

**MEMORANDUM TO THE PUBLIC PROCUREMENT OVERSIGHT AUTHORITY
(PPOA)**

**PRESENTED BY
THE INSTITUTE FOR SOCIAL ACCOUNTABILITY (TISA)**

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Towards a New Integrity Culture in Local Governance in Kenya

***Memorandum of views presented to the Public Procurement Oversight Authority – PPOA
Nairobi, Kenya 24th June, 2010.***

1. About TISA

The Institute for Social Accountability (TISA) is pleased to present this memorandum on this day of Thursday, 24th June, 2010 towards the realisation of good governance in Kenya. TISA is a civil society initiative committed towards the achievement of sound policy and good governance in local development in Kenya, to uplift livelihoods of, especially, the poor and marginalized. TISA has been operational since March 2008, and is a locally registered trust.

2. The biggest casualties of corruption are the poor

In making this submission we wish to contribute to increased transparency, prevention of graft and effective utilisation of local development funds in Kenya. Corruption impacts the poor disproportionately as they rely solely on public institutions to meet their basic needs.

Whereas we of the professional and middle classes can afford to pay for private education, private health care, and so forth, the majority rely on those poorly-constructed schools, run down health institutions, misappropriated bursaries to fulfil their basic needs.

Fighting corruption is therefore a moral duty for all of us, especially the heads of public institutions. It has also become a national imperative, because widespread corruption fuels poverty, which in turn breeds insecurity and national discord. We must not be lulled into complacency and accept symbolic reforms and the needed changes.

PPOA is therefore morally obliged to take all necessary steps, with haste and due rigour, to safeguard public resources through the enforcement of rigorous procurement practices.

In preparing this memorandum we have reviewed key legislation pertaining to procurement. Our recommendations are also informed by practical experience in local governance work at the local level.

3. Gains thus far in the reform of procurement framework in Kenya

Since 2002, reforms in Kenya have sought to establish a strong legal and regulatory framework in public resource management. These initiatives have cumulatively stressed upon sound principles with a view to enhancing transparency in local governance in Kenya, for instance:

The exclusion of politicians from the procurement cycle; Reduction of the powers of the Minister for finance in procurement matters; The PPOA has assumed more powers in public procurement policy; Prohibition of any public servant or anybody holding a public office/ their spouses/ relations from participating in any public procurement; Democratization of the procurement process through various committees;

Procurement entities are expected to establish tender committees that should operate fairly independently in the decentralized system; The committees are expected to establish efficient and accountable procurement systems; The Public Procurement Complaints Review and

Appeals Board (PPCRAB or Board) has been set up to adjudicate complaints that arise in the procurement process; etc.

However, the given reforms have left a number of gaps, which consistently negate the impact of the intended reforms. Those charged with the accountability for public resources should ask themselves; why despite all the legal reforms is corruption rampant? What fundamental tenets have previous reforms overlooked that allow corruption to thrive? It is to these that we will pay attention to in the next section.

4. Recommendations

I. Purpose of the Act (PPD 2005) should recognise citizen role and rights

The chief challenge in the realisation of accountability stems from the locus from which national institutions engage in the discourse. National institutions typically look at governance processes from their perspective while good governance will be better achieved by considering processes from the citizen's point of view. National stakeholders need to realise that the citizen is a primary stakeholder in the management of public resources as a payer of taxes and the primary service beneficiary.

The sustainability of the Public Procurement Act is at risk because there is not a clear understanding in public entities as to its full potential as a financial and budgetary control mechanism. Further training is required in the ministries, local authorities, CDF Committees and other procuring entities especially at the managerial and elected members' levels. Unless the Public Procurement Act is seen as an advantage, rather than a threat, by the accounting officers', senior management and elected members, it will not be sustained.

Recommendation: The role and rights of the citizen should duly be recognised in public resource management in the preamble of the Procurement Act. We propose the following language;

Citizens have the right to obtain justifications and explanations for: the use of public resources from those entrusted with the responsibility for their management, the performance of officials and service providers in progressively realising the human rights of those they serve.

Conversely, officials and service providers have a duty to: provide justifications regarding their performance and, take corrective action in instances where public resources have not been used effectively to realise human rights and capabilities'

There should be clear mechanisms for engaging local communities in procurement matters and other activities.

The law should recognise citizens' social audits to ensure that all procuring entities engage in transparent procurement.

II. Pervasive secrecy promotes corruption.

Art.44. PPD, Art.41 PPOA, Official Secrets Act all contribute towards corruption;

The most persistent barrier to combating corruption is the culture of secrecy in public procurement and associated government functions. Without an open information policy other reforms are simply window dressing as secrecy allows collusion, bribery of integrity officials, and compromise of judicial processes.

