



## *Taming Corruption in Kenya's Public Procurement*

*Public procurement in Kenya and the world at large plays an important role in the economic development of the country. It is the vehicle by which delivery of public goods and services is achieved. Unfortunately, due to the large amount of money involved, public procurement is one of the most vulnerable government activity to fraud and corruption. A 2013 Ethics and Anti-Corruption Commission study looks at some of the areas that will help stem corruption in the sector.*

### **The Issue**

An 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. This is due to the huge financial flows involved in public procurement. 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 2013 EACC Public Procurement Study**

The Commission undertook a study to evaluate corruption in public procurement in Kenya. The overall objective of the 2013 EACC Public Procurement Study was to identify areas that have enabled corruption to thrive in public procurement in Kenya and recommend measures to revert the situation.

Data was collected between May and June 2013. A total of 573 suppliers and 377 public procurement practitioners were randomly selected and interviewed in 13 sampled counties. In addition, a total of 369 public procurement files were perused in the 13 counties visited. 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.

The study found out that procurement decisions of who to award tenders is influenced by politicians, senior civil servants and management. The influence was identified by 13 per cent of public procurement officers and 23 per cent of suppliers interviewed. Suppliers interviewed (43%) acknowledged to know firms owned directly or through proxy by public officers working as clerks, procurement officers and senior civil servants. When asked how they determine price to quote in

public tenders, 26.7 per cent of suppliers indicated they consider the prevailing market price but add big profit margin and or factor in bribes they will pay in order to win public tenders. Worth noting is the fact that most corruption and ethical issues (75% of cases identified by the study) in procurement go unreported mainly due to fear by suppliers of losing lucrative business opportunities with public institutions.

This policy brief is primarily based on finding of this study whose report “*An Evaluation of Corruption in Public Procurement: A Kenyan Experience*” can be obtained from the Commission.

### **Public Procurement Practices in Kenya**

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.

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). 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).

The Kenyan procurement process involves several steps. 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.

## **Government Measures aimed at Curbing Corruption in Public Procurement**

### **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. In addition, there has been reluctance by public institutions to fully embrace the system.

### **A strong legal and institutional 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.

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). Further, public procurement is entrenched in the Constitution of Kenya. The act and regulations are yet to be streamlined with the Kenya Constitution 2010. This will include among others the inclusion

of County Governments in the act and regulations. The Ethics and Anti-Corruption Commission is established by an act of parliament to be the lead agent in the fight against corruption in the country. The Kenya Institute of Supplies Management (KISM) is entrusted with maintaining control and oversight of procurement practitioners. However, despite the enactment of the PPDA act, operationalisation of various regulations and various institutions in place to regulate the sector, public procurement in Kenya continues to be marred by corruption scandals and losses amounting to billions of shillings.

### **Wealth Declaration System for Public Officers**

All public officers are required by law to disclose their wealth after every two years. This is meant to keep public officers on check on their financial dealing and bring to the fore any suspicious accumulation of property. However, this vital information is usually kept in sealed envelopes and inaccessible to the public making it hard to authenticate the validity of the information.

### **Policy Recommendations**

#### ***Regular vetting of procurement officers and suppliers/contractors***

Corruption involves giving and receiving. In most cases, two parties are involved: a public officer and a private company. Research has indicated bribes are used to win government contracts and some companies winning public contracts are owned directly or by proxies by procurement officers or other public officers. There is need for the government to put in place a vetting framework to regularly vet/undertake lifestyle audit of procurement officers and suppliers more so before engaging the suppliers in business contracts. Key institutions to lead in the vetting process should include NSIS, EACC, PPOA and the Police Service. 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.

### ***Enhance use of intelligence mechanisms to gather information***

Suppliers trading with public institutions have lots of information that could help unlock corruption cases in public procurement leading to successful prosecution. They know companies owned by public officers and trading with public institutions, know when procurement decisions are influenced by public officers, know public officers who divulge crucial procurement information that prejudice legitimate commercial interests or inhibit fair competition, and know suppliers offering bribes to public officers in order to influence procurement decision among others. Unfortunately, most of these suppliers are unwilling to report these malpractices largely due to the fear of losing lucrative business opportunity with public institutions. 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.

### ***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. Politicians, senior civil servants and management of public institutions influence procurement decision. There is therefore need 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 (1) (d) criminalize exertion of pressure or unduly influencing a procurement decision to favour a particular bidder.

### ***Ensure competition in open tenders***

Corruption thrives on secrecy. Transparency and accountability is recognized as key conditions for promoting integrity and preventing corruption in public procurement. 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, public institutions attracted very few supplies through open tenders. In some cases, only one supplier expressed interest in public tenders to supply goods that were not technical to warrant attracting one supplier. 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.

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

There is need to domesticate and integrate a number of best practices employed by other countries in the fight against corruption in public procurement. Some of the practices to integrate include: Hong Kong's Anti-Corruption Agency strategy of employing over 70 per cent of its resources to investigate corruption and prosecute

offenders. 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.

### **Revamp market research**

It is a well known fact that government buys goods and services at prices higher than what is offered in the open market. Sometimes the prices are exorbitant. One of the factors contributing to this state of affairs is the fact that procuring entities establish the market rate price of goods they intend to procure by asking only a few random suppliers, sometimes only one, of their suppliers the market price of the goods. On the other hand, suppliers establish the price to use while seeking public tenders by considering the prevailing market price but add big profit margin and or factor in bribes to pay in order to win the tenders. Further, suppliers collude to fix prices to quote during public tendering.

There is therefore a need to re-examine the whole idea of market research. 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. The 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.

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

Most public institutions terminate procurement process before their completion because of insufficient funds and changes in prices of goods and services during the procurement process. In addition, delay in effecting payment to suppliers after they have rendered services to public institutions is a common occurrence. This creates room for corruption to thrive as suppliers jostle to have their payments effected.

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.

### **References**

- EACC. (2015). *An Evaluation of Corruption in Public Procurement: A Kenyan Experience*. EACC.
- KACC. (2010). *National Enterprise Survey on Corruption*. KACC.
- OECD. (2009). *OECD Principles for Integrity in Public Procurement*. OECD.
- PPARD. (Undated). *Draft Procedure Manual*. Nairobi: PPARD.
- PPOA & Ramboll Management A/S. (2007). *Assessment of the Procurement System in Kenya*. PPOA.

