

SEALING CORRUPTION LOOPHOLES IN PUBLIC PROCUREMENT



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Presentation outline

- Definition
- Legal and Regulatory Framework
- Purpose of the Act
- Internal Organization of the Procuring Entities
- Overview of corruption in public procurement
- Corruption risks in the procurement process
- Corruption prevention strategies
- Offences under the PPDA,2005
- General Penalty
- Offences under the ACECA

1.0 *Definition- (What is procurement)*

- According to PPDA public procurement constitutes of acquisition of goods, assets, works and services and livestock or a combination by Purchase, Rental, Lease, Tenancy, Hire purchase, License, Franchise or any other contractual means.
- It includes but is not limited to any acquisition by which any public funds are utilized.
- Public Funds includes monetary resources appropriated to Procurement entities through the budgetary process, as well as extra budgetary funds, including aid, grants and credits, put at the disposal of Procuring Entities by Foreign donors, and revenues of Procuring entities

Procurement process

- Need Identification and procurement planning
- Specification of requirements
- Identification of potential bidders
- Soliciting bids and proposals
- Evaluation of bids and proposals
- Contract Award
- Negotiation* (RFP & D.Contracting)
- Contract Implementation
 - Post Award Orientation
 - Contract Performance
 - inspecting, Dispute Resolution, Payment
- Storage (including distribution) and inventorying
- Disposal of obsolete, surplus and unserviceable assets

Supply Chain Management

- There is need to go beyond the traditional public entity enterprise by assessing the impact of all players/stakeholders involved in ensuring goods, assets, works and services reach the ultimate consumer (Supply Chain). These include Suppliers/ contractors, sub contractors, project managers, Suppliers' suppliers, end consumers, the community, financiers/ donors, political persons, advertisers , Insurance Firms, etc.
- **This Public procurement process, contract management, Disposal, Supply Chain Mgt (including inventorying and distribution) is guided by laid down procedures**

Legal and Regulatory Framework

- PPDA,2005
 - PPDR,2006
 - MANUALS
 - CIRCULARS
 - STANDARD BIDDING DOCUMENTS
 - PPOA GUIDELINES
- NB/ DONOR FUNDED GUIDELINES**

Purpose of the Act: to establish Procurement Procedures that;

- Promote competition and fair treatment to competitors – level playing ground, open bidding the preferred procedure, ARB, performance specs.
- Maximize economy and efficiency – alternate bidding procedures, aggregation of items.
- Promote integrity and fairness
- Increase transparency and accountability – cross sectional approach, records, reports.
- Increase public confidence –contract awards to PPOA website, opening of bids.
- Facilitate local industry and economic development – margin of preference

Internal Organization of the Procuring Entity

Consists of the various players:

- Accounting Officer
- The User Department
- Procurement Unit
- Tender Opening Committee
- Evaluation Committee
- Tender Committee & Procurement Committee
- Negotiation Teams
- Contract Management Committee (RFP, D. Contracting)
- Disposal Committee

Oversight Role in Procurement

The PPDA, 2005 Creates an autonomous Public Procurement Oversight Authority (PPOA)

- Ensuring compliance with the Act and the Regulations
- Assist public entities in Implementation and operation of the public procurement system
- Ensuring professionalism in the public procurement function
- Monitoring performance of the procurement system and report on its performance
- Initiate procurement policy and propose amendments to the Act/regulations
- Prepare and submit an annual report on the performance of the Public Procurement to the minister for finance who shall table in the house (section 20 (1))of the PPDA, 2005.

Key Features- Authority's power to ensure compliance

- Public entity must provide the Authority with information relating to procurement as the Director- General may require in writing
- Director- General may order an investigation of procurement proceedings to determine the level of compliance with the Act by a Public body and he can take the following action:
 - Direct the public entity to rectify the contraventions
 - Cancel the procurement contract
 - Terminate procurement proceedings
 - Prepare and submit a summary of his/ her findings and recommendations of the public entity to KACC

Some of the features of the PPDA, 2005

- **Security related procurements brought under the Act – using dual list; (agree annually on the restricted list with the PPOA)**
- **Better Management and Disposal of Public Assets**
- **Removal of Board Members and Civic leaders from the procurement process**
- **Preference and reservations for local suppliers/ contractors**
- **Transfer of procurement responsibility and registration of procurement agents**
- **Provision of various procurement procedures**
- **Punitive penalties for contravention of the Act and Regulations**
- **Provision of grievance settlement mechanism thro' the Public Procurement Administration Review Board.**

Are the procurement procedures tamper - proof?

