation;
- ii) Court Order;
- iii) A Public Officer of the procuring body who is involved in the procurement process;
- iv) Requirement by the Act or the Regulations.

## (XIV) Procurement Records

A procurement body should keep the following information:

- i) Records for each procurement for at least six (6) years after the contract or termination of the process. The records must contain among other things, a brief description of

the items being procured, procedure used and reasons if not Open Tendering, copy of advertisement if it was advertised, summary of tenderers, evaluation and comparison and reasons for termination if it was terminated.

- iii) A procuring body must maintain a proper filing system with clear links between procurement and expenditure files.

### **(XV) Amendments & Variation of Contracts**

In order to effect any amendments and variations of contracts, the procuring entity should ensure that:

- i) Amendments to the procurement contracts only take place after a written approval by the Tender Committee and
- ii) The amendments are based on the prescribed price or quantity variations for goods, works or services.

### **(XVI) Interest on Overdue Amounts**

A public body shall pay interest payable on overdue amounts at the prevailing commercial bank rates.

### **(XVII) Inspection and Audits Relating to Contracts**

The inspection of procurement contracts may be carried out by the Director-General or Controller and Auditor General.

## **4.0 METHODS OF TENDERING**

The following methods of tendering have been provided for by the Act:

- i) Open Tendering
- ii) Restricted Tendering
- iii) Direct Procurement
- iv) Request for Proposals
- v) Request for Quotations
- vi) Low-Value Tendering
- vii) Specially Permitted Procurement Procedure

## 4.1 Open Tendering - Section 50

Open Tender is a method of inviting bids through advertisements from willing bidders. Open tendering should be used as the preferred procedure for public procurement provided for under the Act and should be followed strictly.



### 4.1.1 Requirements for Open Tendering - Section 51 to 71

- a) Parties are invited to tender. The invitation document should set out the following:
  - i) The name and address of the procuring body;
  - ii) The assigned tender number;
  - iii) A brief description of the items to be procured including the time limit for delivery or completion;
  - iv) An explanation of how to obtain the tender documents and the fee, if any;
  - v) An explanation of where and when to submit tenders and their opening;
  - vi) Statement inviting tenderers or their representatives to attend the opening of tenders.
- b) Sufficient information to potential bidders or tenderers.
- c) That amendments to the tender documents can be done at any time before the deadline for submitting tenders by issuing an addendum (supplement) to all persons who had been issued with the tender documents.
- d) That tenders are advertised at least twice in a newspaper of general nationwide circulation, which has been regularly published for at least two years before the date of the advertisement if the value of the items being procured is equal to or more than the prescribed value for national advertising. The advertisement can also be done on the organization's website or posted at any open and noticeable place reserved for such advertisement in the public body's building.
- e) Adequate time should be allowed for the preparation and submission of tenders.
- f) The procuring body has to provide copies of the tender documents expeditiously in line with the invitation to tender and a fee may be charged for the tender documents.

- g) Tender security may be provided by the tenderers.
- h) Tenders are submitted before the deadline and must be in writing, signed and sealed in an envelope. The tender must also bear the tender number assigned to it by the procuring body.
- i) Tenderers can change or withdraw the tender in writing before the submission deadline.
- j) Opening of tenders is done by a Tender Opening Committee appointed by the Accounting Officer.
- k) Tender validity period may be extended by the procuring body and all tenderers are notified.
- l) Clarifications may be sought and corrections of arithmetic errors made by the procuring body.
- m) Tenders are evaluated and compared using the criteria given in the tender documents. Such criteria must be objective and quantifiable.
- n) An evaluation report containing a summary of the evaluation and comparison of tenders is prepared.
- o) Notification of the tenderers about the outcome of the evaluation and comparison of tenders.
- p) A written contract is then created between the procuring body and the successful tenderer. If the successful tenderer refuses to sign the contract then the tender which was second to his/hers in the evaluation and comparison should be considered, if the period during which the tenders must remain valid has not expired.
- q) For international tendering, that is, where foreign persons must participate in the process, the following requirements should be met:
  - i) Invitation to tender and tender documents must be in English;
  - ii) If advertisement is required by law, then an advertisement for the invitation to tender has to be done in one or more English language newspapers or other publications that have sufficient circulation outside Kenya;
  - iii) Technical requirements must comply with the international standards or standards widely used in international trade and also comply with the Kenyan law;
  - iv) Internationally used currency may be quoted or the ones specifically provided for by the tender document;
  - v) Any general and specific conditions to which the contract would be subject must be of a kind generally used in international tendering.

