



Institute of
Economic Affairs

PUBLIC PROCUREMENT IN KENYA:

Analysis of the Auditor General's Reports

Public Procurement in Kenya: Analysis of the Auditor General's Reports

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Published by

Institute of
Economic Affairs

With Funding from



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ISBN No. 9966 - 1922 - 8 - 8

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List of Abbreviations

ACECA	Anti-Corruption and Economic Crimes Act
CSO	Civil Society Organization
EACC	Ethics and Anti-Corruption Commission
MDA	Ministries Departments and Agencies
MoH	Ministry of Health
MoE	Ministry of Education
OAG	Office of the Auditor General
PPDA	Public Procurement and Disposal Act (2005)
PPAD	Public Procurement and Assets Disposal Act (2015)
PPOA	Public Procurement Oversight Authority
PPARB	Public Procurement Administrative Review Board

Acknowledgements

The Institute of Economic Affairs expresses gratitude to the authors of this study, Jackline Kagume and Noah Wamalwa, under the guidance of Kwame Owino, the Chief Executive Officer.

We thankfully acknowledge the feedback and input by participants drawn from various organizations present at the peer review of this study. We acknowledge the useful input by John Mutua (Institute of Economic Affairs), Clare Amuyunzu (Africa Institute for Health and Development), Odanga Madung (School of Data), Benedict Omillo (East Africa Centre for Human Rights), Tolu Amondi (KCPF), Eastone Owino (Development Initiatives) and Victor Nyongesa (The Institute for Social Accountability).

In addition, we acknowledge the communications support by Oscar Ochieng (IEA) who provided the editing, design, and layout of this publication. We further appreciate the support of Collins Oyoo and Kipkogei Kemboi who provided programme and administrative support towards the successful completion of this project.

Lastly, IEA extends sincere gratitude to Hivos for the financial and technical support towards the development and publication of this study.

Executive Summary

Public expenditure through procurement of goods and services is an important avenue for ensuring the provision of public services in Kenya. The integrity of the entire process from tendering all the way to provision of the same services or delivery of the goods and their use is an indispensable indicator of the robustness of management of public resources and fidelity to the constitution of Kenya. These goals are best assured through an institutional framework for securing oversight by the legislature, adherence to value for money principles by all agencies that receive public money and by availability of orderly accounts to enable the Office of the Auditor General to render an opinion as required by article 229(5) and (6) respectively.

The country's total public spending is high considering the income level of citizens and the incidence of poverty that obtains in Kenya. Accountability for public spending and adherence to the rules of procurement are essential to reducing corruption in the form of procurement fraud or subversion of procurement law. This study confirms that the reports of the Office of the Auditor General (OAG) that there are violations of the law which not only undermine the effectiveness of public spending but also reveals waste of resources that should be spent to improve the public services.

This study has disaggregated the risks of procurement fraud and subversion of law by examining the 3 discrete stages of the procurement cycle namely, the Pre-tendering, the Tendering and the Post Award phases. The most profound insights generated from this disaggregation of the procurement process into discrete parts is that the most serious violations occur after the post award stages. Tracking the findings of the OAG for evidence on the risks that lead to systematic loss of public funds confirms the value of transparency to ensuring fidelity of practice of public procurement to the law.

In a comparative sense, the pre-tendering and tendering processes are more exposed to transparency than the Post Award phase. This is because the processes that are obscured from direct public scrutiny provide the most opportunity for perversion of the processes. This demonstrates that the egregious violations that are revealed in the reports of the Office of the Auditor General are the result of strategic behaviour by officers managing the process and their counterparts who are providers of goods and services.

Focusing on the accounts for the Ministry of Health and the Ministry of Education, the survey confirms that there are pervasive and consistent violations of law throughout the financial years from 2014-2016 and that these violations have led to financial losses that altogether add up to billions of shillings. The share of accounts receiving adverse opinions in those three years was improved but the quantum of funds that they reflect underscores the fact that the procurement process faces significant challenges for ensuring accountability in the utilization of public funds in Kenya.

The study concludes with recommendations aimed at strengthening the oversight of public procurement as an avenue for raising the effectiveness of public service delivery for Kenya. Among the prescriptions for sealing the opportunities for corruption in public spending are increased transparency in the entire public procurement tendering cycle, avoidance of broad confidentiality clauses in procurement mechanisms for raising alerts for complicated and huge variations in ongoing tendering projects. Most of the fixes do not require significant technical amendments to law but a mere adherence to transparency and open contracting in Kenya.

Introduction

Public procurement plays a pivotal role in the economic development of any country. In Kenya, it is the means through which government spends revenue raised annually, for the implementation of public service delivery. As such, a public procurement system that is economically inefficient invariably undermines the government programmes for economic growth. Cognizant of this fundamental role, Article 227 of the Constitution of Kenya mandates Parliament to prescribe a framework within which policies relating to procurement and asset disposal shall be implemented. Specifically, it requires that any state organ or public entity contracting for goods or services must do so within a system that is fair, equitable, transparent, competitive and cost-effective. The Constitution further establishes a number of oversight bodies and mechanisms to ensure adherence to these requirements. Key among these is the Office of the Auditor General, the Parliamentary Oversight Committees and the Ethics and Anti-corruption Commission.