- Is it possible to rig procurement by including vague or ambiguous terms in procurement specifications, or indeed to omit certain essentials.
- Is it possible for public officials may resort to alternative procurement methods through hoodwinking the tender committee and fake written reasons?
- Is it also possible for bidders to collude among themselves or with a procurement officer and set abnormal prices in a given tender in order to win it?
- Is it possible for procurement officers to leak information on a given tender to bidders without the procurement authority's knowledge.

Overview of corruption in public procurement

- An estimate of 30-35% (World Bank) of procurement funds is lost through procurement malpractices; In Kenya procurement accounts for about 10 % of our GDP (approx. Ksh. Kshs. 2,099.79 billion in 2008) i.e. Kshs. 209.9 billion annually
- Incidences of manipulation of the process are confirmed by various studies, e.g.. the PPOA found that most of the tendered products/services are procured with a mark-up of 60 per cent on the market price
- Most cases of grand corruption as highlighted in the media are procurement related
- According KACC about 80 percent of corruption in Kenya is linked to public procurement.

How does a government officer obey the law, and, when called to task, retain the ability to stand up and say "my conduct was both legal and ethical"?

Corruption Risks – Administration Function

- Lack of a procurement policy; authority to approve procurement-initiation, orders/contracts, approval thresholds in the sub units, cash payment limits, custody of accountable documents, security of opened bids etc
- Low placement of procurement function
- Reporting
- Staffing; competency, deployment, leaves, promotions, professional body
- Constitution of procurement related committees (Sec. 26 (5 a&b)).
- Top level managers involvement in routine activities
- None involvement of users in the procurement process
- Prevalence of cash purchases
- Failure to use STD bidding Documents

Corruption Prevention - Administration Function

- Putting procurement governance instruments in place (manuals, policy etc)
- Placement of procurement function at a strategic level
- The Procurement Unit to be staffed with procurement professionals.
- The head of the procurement unit to be a procurement professional who shall report directly to the accounting officer or the head of the procuring entity – Section 4.3 of General Manual
- Tender Committee briefs to the accounting officer
- Quarterly reports by procurement committee to tender committee.
- Proper constitution of procurement related committees (Sec. 26 (5 a&b))
- Use the SBDs provided by PPOA

Corruption risks- Need identification & Procurement Planning

- Lack of Planning, unexplained delays, none compliance to Procurement plans. No bottom up planning process. Procurement plan not linked to the budget.
- Needs not demand driven - organizational requirements and stakeholder needs and issues, Inadequate analysis of the supply market
- Overstated physical requirement - Bullwhip effect (demand variably increases as one moves up the chain)
- Exaggerated price projections
- Procurement initiated to favor previous suppliers/contractors
- Advance release of relevant information to particular supplier
- Selection of uneconomic projects because of opportunities for financial kickbacks and political patronage

Corruption prevention - Need identification & Procurement Planning

- Bottom up approach to procurement planning
- Link procurement plan to the budget
- Timely procurement planning.
- Market intelligence
- Demand driven procurement plans

Corruption risks- Specification & Sourcing

- Specifications designed to favor a particular provider, Use of brand names, Incomplete specifications, vague specification (Lock- out), specifications prepared by a potential bidder
- Delay requisitions to create false emergencies
- Procurement Initiation approved by persons without delegated authority
- Sourcing not carried out by procurement staff.
- Selective invitation of pre-qualified suppliers, various firms owned by one bidder
- Restricted advertising or insufficient notice , Limited bidding period. Advertisement limited to certain media e.g. Regional papers, publication in a paper with the smallest circulation but still meets the minimum requirements, invite companies with a completely different area of specialisation or without any experience in the relevant field, make sure that only a limited number of the invited enterprises receive the invitation, and then put the blame on the mail system, Making the tender public during holiday time, when most administrative offices are closed,
- Tender documents without vital information e.g.BQs missing, supply and delivery, proposed contract period
- No evaluation criteria,put much weight on one particular criteria of evaluation met by the bribing company only, disqualify unwanted suppliers, for instance on ethical or political reasons). If this fails, the tender may be delayed or recalled on grounds of changed priorities, shortage of finance, or a larger/smaller scope of work