Presently procurement records are held as confidential. In this way tender and procurement agreements and operations are not open to public scrutiny, effectively locking out citizen oversight as envisioned in the public processes especially local governance such as the CDF, LATF, ESP and so forth.

For instance procurement records such as work plans, contractor agreements, bills of quantity, and so forth are routinely withheld from the public undermining the public's ability to oversee local development projects some of which they proposed in the first place.

Supplier information is maintained as confidential allowing government officials and politicians to conceal their interests in local contracting companies, in contravention of the PPD and PPOA. This prevents genuine contractors from benefitting from local contracts allowing the political elite to capture these funds and squeezing genuine businesses out of the market.

Recommendations

- Procurement records should be made open to the public;
- Detailed contractor /supplier profiles should be made available to the public;
- Public officer wealth declarations should be made public. The heavy penalties provided for divulging information under the PPOA are punitive, and undermine the very spirit of the Act.

III. Penalties and redress not taken seriously

The legislation is very thin on penalties and sanctions. Although it lays down many rules, it does not provide for punishment matching those who disobey or abuse the rules. Sections of the legislation that deal with disclosure of information are limiting. The Act (Part IX) specifies conditions under which a participant can be debarred from participating in a procurement process, thus dealing with the problem of who is eligible and who is not but is silent on how to deal with a company or persons that incorporate in different names, as has happened in the past, in order to circumvent the process. The illegality of incorporating under different names is a matter that should be addressed through ethics in public procurement.

The law has not kept pace with numerous procuring committees' which are handling significant amounts of local development money.

Recommendations

- Local redress needs to be strengthened by outlining specific penalties and according each a corresponding penalty.
- Routine offences such as poor record keeping, withholding of information and so forth should be detailed and dealt with by a local redress officer in charge of discipline, within a specified time.
- The list of offences and corresponding penalties should be published and displayed in the relevant office.
- As per the Act, a discipline roll should be maintained for both officers and contractors and available to the public for scrutiny.
- Contractors who offend procurement guidelines should be blacklisted, and the list made public. Failure to act against procurement offences should be actionable.
- Procurement laws and specific funds laws need to be harmonised to provide for stiffer penalties for breaches to make it unattractive.
- The Commissions responsible for enforcement of officer code of conduct provided in the ACECA 2003 does not deal effectively with devolved funds. The law needs to be reviewed and revised to give corresponding Ministries the responsibility of discipline of routine cases. The local accounting officer for various funds needs to be identified by law. As stated before there is need to establish a local redress office to decentralise compliance and enforcement. Only big cases should be referred back.
- Failure by responsible officers to act should be actionable.
- A code of conduct for local fund committees should be established.

IV. Illegal Procurement by Project Management Committees:

The Project Management Committee (PMC) is recognized in the CDF Amendment Act 2007 as the committee responsible for implementation of a project. The CDF Implementation guidelines further expressly recognise PMC's as a procurement unit subject to government financial regulations.

Yet, according to the Public Procurement Oversight Authority, the Project Management Committee (PMC) has no legal mandate to award tenders under the current procurement law. Circular PPD2/20/29A/10 recognized PMC's as Public Entities under the Exchequer & Audit Act Cap 412 sec. 5A (2h) hence mandated to establish tender committees. However, the Public Procurement & Disposal Act, 2005 Sec. 143 amended the Exchequer & Audit Act Cap 412 by deleting sec. 5A hence PMC's are no longer recognized as an independent public entity and cannot establish a tender committee.

In simple terms Public Procurement & Disposal Act, 2005 outlaws procurement by project management committees. In direct contravention to this position the CDF Implementation Guidelines recognise PMC as procurement entities. Further, Section 5 (1) of the Procurement Act states that where there is conflict with any other Act or regulation, the Procurement Act shall prevail. It therefore appears that PMC procurement by CDF PMC's is illegal.

Suggested Way Forward:

- The PPOA needs to clarify the position on CDF PMC's. It also needs to take action against those local committee members that are serving as procuring entities in contravention of the Public Procurement Act. An Open information policy will quickly expose those abusing the act at local level through citizen oversight.

V. Is PPOA reaching the local level?

PPOA is out of step with the prolific growth of local development funds in Kenya. The processes prescribed legally do not take cognizance of the capacity and sheer volume of contracts currently being handled by local committees.