## 4.2 Alternative Procurement Procedures – Section 72

Although the procurement law gives a higher premium to Open Tendering, as a method of preference, over and above the other methods, there are instances where alternative procurement methods can be used. These alternative procurement methods are discussed below:

### 4.2.1 Restricted Tendering - Section 73

Restricted tendering refers to a process in which few bidders are identified and invited to bid. Restricted tenders are not advertised. Restricted tendering may be used in the following instances:

- i) When the process is complex or the specialized nature of the goods, works or services favours pre-qualified contractors
- ii) When the time and costs for examination and evaluation of the large number of tenders would be unequal to the value of goods to be procured
- iii) When there are only few known suppliers of goods, works or services sought after
- iv) Whenever the Tender Committee gives approvals and reasons in favour of Restricted Tendering.

### 4.2.2 Direct Purchase (Procuring) - Section 74

Direct procuring means buying goods and or services from a single source. Section 74 of the Act states that Direct Procurement may be used if the intention is not to avoid competition in addition to the following conditions, either when;

- i) There is only one person who can supply the goods, works or services being procured; and;
- ii) There is no reasonable alternative or substitute for the goods, works or services;

Or

- iii) There is an urgent need for the goods, works and services being procured;
- iv) The other available methods of procurement are impractical; and
- v) The circumstances that gave rise to the urgency were not foreseeable and were not the result of the negligent or slow conduct on the part of the procuring body
- vi) Tender Committee approval must be obtained and the reason given.

There may be negotiations between the parties and the resulting contract should be in writing and signed by both parties. Moreover, this tendering method should not be used in a discriminatory manner, for example, where some entities are offered favoured preference as a result of nepotism.

### **4.2.3 Request for Proposals - Section 76**

This is a method of procuring services of an intellectual or academic nature and where the procuring organization does not have such skills. This method should be used for the procurement of services or combinations of goods and services, where such services are mainly of an advisory, consultancy or academic nature.

#### **4.2.3.1 Procedure for Request for Proposals - Section 76**

- i) Preparation of notice inviting interested persons to submit expressions of interest. Such invitation shall set out the name and address of the procuring entity; a brief description of the services or goods being procured; the qualifications necessary for invitation to submit a proposal and an explanation of the time and place for submission of expression of interest;
- ii) Advertisement of the notice inviting Expressions of Interest in at least two daily newspapers with nationwide circulation;
- iii) Preparation of the Terms of Reference setting out the specific requirements;
- iv) Determination and development of the required qualifications for an entity to be invited to submit proposals;
- v) Determination of qualified persons and criteria for their assessment by the procuring body;
- vi) Request for Proposals to those qualified and such request shall have details on the services or goods being procured and the deadline for submission of proposals;

- vii) The Proposals are then evaluated and the successful proposal shall be the one with the highest score;
- viii) Notification of those who made Proposals about the outcome of the evaluation and comparison of the proposals;
- ix) Negotiations may then take place and a contract signed after this.
- x) For international competition, then the requirements similar to the ones under international open tendering should be used.
- xi) A person who enters into a contract resulting from this method cannot enter into another contract for goods or works that arises from or is related to the original contract.

#### **4.2.4 Request for Quotations - Section 88**

This method should be used when:

- a. The procurement is for goods that are readily available and for which there is an established market; and
- b. The estimated value of the goods being procured is less than or equal to the prescribed maximum value for using requests for quotations
- c. A statement of the current cost of an item or service will be needed.

##### **4.2.4.1 Procedure for Request for Quotations - Section 89**

- i) Preparation of a Request for Quotations setting out the name and address of the procuring body, specific requirements relating to the goods being procured, time and place of submission of quotations among others.
- ii) The request should be given early enough to at least three people determined by the procuring body, otherwise, this should be given to as many people as possible to ensure effective competition.
- iii) The successful quotation should be the one with the lowest price that meets the requirements set out in the request for quotations.
- iv) A contract should arise from this process by the procuring body placing a Purchase Order with the person who submitted the successful quotation who then confirms the Purchase Order in writing.
- v) With respect to international competition, International Open Tendering requirements will apply.

#### **4.2.5 Low-value Procurement - Section 90**

This method should be used when the estimated value of the goods, works or services being procured is less than or equal to the given maximum value for that low-value procurement. Other prescribed conditions must be specified.

The procedure for low-value procurement should be prescribed for different classes of public bodies, or classes of goods, works or services. For example, procedures for the procurement of office bulbs, tissue paper, sugar, tea and coffee should be prescribed for a government department.