Cont: Corruption risks- Specification & Sourcing

- design the tender so that particular qualifications are requested, representing comparative advantages held by the bribing company. The protected company will thus offer the lowest price, and the contract award is defensible.
- Failure to observe the procurement thresholds. Restricted tendering and D. contracting not approved by TC. A common justification –
 - preference for a previous supplier whose performance has been satisfactory, -
 - Working with known and trusted faces
 - the uniformity of spare parts and familiarity of operators with similar equipmentNB/These advantages may be alleged and cover a corrupt transaction
- Opening bids before the deadline. Bids submitted and accepted after the deadline.
- Sale of confidential information (specific property rights, pricing structures) - “information brokers” operates between the procurement entity and the companies involved, selling and buying facts and figures,
- Failure to respond to requests from suppliers/ contractors for clarifications in time, answering queries on phone
- Different location for receiving and opening bids, late bids accepted, security of opened bids - exposing it to risks of undisclosed / illegal tampering or modification by any party

Cont: Corruption risks- Specification & Sourcing

➤ **Collusive Practice by supplier**

- **Subcontract bid rigging** - bidders agree not to submit bids, or to submit cover bids that are intended not to be successful, on the condition that some parts of the successful bidder's contract will be subcontracted to them. In this way, they "share the spoils" among themselves.
- **Bid suppression** - some of the bidder agree not to submit a bid so that another conspirator can successfully win the contract.
- **Complementary bidding/ cover bidding/ courtesy bidding** - occurs where some of the bidders bid an amount knowing that it is too high or contains conditions that they know to be unacceptable to the agency calling for the bids.
- **Bid rotation** - bidders take turns being the designated successful bidder. A form of market allocation, where the conspirators allocate or apportion markets, products, customers or geographic territories among themselves.
- **Loser's fee** - It is a condition (express or implied) of a tender that each unsuccessful tendering contractor will bear its own tender costs. Prior to tender submission, the competing contractors secretly agree that they will each include in their tender price an agreed additional sum of money representing the total estimated tender costs of all the competing contractors. Whichever contractor is awarded the contract will then divide this sum of money between all the unsuccessful contractors who will thereby recover their tender costs.

Corruption Prevention - Specification & Sourcing

- Team based approach in preparation of specifications, bills of quantities, TORs
- Use of performance based specifications, samples, brochures, standard specifications etc
- Firm providing specifications/Terms of Reference not to bid
- Delegation of authority to approve procurement initiation to be in writing. Establish the approval thresholds. Maintain specimen signature of persons with authority to approve.
- Procurement to be undertaken by the procurement staff.
- Widen the bidders base. Establish a Criteria for selection of firms from prequalified list.
- Provide sufficient information in the bid documents. objective and quantifiable evaluation criteria, Pre bid meetings/ site visits, respond to queries in writing and to all bidders
- Security of opened bids; defined document management and control procedures including physical security of submissions, restricting access to controlled documents, secure working areas,

Corruption risks – Evaluation & award

- Lack of evaluation criteria (Sec. 66(2, 3a)
- Substitution of evaluation criteria, criteria not applied uniformly
- Bid evaluation committee members not having the “technical expertise necessary” to properly evaluate bids.
- Entertainment of bidders and other intermediaries with vested interests during the evaluation process
- Award of contracts before post qualification/due diligence is carried out
- Evaluation of bids by tender committee.
- Awarding contracts to companies set by own staff
- Bribes are paid to obtain promises of changes and additions of the work, so that the bidder can win the bid with an inferior offer.
- Interference (politicians, top management)
- Bid rigging ; substitution of documents
- Litigious tendencies to delay process
- Ineffective market research

Corruption prevention - Evaluation & award

- Pre-determined evaluation criteria
 - Involvement of technically competent members, experts and observers
 - Frequent review of awards and orders
 - Continuous suppliers/ contractors appraisal
 - Post qualification/ due diligence for recommended firms – to ascertain;
 - Submission of falsified documents
 - Fraudulent Certificate of Previous Experience
 - Forgery of Signatures
 - Falsified Resume
 - Submission of Falsified Financial Statements
 - Lack of consent of the consultants included in the bid
 - Suppliers with diff names but same phone numbers, directors etc.
- Forms :** Company office checks, Site visits, product testing, clarification of methodology and approach to delivery, reference check, (customers, banks etc) etc.

