

Legal Provisions in Procurement

PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT, 2015

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INTRODUCTION

- ❑ The Public Procurement and Disposal Act, 2005 was repealed on 7th January, 2016 through Kenya Gazette Supplement No. 207
 - *The PP&D Act, 2005 was operationalized on 1st January, 2007.*
 - *It established PPOA, PPARB and PPOAB as regulators of the public procurement system.*
 - *The threshold Matrix to determine segregation of responsibilities and procurement methods.*
 - *Classification of PEs into classes A, B, and C.*
 - *Ministries, Counties, State corporations fall under class A.*

- ❑ It was replaced with the Public Procurement and Asset Disposal Act, 2015 whose purpose is to;
 - *Maximize economy and efficiency*
 - *Promote Competition*
 - *Promote Integrity and fairness*
 - *Increase transparency and accountability*
 - *Increase public confidence*
 - *Promote local industry and economic development*

WHY THE NEW LAW?

- Realign law with Constitution of Kenya 2010
- Realign law with Kenya Vision 2030
- Addresses challenges in the repealed Act.
- Clarify the role of the National Treasury as the policy developer
- Enhance and distinguish the roles of public procurement regulators
- Incorporate the need for devolution as required by new constitutional dispensation.
- Enhance asset and contract management.
- Professionalization of procurement function

Public Procurement Provisions-Under the New Constitution

- ❖ fair, equitable, transparent, competitive & cost-effective - Art. 227(1)
- ❖ procurement & disposal law to provide - Art. 227(2):
 - ✓ Categories of preference
 - ✓ Protection of persons, groups previously disadvantaged by unfair competition or discrimination
 - ✓ Sanctions against suppliers who have not performed professionally, agreements or law
 - ✓ Sanctions against tax defaulters, corrupt & serious violators of employment laws & practices

GUIDING PRINCIPLES

1. National Values,
2. Equality And Freedom from discrimination,
3. Affirmative Action,
4. Integrity,
5. Public Finance,
6. Values & Principles of Public Service,
7. Promotion of Local Industry,
8. Sustainable Development
9. Protection of Environment

APPLICATION

- Scope of Application is widened to emphasize and include:-
 - procurement planning,
 - inventory management,
 - asset management,
 - disposal of assets and
 - contract management
- Application excludes procurement of PPPs
- Ratified Treaties or agreement shall prevail in case of conflict the Act.

CONFLICTS WITH OTHER AUTHORITIES

Acts of Parliament

❖ The PPADA 2015, shall prevail in case of any inconsistency between this Act and any other legislation or government notices or circulars, in matters relating to procurement and asset disposal except in cases where procurement of professional services is governed by an Act of Parliament applicable for such services.

International Agreements

- ❖ This Act prevails except in instances of international treaties or agreements ratified by Kenya and to which Kenya is party or in negotiated grants and loans
- ❖ Insurance and carriage must be by Kenyan bodies

REGULATORY FUNCTION

- ❑ Unlike the previous dispensation, regulatory role is shared by three national organs, namely:-
 - *The National Treasury*
 - *Public Procurement Regulatory Authority and its Board of Management*
 - *Public Procurement Administrative Review Board*
- ❑ Oversight was reserved for Parliament
- ❑ The National Treasury as the exclusive policy developer.
- ❑ Regulatory teeth given to the Authority (PPRA)
- ❑ Independence of PPARB emphasized.
- ❑ Increased PPARB members from nine to fifteen

COMPLIANCE

- Both the National Treasury and PPRA have right to procurement and disposal information
- Parties have right to direct judicial review against investigative or debarment orders by PPRA.
- This is a departure from previous dispensation where they were first required to Administrative review from PPARB.

RESPONSIBILITY FOR COMPLIANCE

- Head of procuring entity (primary responsibility) - Sec.27(2)
- Boards - Sec.27(3)
- Committees - Sec.27(3)
- Employees - Sec.27(3)
- Suppliers and contractors - Sec.27(4)

INTERNAL ORGANISATION of Procuring Entities (PEs)

- Accounting Officer primarily responsible for compliance and takes over the roles of Tender committee and Procurement Committee
- Evaluation Committee to be formed on ad hoc and rotational basis for the purpose tender evaluation
- Procurement function empathically to be handled by procurement professionals.