Recommendations

- As stated in III. PPOA needs to effectively decentralise its functions in line with growing fiscal decentralisation.
- **Capacity building:** The procurement law should provide that respective funds commit adequate resources for capacity building local fund management committees.
- **Awareness Creation:** Resources should be committed towards awareness creation. Procurement processes, penalties and other standards should be published and displayed on local notice boards to demystify procurement.
- Procurement records and reporting processes should be simplified in line with capacities of local implementation committees to enhance record keeping and reporting.
- PPOA needs to collaborate with respective fund national institutions to harmonise reporting and procurement processes.
- Standard cost estimates and specifications for projects should be generated for all common projects to prevent overpricing. The law should levy penalties for overpricing.
- Procurement meetings should be open to the public. Monthly, scheduled, public, procurement meetings where new bids are announced, tenders opened and evaluated tenders awarded is a simple way to circumvent the collusion. The ESP tender process showed that this is possible.

VI. PPOA not advertising tenders

The PPOA is empowered to investigate and submit evidence to prosecutors, refer cases of corruption to the Kenya Anti-Corruption Commission (KACC) as well as debar firms that have

contravened the Act and Regulations from participating in future public transactions. However, it is not clear how far PPOA has gone with these measures. The PPOA website <http://www.ppoa.go.ke> also does not publish advertisements on some development projects such as CDF open tenders for goods/ works above Kshs. 6 million, as required. Despite strong provisions contained in the procurement law, the PPOA is not enforcing financial discipline to reign in runaway corruption in CDF. The only information on CDF is the CDF Westlands Review Report which is a product of a procurement review that was carried out in Westlands Constituency Development Fund office. The review was conducted from 28th April to 25th May 2009. It was intended to cover the financial year commencing 1st July 2007 to 30th June 2008.

Recommendations

Procedures and regular monitoring of the procurement activities should be intensified by the Procurement Oversight Authority and all Procuring Entities with emphasis on value for money.

VII. Procurement Planning by Procurement Entities not visible:

In a departure from the past dispensation, Part III of the Public Procurement and Disposal Act recognizes the need for procurement planning and provides that “all procurement shall be within the approved budget of the procuring entity and shall be planned by the procuring entity concerned through an annual procurement plan” in Section 26 (3)(a).

A procurement Plan shows the items that will be required by a particular user and therefore the items that will be procured by the Procurement Entity. The Plan shows what will be procured and when and to meet which needs.

To prepare a Procurement Plan, a Procurement Entity is required to engage users in identifying their needs for the next one year during the Government budget planning cycle. The procurement entity then takes into account the needs and prepares a plan showing what will be bought during the year for the entity. A Procurement Plan showing the materials required is derived from the Bill of Quantity (BQ) or Bill of Material (BM) that must be prepared showing exactly what will be required.

Procurement Planning is compulsory for all those institutions that utilize Public funds such as CDF, LATF and ESP.

Despite this stipulation, the country is dotted by many incomplete projects. The requirement for procurement planning was aimed at ensuring smooth implementation of projects/service delivery as well as completely eliminating pending bills. However, with such a regulation in place, we still find that urgent purchases at the end of the financial year are still a common feature raising questions as to whether the items are necessary or whether any procurement plans are prepared, and if so, how they are implemented.

PPOA states, “Procuring Entities are reminded of the statutory requirement to plan all procurements through an annual procurement plan. Accounting Officers must ensure that procurement plans are prepared and implemented and Public Officials shall be subjected to penalties prescribed in the Public Procurement and Disposal Act and the Regulations including payment to the procuring entity for the loss resulting from their actions.”

Responsibility for Accounting Officers for complying with the Act is clearly stated in Section 27 of the Act. PPOA shall not hesitate to use powers conferred to it in Part VIII of the Act to ensure full compliance is achieved. Further, Section 137 provides for general penalties for offences committed under the Act.

Even though the procurement Act is very clear on the statutory requirement to plan all procurements through an annual procurement plan, it appears that not all institutions that utilize Public funds countrywide have made these records public.

Recommendations: The PP legislative framework should promote efficiency of the public contract

Sound programming and planning of the procurement is crucial to agree on a cost effective and accurate public contract. An efficient public contract starts with an accurate and unbiased assessment of the contracting authority’s needs. Once this has been achieved, the public procurement process should not normally be initiated until the appropriate budget has been allocated or a source of financing is defined. The law should mandate proper contract management. The mismanagement of the contract or fraudulent payments may increase the costs of the contract. Variations to the signed contract should be permissible, once carefully scrutinised from an integrity perspective, and should be prohibited when amendments significantly alter the economic balance of the contract in favour of the tenderer in a manner which was not provided for in the tender and terms of the initial contract.

The regulatory agencies should be professional, independent and provide audit and monitoring of the Public Procurement sector to raise the profile of procurement and drive up sector capability.

VIII. Lack of clear administrative compliance criteria within standard bidding documents

There are no clear administrative compliance criteria within the standard bidding documents pertaining to legality of the vendor, for example, in tax matters, that should be met by a vendor to be allowed to participate in a tender process.