#### **4.2.6 Specially Permitted Procurement Procedure - Section 92**

This method may be used with permission from the Authority and may include concessioning and design competition. The procedure for specially permitted procurement should be prescribed. “Concessioning” means procurement whereby mobilization of private sector resources for purposes of public financing, construction, operation and maintenance are encouraged. “Design Competition” means a procurement procedure whereby competitive bids are invited for services which are creative in nature such as architecture, landscaping, engineering, design projects, urban and regional planning and fine art.

### **5.0 ADMINISTRATIVE REVIEW OF PROCUREMENT PROCEEDINGS**

This Act provides for the Public Procurement Administrative Review Board to which any administrative review, appeal or complaint can be sought by an aggrieved party to the procurement proceedings who has suffered loss or damage due to the breach of a duty imposed on a procurement body by the Act or Regulations except in the following cases:

- i) The choice of a procurement method is in line with the requirements of the Act;
- ii) Termination of procurement proceedings by a procuring body is in accordance with the Act;
- iii) Where a procurement contract for Open Tender has been entered into in accordance with the provisions of the Act;
- iv) Where an appeal is frivolous, meaning the appeal is found not to have any merit.

The Review Board through its Secretary shall notify the procuring body upon receiving the complaint and the procurement proceedings may be suspended as may be determined by the Review Board. The Board can also suspend frivolous requests at this level.

Parties to the Review Board shall be:

- i) The person who requested for the review,
- ii) The procuring body,
- iii) Successful person if so notified and
- iv) Such other person as the Review Board may determine.

The Board must conclude the review after thirty days after receiving the request for the review. Upon considering the request, the Review Board can do any one or more of the following:

- i) Cancel the whole procurement process;
- ii) Direct the concerned procurement body to correct the situation or right the wrong;
- iii) Substitute its own decision for any decision by the procuring body in the proceedings;
- iv) Order the payment of costs as awarded between parties to the review.

An aggrieved party has the right to seek Judicial Review in the High Court within fourteen (14) days from the date of the Board's decision. The decision of the court shall be final.

## **6.0 ENFORCEMENT OF THE ACT AND THE REGULATIONS**

Under Part VIII of the Act, the power to ensure compliance with the Act and Regulations rests with the Public Procurement Oversight Authority. All public bodies should provide the Director-General with the information relating to procurement as he/she may require in writing.

The Director-General may order an investigation of procurement proceedings to determine the level of compliance with the Act, Regulations or the Authority's directions by a public body.

### **6.1 Powers of Investigators - Section 103**

For purposes of carrying out an investigation of the procurement proceedings, an investigator has the following powers:

- i) He shall have access to all books, records, returns, reports and other documents of

- the procuring body or a person who participated in the procurement proceedings, and these shall also include electronic documents;
- ii) He shall have the power to remove or make copies of any of the documents mentioned above;
  - iii) He may require an employee or official of the procuring body or an employee or official of a person who participated in the proceedings to provide explanations or information.

Upon completing his investigations, the Investigator shall prepare and submit a report to the Director-General. The Director-General may take any of the following actions upon being satisfied that there is breach of the Act or Regulations:

- i) Direct the public body to correct the contravention;
- ii) Cancel the procurement contract;
- iii) Terminate procurement proceedings;
- iv) Prepare and submit a summary of his findings and recommendations to the public body and the Kenya Anti-Corruption Commission.

A party who is aggrieved by the decision of the Director-General can seek review of the decision by the Board within twenty one (21) days or appeal to the High Court against the Board's decision within fourteen (14) days. The Board can confirm, vary or overturn the Director-General's order and direct the payment of costs as between the parties to the review.

## **7.0 DISQUALIFICATION FROM PARTICIPATING IN PROCUREMENT PROCEEDINGS**

Part IX of the Act states that a person can be debarred or disqualified from participating in procurement proceedings by the Director-General with the approval of the Advisory Board on the following grounds:

- i) When he has committed an offence under the Act;
- ii) When he has committed an offence relating to procurement under any Act;
- iii) When he has breached a contract for procurement by a public body;
- iv) When he has given false information about his qualifications;
- v) Where he has refused to enter into a written contract for procurement;
- vi) On any other ground given by the Director-General with approval of the Advisory Board.

The debarment or disqualification under this section is for a period of not less than five years. A person debarred by the Director-General can within twenty one (21) days request for a

review by Public Procurement and Administrative Review Board. Upon hearing the request, the Review Board can confirm, vary or overturn the Director-General's debarment of the person and order the payment of costs as between the parties to the review. An appeal from the decision of the Public Procurement and Administrative Review Board may be made in the High Court within fourteen (14) days of the Board's decision.