NEW PRINCIPLES

- Procurement and asset disposal planning mandatory
- Specific requirements and technical specifications to be
 - *generic,*
 - *based on acceptable standards, and*
 - *be environment-friendly (Green procurement), etc.*
- Tender security discretionary to others but not applicable to SME and other disadvantaged groups. To be stated as absolute value. Not more than 2% of contract value.
- Termination or cancellation of procurement and asset disposal proceedings only allowed with reasons set forth such as:-
 - *operation of law,*
 - *substantial technological change,*
 - *inadequate budget,*
 - *civil commotion,*
 - *force majeure, etc.*
- Declaration NOT to engage in Corruption (section 62)

NEW PROCUREMENT RULES

- Recommendation for contract awards by evaluation committee to accounting officer
- Qualifications for contract award;
 - ✓ Have necessary qualifications, resources and equipment
 - ✓ Have legal capacity to enter into a contract
 - ✓ Not be insolvent, in receivership or bankrupt
 - ✓ Not be debarred from participating in procurement proceedings
- The successful tender will be:-
 - *lowest evaluated price,*
 - *highest technical score if services from regulated professions*
 - *highest combined score*
- Notification of intention to enter into contract
- Extension of tender validity period for not more than 30 days more
- International tendering only allowed if no effective local competition

NEW PROCUREMENT METHODS

1. Two-stage tendering;
2. Design competition;
3. Electronic reverse auction;
4. Force account;
5. Framework agreements;
6. Competitive negotiations; and
7. Community participation (under the Draft Regulations)

Section 91 - 114

CONTRACT VARIATION

- Quantity variation 15% for goods / services
- Quantity variation 20% works
- Resultant cumulative variation should not be more than 25% of the original contract price
- No price variation for up to 12months from date of signing of the contract
- Price variation to be based on CBK inflation rate

ADVANCE PAYMENT

- No advance payment
- Where allowed with justification 20% shall be paid , but with payment security from a reputable bank equivalent to the same amount.
- Money to be used for intended purpose only

OUTLAWED PRACTICE

- Corrupt practice
- Fraudulent Practices
- Collusive Practices
- Conflict of interest
- Disclosure of confidential information
- Splitting of orders
- Procurement contracts with public servants
- Inappropriate influence of evaluations

PROCUREMENT CONTRACTS

- Accounting officer to ensure that complex and specialized contracts valued above KES. 5 Billion are first cleared by AG, the respective CS and the Cabinet
- Creation of procurement contracts confirmed by signing
- Changes to contract responsibilities not set forth in tender docs outlawed.
- Publication of procurement contracts by PEs mandatory and reported to PPRA
- Framework contracting applicable subject to prescribed restrictions in the form multiple awards and indefinite-delivery contracts

PROCUREMENT CONTRACTS CONT'D

- Performance security to be not more than **10% of contract value**
- Advance payment exceptionally allowed up to **20% with guarantee**
- Sub-contracting not allowed for **debarred firms**
- Contract **implementation team** required for every complex and specialized procurement
- Contract **progress reports** by procurement function on monthly basis to accounting officer.
- No contract price shall be **varied upwards within twelve months** from the date of the signing of the contract
- Termination of contract to be **approved by accounting officer**
- Contract close out **confirmed with certificate** immediately after completion.

DISPOSAL OF ASSETS

- Includes assets (real and immovable property)
- Addresses lacuna of limiting disposal to stores and equipment.
- Disposal of waste to incorporate green issues
- Technical expert to take into account real market prices and set up reserve price.

ROLES OF THE BOARDS/COUNCILS

The council should:

- Establish a procurement policy that promotes sustainability, high ethical standards and best practice.
- Establish a **procurement function** in the organization, which is managed by competent and professionally qualified persons of integrity
- Approve the **annual procurement plan**, which should be aligned with the **annual budget**.
- Periodically review** the implementation of the procurement plan
- Receive a **quarterly report on the actual expenditure** compared to the budget and demand explanations from management on any variances
- Ensure that the Committee responsible for risk monitors **risks in the procurement process** and that they are addressed in accordance with the organization's risk management policy.
- Ensure that there exists a clearly **documented audit trail** of procurement activities.

OFFENCES AND SANCTIONS

New prohibitions and offences.

- *divulge confidential information under section 67 – sign confidentiality form;*
- *inappropriately influence tender evaluations;*
- *split procurements;*
- *committing a fraudulent act;*
- *knowingly withholding the notification of award to a successful and unsuccessful tenderer;*
- *sign a contract contrary to the requirements of the Act or Regulations made thereunder; or*
- *contravening a lawful order of the Authority or the Review Board.*

Protection from personal liability and indemnity if offence committed in good faith

- *If adjudged innocent*
- *Free legal assistance to employees subject to a prescribed maximum*

Legal Framework

□ The key Governance instruments include:-

- The Constitution-Article 227
- The Public Procurement & Assets Disposal Act 2015
- Public Service (Values and Principles) Act 2015 – Sec 9
- Fair Administrative Actions Act 2015 – Art. 47 of Const.
- Public Private Partnership Act 2013
- Public Finance Management Act 2012
- Supplies Practitioners Management Act 2007- Art. 232
- Anti-corruption and Economics Crimes Act 2003
- Public Officer Ethics Act 2003
- National Police Service Act 2012
- Regulations to be developed within 1 year from the commencement date of the PPADA, 2015
- Manuals & Standard Tender documents

The End

Thank you