The Office of the Auditor General (OAG) is established as an independent office under Article 229 of the Constitution of Kenya. The office is required to audit expenditures of all government Ministries, Departments and Agencies (MDAs) and confirm that public resources are applied lawfully and effectively. It has a primary oversight role of ensuring accountability between the three arms of government (the Executive, Legislature and Judiciary) as well as County Governments, Constitutional Commissions and Independent Offices. The Constitution mandates the office to audit and report its findings to the National Assembly, Senate or relevant County Assemblies. This constitutional mandate requires the OAG to not only look at fiscal accountability, but also to confirm whether programmes implemented lead to the planned results and outcomes.

Reports of the Auditor General over the past have consistently revealed irregularities in the use of public funds, as well as glaring corruption in the public sector. Most of the misappropriations reported are linked to breaches in procurement requirements. Corruption has become a major obstacle to socio-economic development in Kenya, both at the national and county levels of government. In the most recent Auditor General County reports for financial year 2015/16, the Auditor General revealed widespread misuse of public funds through weak financial controls and failure to properly account to funds spent in various County Assemblies. Anomalies such as failure to adhere to procurement laws, breach of the Public Finance Management Act, disparities in revenue collection and the amount taken to banks and abuse of office by county executives and assemblies are cited in the reports.

A direct link exists between accountability and decreased corruption. According to the World Bank (2009), accountability is the degree to which governments have to explain or justify what they have done or failed to do. According to the World Bank, more transparency in governance should mean less scope for corruption, in that dishonest behaviour becomes more easily detectable, punished and discouraged in the future.”

The direct costs of corruption include loss of public funds through misallocations or higher expenses and lower quality of goods, services and works. Those paying the bribes seek to recover their money by inflating prices, billing for work not performed, failing to meet contract standards, reducing quality of work or using inferior materials, in the case of public procurement of works. This results in exaggerated costs of goods and services and a decrease in quality.

About the Overall Project ‘Civic Engagement for Open Contracting’

The IEA’s study on public procurement and loss of public funds is part of a larger global initiative on promoting civic engagement for open contracting. “Open Contracting” is about publishing and using open, accessible and timely information on government contracting to engage citizens and businesses in identifying and fixing problems”. The underlying principle for open contracting is promoting disclosure of public contracts through all the stages of public procurement.

Transparency of government transactions is best manifested through the procurement information and contract data sets made available to the public. Open contracting involves the full chain of government contracting, from procurement of goods, works, and services for citizens, to concessions of natural resources. It starts at the planning stage, and covers tenders, awarding, and implementation of all public contracts. The IEA’s approach for analysis of the Auditor General’s reports is based on the recognition that the reports provide a good and accurate indicator of the extent of adherence to public procurement regulations. Generating knowledge on public procurement findings per the Auditor General’s reports will provide useful insights for advocacy in terms of areas that require improvements if transparency in public contracting to be enhanced.

According to Hayman, promoting transparency in public procurement processes is ultimately beneficial to everyone. For government, open procurement processes will deliver better value for money and reduce the losses incurred from stalled and substandard projects. The private sector would also benefit from fairer competition facilitated by transparent public contracts. Citizens who are the main beneficiary of government projects will benefit from higher quality goods and public services provided by government.

1.1 Objectives of the Study

The objectives of this study are to:

1. Examine the public procurement and contracting process in Kenya and establish its strengths and weaknesses
2. Analyze procurement related breaches highlighted by the Auditor General’s reports
3. Track systemic loss of public funds through procurement
4. Generate knowledge on high risk stages of the public procurement process for advocacy by CSOs

1.2 Methodology

The overall approach in undertaking this study comprised an analysis of relevant documentation and key consultations. The main sources of data for the study were:

1. Reports of the Auditor General on the financial statements of National Government for financial years 2013/14, 2014/15 and 2015/16
2. Annual Expenditure Reports of the Office of the Controller of Budget 2013/14, 2014/15 and 2015/16
3. Various Statutes including the Public Procurement And Assets Disposal Act, Anti-Corruption and Economic Crimes Act, Bribery Act, Public Audit Act
4. Other relevant reports

Reports of the Office of the Auditor General provided the main source of data for this study. Education and Health sectors were selected as the main focus areas, based on the size of their annual budgets and their critical role in ensuring public welfare, as two of the most critical public service delivery actors.

For each of the sectors, the OAG reports provided data in the following structure:

1. Overall opinion of the Ministry by the OAG
2. Assessment of all procurement related violations highlighted in the report
3. Specific project in question
4. Amount queried
5. Violations by Procurement stage and sub-stage
6. Classification of procurement issue

This data was then analysed to provide an assessment of the public procurement areas associated with the highest violations and related corruption risks.