Corruption prevention - Evaluation & award

NB/

- applying the same process to all site visits i.e. allocating the same time to each visit, inspecting the same products or services and asking the same questions
- organizing and paying for your own travel and meals – hospitality is an integrity issue
- maintaining a record of each visit – who attended, who you spoke to and the answers you received
- making a formal note of your findings for each visit. These are part of the evaluation .Not letting the visit give the supplier the opportunity to enhance or add to its original tender.
- Reject unsolicited communications/Isolation of evaluators
- Undertake structured and well-documented market research
- Declaration of interest
- Inform all bidders, successful and unsuccessful, on the outcome of the award (simultaneously).

Corruption risks - Contract Implementation

NB/This is the primary part of the procurement process that ensures that the Government gets what it pays for;

- Accept/receive less quantity or quality or type other than what was ordered
- Delay in acceptance of goods
- Delays in delivery or performance by suppliers/ contractors
- Proposal for impaired/ weak controls thus reducing costs and time for contract execution
- Unjustified price variations and contract amendments
- technical expertise can be bribed to ignore work that is left out of the contract

Corruption risks - Contract Implementation cont.

- Bribery of Stores staff by competing suppliers to reject goods from their business rivals
- Goods or services not being used, or being used for purposes inconsistent with intended purposes.
- Diversion of goods for personal use or resale/ “sister projects”
- Unclear role of government technical representative; contractor to manipulate decisions regarding modifications or additions to the original project,
- No joint agreement between the procuring entity and the contract management agent
- Contract manager may change terms and conditions of contract without procurement entity’s approval e.g. issue instructions for contract to stop, change contract period, authorize use of subcontractors e.t.c
- Replacement of staff given in the request for proposal/tender document
- Inadequate surveillance and monitoring of contracts.
- Goods returned to supplier yet no controls to ensure replacement, credit notes etc.

Corruption prevention - Contract Implementation cont.

- Post award orientation- mutual agreement
- Partnering; a dispute resolution method
- Goods inspections and acceptance committee should be established and certify receipt of all goods
- Enforcement of contractual conditions
- Giving written instructions to suppliers/ contractors
- Involvement of independent experts for receipt of complex equipment
- Develop contract administration plans- define expected output, methodology etc

Cont.

- Maintain accurate records of events during the contract period to ensure compliance with contract terms and conditions.
- Customer satisfaction survey
- Procurement entity technical representative to be appointed by letter, his role and limitations to be defined.
- Quality assurance auditors, technical inspectors etc
- Quarterly meetings with top management of contractor and proc. entity.
- Contract variations to be subjected to tender committee/procurement committee

Corruption risks - Payments

- Payment before delivery (unsecured)
- Payment for goods, services or works not received/false claims
- Selective payment of suppliers
- Full payment for partial delivery
- Delayed payment
- Deliberate loss of supporting documents – double payment
- Excessive number of signatures required to approve progress payments

Corruption prevention – payments

- Establish clear payment procedures
- Generate authentic performance reports for goods, services and works from users.
- Formulate a creditors payment policy
- Advanced payment guarantees
- Performance Guarantees
- Procurement unit to certify receipt of goods/ works and services

CORRUPTION RISKS - STORE MANAGEMENT, INVENTORYING AND DISTRIBUTION

- Lack of a clear policy on stores Mgt
- Lack of title documents – log books, title deeds
- Poor maintenance of assets
- Lack of proper records for receipt, issue and issue of stores
- Lack of segregation of duties – receipt and issue of stores, poor description of duties, no staff rotation
- Lack of separation between physical receipt and issue of stores. Limited storage facilities
- Lack of independent physical verification of stores
- Improper authorization for issue of inventory
- Failure to return government items upon ceasing employment.