The Public Procurement Oversight Authority is required to maintain and avail to public bodies a list of the disqualified persons. The maintenance and disclosure of such information serves to assist the public in knowing the persons who may have been involved in procurement malpractices.

## **8.0 DISPOSAL OF STORES AND EQUIPMENT**

Part X of the Act relates to the disposal of stores and equipment of a public body that are unserviceable, obsolete or surplus. A public body must comply with the Act, the Regulations or directions of the Authority with respect to disposal of stores and equipment. This responsibility rests with the Accounting Officer of the public body. Employees and members of public bodies will be held personally liable for contravening any aspect of the Act, Regulations or directions of the Authority.

A public body is required to establish a Disposal Committee to determine the items for disposal and the best method of disposal.

### **8.1 Procedure for disposal of Stores and Equipment - Section 129**

- i) The responsible employee should inform or notify the Disposal Committee within reasonable time after the stores or equipment become unserviceable, obsolete or surplus;
- ii) The Disposal Committee should recommend to the Accounting Officer the best method of disposal, which may include the following:
  - a. Transfer to another public body or part of a public body, with or without financial adjustment;



- b. Sale by Public Tender
  - c. Sale by Public Auction
  - d. Destruction, Dumping or Burying; and
  - e. Trade - in.
- iii) The Accounting Officer should give a written notice to the Committee whether he accepts or rejects the recommendations of the Committee. If he accepts then the disposal shall be done according to the Committee's recommendations. If he rejects the recommendations he shall, within the specified time, give reasons for the rejection to the Committee. A written copy of these reasons will be sent to the Authority and the matter referred back to the Committee for further consideration. The Authority may give directions on the disposal of items to the public body.
- iv) No disposal shall be made to an employee or member of the public body unless allowed by the Regulations.

## **9.0 NATIONAL SECURITY TENDERS**

Part XI of the Act has provision for the procurement of goods, services and works for use for the defence and national security institutions such as the Armed Forces, the Kenya Police Service, the National Security Intelligence Service, the Kenya Prison Service, the Administration Police and the Kenya Wildlife Services.

The Act regulates the procurement of security items and shows how such procurement and disposal are to be managed, audited and laid before Parliament in the Annual Report. The Act requires security organs to maintain a dual list covering items that are subject to open and restricted procurement and disposal methods. The defence and the national security institutions are required to agree annually with the Authority on the category of restricted items to be included in the restricted list and on restricted procurement or disposal methods to be applied to each category of items on the restricted list. Items under the restricted list are to be procured in accordance with the method approved by the Authority and shall be subjected to the classified audit by the Controller and Auditor General or his appointee.

## 10.0 OFFENCES AND PENALTIES

The offences under Sections 135 to 137 include the following:

- a) Obstructing or hindering a person from carrying out his duties under the Act;
- b) Misleading or deliberately lying to a person carrying out his work under the Act;
- c) Delaying without justification the opening or evaluation of bids or awarding of contracts beyond the stipulated period;
- d) Exerting undue pressure or influence to the Tender Committee or members for favors; and
- e) Opening any sealed bid or any document required to be sealed to disclose their contents before the time for public opening of such documents.



The punishment for any of the above offences is as follows:

- i) For an individual, a fine not exceeding four (4) million Kenya shillings or a jail term not exceeding ten (10) years, or both.
  - ii) For a body corporate, a fine not exceeding ten (10) million Kenya shillings.
  - iii) Additionally, a Public Officer so sanctioned shall be disqualified from holding a public office and debarred if a private individual.
- f) Influencing inappropriately the evaluation and comparison of tenders either before or after the submission of the bid. The penalty here is:
- i) A fine not exceeding four (4) million Kenya shillings or a jail term of not more than three (3) years or both for an individual, and
  - ii) A fine of not more than ten (10) million Kenya shillings for a body corporate.
- g) Involving oneself in fraud, misrepresentation, collusion to rig the bids, and conflict of interest; the penalty shall be:
- i) Penalties under the Anti-Corruption and Economic Crimes Act, 2003;

- ii) The person is disqualified from entering into a contract for the procurement
- iii) Contract becomes voidable by the public body if already entered into.

## **11.0 ILLUSTRATION**

In order to fully appreciate the offences and penalties associated with the infringement of the Public Procurement and Disposal Act, we have developed a hypothetical illustrative “case” below for the consideration of the reader:

Munyoti is a Procurement Officer in one of the parastatals in Kenya. The parastatal advertised for tenders for the supply of 10 units of computers and other software for its internal use. Software Supply Company Limited is one of the firms that have expressed its interest to supply the computers and software. Many other companies have expressed their interest in supplying the materials and have made their bids according to the tender requirements.