Another shortcoming is the incorporation of award criteria, as distinct from compliance requirements, within the regulations or set of standard bidding documents. This has led to a

level of arbitrariness in the technical evaluation of bids, which obscures the evaluation process rather than promoting transparency. Arbitrariness is a fertile ground for abuse.

The treatment and management of contract variations has been handled differently across various procuring entities, and even though there is some reference to earlier procurement manuals limiting the value of contract variation, it is applied primarily in a discretionary manner.

The Regulations are completely silent on some aspects of procurement including warehousing, inventory management and audit. Supplies management is much wider than acknowledged in the Regulations. This omission of important facets of procurement can easily become a breeding ground for corruption as it creates weaknesses and or gaps in the process.

Section 26 of the Act gives public entities the approval to establish procurement procedures. This is likely to result in different procurement thresholds, thereby defeating the purpose of the Act to make public procurement uniform across all public entities. The freedom to establish own procurement procedures means that identical situations are likely to be treated differently. Section 66(4) states that the successful tender shall be the one based on the evaluated price. Price thus gets prominence. This defeats the legislations' purpose of attaining best value for money. The best value for money is not necessarily measured in terms of low prices.

Recommendations

Both the Act and the Regulations are technical documents and contain technical definitional terms e.g. Urgent; Frivolous. Technical terms, unless well defined and elaborated in the area of procurement, can easily lead to different interpretations of rules and regulations leading to lack of effective competition, transparency, discrimination of bidders, unequal treatment and failure to achieve value for money.

IX. Likely abuse of the judicial review process by aggrieved participants due to corruption

An attempt by the Act to limit the appeal period is unconstitutional, as it cannot usurp the powers of the High Court. To leave things as they are can lead to creation of confusion, different interpretations of terms, concepts and abuse of the system. Not enough care has been taken to properly separate the authorizations of procurement initiation, selection and commitment. Separation of roles and powers ensures that no single person or entity has the capacity to make all decisions without checks, controls and balances. As things stand now, it would appear that procuring entities have too much power vested in them in matters of Public Procurement.

The Act gives a strong judicial status while the Regulations are not explicit about this. The implication of this is that the Minister for Finance has wide latitude for instituting adhoc amendments and revocations at will. Where there is possibility of abuse of legislation by Ministers, the public procurement process cannot be expected to be efficiently managed.

X. Use of E-Procurement

Greater use of electronic procurement, which was one of the desired outcomes set by the Public Procurement regulations, has not advanced to the stage reached by more developed countries. The main achievement to date has been the improved PPOA website, though the Authority has still to persuade most entities such as the institutions under CDF to place on the website their bid opportunities, notices of best evaluated bidder and contract award and other statutory information. More advanced applications of electronic commerce, including its use in tendering, may not be suitable until substantial improvements in basic infrastructure have come about.

XI. Monitoring & Evaluation Needed

Most seriously, there is no evidence that the reforms carried out so far have been successful in reducing the incidence of corruption in public procurement in Kenya. The annual surveys by Transparency International have shown that Kenya is one of the most corrupt countries in the world and that little progress has been made in reducing it.

Suggested Way Forward:

A key requirement is to establish an effective system of monitoring and evaluation that is based on reliable and comprehensive statistical data covering the value and type of procurements transacted and the procurement process itself. Such data, together with the findings of procurement audits and special investigations in response to complaints and other information, provide an important means of detecting anomalies and malpractices which demonstrate that transparency and integrity have been compromised.

The monitoring and evaluation system should also determine the risks and vulnerable points at each stage of the procurement process. Efforts at remedying malpractices have tended to focus on the bidding process.

Once malpractices have been identified, they must be corrected and mechanisms put in place to prevent recurrence. Some problems may be attributable to inadequate knowledge and skill or to lack of essential equipment, for example, a procuring entity may be unable to meet a requirement to place notices of bid opportunities on the regulator's website because it lacks computers with internet connections.

XII. Partnerships Building

Procurement regulators and other anti-corruption agencies need to develop partnerships with civil society organisations in the areas of awareness creation, promotion of local monitoring. Such organisations can be powerful weapons both in exposing corruption in procurement and in educating the public about the need to combat corruption.

Laws reviewed

- The Public Procurement and Disposal Act, 2005 (the Law). The Law became effective from January 1, 2007.
- The Public Procurement and Disposal Regulations, 2006. The Regulations are meant to assist in the application and implementation of the Law (Act).
- The Public Procurement and Disposal Regulations, 2009. The Regulations are meant to assist in the application and implementation of the Law (Act).
- The Public Officer Ethics Act, 2003 (revised in 2009) CAP. 183 Laws of Kenya
- The Public Officer Ethics (Public Service Commission) Administrative Procedures, 2009.
- The Anti-Corruption and Economic Crimes Act, 2003(revised in 2009) CAP. 65 Laws of Kenya