CORRUPTION PREVENTION - STORE MANAGEMENT, INVENTORYING AND DISTRIBUTION

- Written guidelines – authorization levels, frequency of stock verification, procedure for returns etc
- Inventory and Public Property Management shall be delegated to Inventory Management unit and in the absence of such a unit by the Procurement unit of the Procuring Entity.
- Ensure title documents maintained
- Maintain appropriate store records- standard records
- Periodic stock verification/ inventory verification
- Earmarking/ coding
- Staff trained in good storage and distribution practice, Job rotation, proper handing over
- Physical security of stores, burglar proof, fire prevention, cleanliness
- Protective gear for staff
- ensure that issued stores/assets are being used in the best interest of the Procuring entity
- Make available for disposal any assets, property and stocks which cannot be utilized through normal supply channels.
- Recording and control equipment should be calibrated and checked at defined intervals by appropriate methods

Disposal – Perception

- ‘It’s OK to sell this stuff to mates, because the proceeds go back into the social club for all of us to share.’
- ‘It’s only just this once — it’s not as if I was ripping off the system by making a habit of it.’
- ‘Nobody at work will use it, so it’ll only go to waste if I don’t take it to use at home’.
- ‘My supervisor let me take some offcuts home last time, so he probably won’t mind if I just take this lot.’
- ‘I won’t bother asking the manager because she’s too busy to worry about small things like this.’
- ‘Everyone else does it, why shouldn’t I?’
- ‘There aren’t any rules about what to do with scrap, so I can’t be breaking any.’

Disposal – why should we be concerned?

- Assets and materials are purchased by a government agency to be used for the public benefit.
- Whether expensed as consumables or officially recorded as assets, such items remain the property of the agency (on behalf of the public) throughout the whole cycle from acquisition to disposal.
- Even at the point of disposal, the agency retains ownership of these items and, as the owner, has the sole right to decide their fate.
- Depriving the agency of any item it owns, or of any potential benefits derived from that item, is stealing — which amounts to official misconduct and is reportable to the CMC.
- Even though an item may be of low materiality, its unauthorized disposal may be seen as corruption

Disposal -Signals of corruption

- Overstocking
- Poor maintenance of storage areas and facilities
- Unauthorized disposal
- Disposal of recently procured items before expiry of their useful lifecycle. Improper writing off.
- Deliberately diminish the value of an item.
- Disposal at a throw away prices, below realizable market value
- Cannibalization before disposal
- Delays in disposal such that items deteriorate in value and become an eyesore
- Conflict of interest in the disposal process
- Misappropriation tolerated because 'it's always been the practice'

Disposal - Corruption prevention

- Have a stock control policy that specifies items classification, desirable stock levels - (safety levels, re-order levels, maximum and minimum levels)
- Routine verification of stores
- Employing experts in valuation of items- establish scrap value
- Writing off items after disposal certificates have been issued
- Timely disposal of items as they become due
- Computerize stores systems
- Declaration of personal interest
- Security and vigilance over used assets.

Offences under the PPDA2005

- Obstructing a person from carrying out duties under the Act.
- Misleading or lying to a person carrying his work under the Act
- Delaying without justification the opening or evaluation of bids or awarding a contract.
- Exerting undue pressure or influence on the Tender/evaluating Committee or its members
- Opening any sealed bid before time for public opening.
- Conflict of interest Sec.43
- Breach of confidentiality Sec.44

General Penalty- PPDA2005

- Individual - fine not exceeding Kshs. 4 million or 10 years imprisonment or both
- Public officer- apart from the above fine,debarment from holding public office, private individual shall be debarred
- Corporate body- fine not exceeding Kshs. 10 million
- Disqualification from contracting
(comment on the adequacy of the penalties)

Penalty - ACECA

Section 48

- A person convicted of corruption under the ACECA shall be liable to –
- (a) a fine not exceeding one million shillings, or to imprisonment not exceeding ten years , or to both; and
- (b) an additional mandatory fine if, as a result of the conduct that constituted the offence, the person received a quantifiable benefit or any other person suffered a quantifiable loss.

Penalty - ACECA

Section 49.

- In Prosecution of the corruption offences, it shall be no defense that the receiving, soliciting, giving or offering of any benefit is customary in any business, undertaking, office, profession or calling.

Conclusion

- We are called to streamline internal processes and work in collaboration with partners to efficiently execute the anti-corruption mandate in the entire supply chain.