Nicole who is an employee of Software Supply Company Limited approaches Munyoti and tells him that he would be given 10% of the contract price should he give the company the chance to supply the materials. Munyoti accepts the offer, which he says is good. He then tells Nicole to submit the company’s bid for a specified price with certain inclusions. Munyoti then tries to cause the other bidders who had submitted their bids to withdraw their bids.

Software Supply Company Limited succeeds as the best bidder after the deadline for the submission of the tenders and the evaluation and comparison processes. A procurement contract for the supply of computers and other software is made between the parastatal and Software Supply Company Limited. Later, it emerges that Nicole who is an employee of the successful bidder had colluded with Munyoti in order to win the tender and that Munyoti had been offered a certain percentage for the deal.

Upon being taken to Court, Software Supply Company Limited, Nicole and Munyoti are found guilty of the offence of bid rigging resulting from collusion and are punished as follows:

- i). Both Munyoti and Nicole are sent to jail for 5 years plus a fine of one (1) million Kenya shillings each;
- ii) Software Supply Company Limited is fined 5 million shillings;
- iii) In addition, Munyoti is disqualified from holding any public office in his lifetime;
- iv) Software Supply Company Limited is disqualified from participating in any procurement proceedings for five (5) years;
- v) The contract for procurement that had been entered into between Software Supply Company Limited and the parastatal is voided by the parastatal.

## **12.0 CONCLUSION**

The Public Procurement and Disposal Act, 2005 is an important law that addresses a specific and yet complex need in Kenya. This law and other laws that have been enacted to check and address corrupt practices and seal known systems loopholes will continue to boost the war against corruption in Kenya. It had become increasingly clear that the Ministry of Finance Guidelines were being circumvented. It is now the responsibility of every Kenyan and people of goodwill to insist on the correct procedure and to report all those suspected corrupt practices to relevant agencies. In particular the Act:

1. Establishes a strong public procurement system with the objective of enhancing efficiency; competition, integrity, transparency, public confidence and a conducive investment environment;
2. Establishes a strong organizational framework with an enhanced oversight mechanism, well defined procuring bodies and tender committees;
3. Reduces delay in the procurement process in that it dispenses with the requirement for the Permanent Secretary Ministry of Finance to countersign contracts in the Central Government as stipulated by the Government Contract Act (Cap 25 of the Laws of Kenya);
4. Strengthens professionalism in public procurement through recognizing the role of professionals in the process and the need for continuous training and development;
5. Provides potential to seal the loopholes for corruption thus reducing wastage of public resources;
6. Prescribes heavy sanctions to ensure compliance with the Act, Regulations and the directions of the Authority;
7. Regulates the procurement of security items by security institutions;
8. Provides potential for improving the good image of the country as a good investment destination;

9. Provides for General Procurement Rules with improved requirements, which when complied with, would ensure efficiency, fairness and transparency in the procurement processes; and
10. Restricts single sourcing, which has been a leeway for corruption in the procurement system in Kenya, to very few situational circumstances.



**KACC HEADQUARTERS**

Integrity Centre, Millimani/Valley Road Junction  
P. O. Box 61130 - 00200 Nairobi • Tel: (020) 2717318, 310722, 2100312/3  
Mobile: 0729 888881/2/3 • Fax: (020) 2719757  
Email: [kacc@integrity.go.ke](mailto:kacc@integrity.go.ke)

**Report Centre**

Hotline numbers: (020) 2717468, 0727 285663, 0733 520641 • Hot fax: (020) 2717473  
Email: [report@integrity.go.ke](mailto:report@integrity.go.ke)

**MOMBASA REGIONAL OFFICE**

Apollo Court, Moi Avenue  
P. O. Box 82351 - 80100 Mombasa  
Tel: (041) 2319081 / 2319082  
Mobile Numbers: 0710 768706 • Fax: (041) 2319083  
Email address: [kaccmsa@integrity.go.ke](mailto:kaccmsa@integrity.go.ke)

**KISUMU REGIONAL OFFICE**

3rd Floor, Jubilee Insurance House,  
Ang'awa / Oginga Odinga Street Junction,  
P.O. Box 438 - 40100 Kisumu  
Tel: (057) 2023111 • Fax: (057) 2023555  
Email address: [kaccsm@integrity.go.ke](mailto:kaccsm@integrity.go.ke)

[www.kacc.go.ke](http://www.kacc.go.ke)

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