The Controller of Budget reports provided data on the annual expenditure reports of Ministries, Departments and Agencies, against which misappropriated funds related to procurement violations were measured. Relevant statutes and other reports also provided critical information on the regulatory and institutional framework for public procurement Kenya.

1.3 Organization of the Paper

This paper is organized in five sections. Part 1 provides an introduction to the study and highlights the key objectives informing the project. Part two discusses the legal and institutional frameworks for public procurement in Kenya, focussing on the main statutes regulating public procurement, as well as the bodies mandated to oversee public contracting processes. Part three discusses procurement practice in Kenya, looking at Corruption risks in the public procurement cycle. Part 4 provides an analysis of the findings of the Auditor General's reports on procurement

for the Ministries of Health and Education. Part 5 provides comparative perspectives in addressing procurement related corruption in other jurisdictions. Part six concludes the study and provides key recommendations.

2.0 Legal and Institutional Frameworks for Public Procurement in Kenya

2.1 Policy and Legislative framework

The Public procurement system in Kenya has undergone significant developments. The system had no formal regulations in the 1960s. Treasury Circulars for procurement purposes were implemented between the 1970s and 1990s. In 2005, the first Public Procurement and Disposal Act (PPDA) was enacted followed by the Public Procurement and Disposal Regulations (PPDR) in 2006. Following the entrenchment of procurement in the Constitution of Kenya 2010, these laws were repealed by the enactment of the Public Procurement and Assets Disposal Act (PPAD) of 2015 and the attendant Public Procurement and Disposal Regulations (PPDR). These legislations provide a strong legal framework on which the fight against corruption in public procurement is anchored.

The PPAD Act 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. The PPAD and Regulations cover goods, works and services for all procurement undertaken using public funds. The legal framework is complemented with a series of Standard Tender Documents (STDs) covering procurement of goods, works and services.

Besides the PPAD Act, a number of statutes also have provisions that regulate public procurement processes in Kenya. These include the Anti-Corruption and Economic Crimes Act (ACECA), The Bribery Act, The Public Audit Act, The Public Finance Management Act and the Law of Contract Act.

2.2 Relevant Institutions

The PPAD Act 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). PPOA is established as the supreme public procurement oversight body in the country. 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 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.

The Office of the Auditor General is established as an independent office under Article 229 of the Constitution of Kenya. It has a primary oversight role of ensuring accountability between the three arms of government (the Executive, Legislature and Judiciary) as well as County Governments, Constitutional Commissions and Independent Offices. The Constitution mandates the office to audit and report its findings to the National Assembly, Senate or relevant County Assemblies. Article 229 (6) further tasks the office to ensure that public resources are applied lawfully and effectively.

The Ethics and Anti-Corruption Commission is also established as one of the key oversight institutions in the Kenya. Its functions are prescribed under Article 252 and Chapter six of the Constitution of Kenya. The Commission is required to develop and promote standards and best practices in integrity and anti-corruption, as well as to investigate any acts of corruption and recommend the prosecution of any related acts. On average, the Commission receives between 4,000 and 5,000 complaints per year out of which 6 per cent involves public procurement irregularities which the Commission investigates and recommends prosecution as necessary.

Tender publishing portals and e-procurement form the last framework in place to facilitate integrity in Kenya's procurement system. In August 2014, the 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. The full benefits of this platform are yet to be realized with initial assessments indicating attempts at manipulation of the platform.

3.0 Procurement Practice in Kenya

Public procurement is the process of acquiring goods, works and services involving the use of public funds to accomplish specified public purposes. It begins with the identification of a need and ends with completion of the contract. The Kenyan procurement process as detailed in the Public Procurement and Assets Disposal Act and Regulations involves several steps. This includes identification of requirements; procurement planning; definition of requirements; determination of source; evaluation and selection of vendor; contract award; contract implementation; payment for goods and services; and disposal.

There are five different types of procurement. These include 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 most preferred method.

Section 45 (2) of the Anti-Corruption and Economic Crimes Act (ACECA) criminalizes the commission of breaches related to public procurement procedures. It provides: “An officer or person whose functions concern the administration, custody, management, receipt or use of any part of the public revenue or public property is guilty of an offence if the person:

- (a) Fraudulently makes payment or excessive payment from public revenues for sub-standard or defective goods; goods not supplied or not supplied in full; or services not rendered or not adequately rendered
- (b) Wilfully or carelessly fails to comply with any law or applicable procedures and guidelines relating to the procurement, allocation, sale or disposal of property, tendering of contracts, management of funds or incurring of expenditures; or
- (c) Engages in a project without prior planning.

Increased spending on government contracts magnifies the opportunity for corruption in public procurement. Detecting and preventing fraud in procurement requires an understanding of the basic elements of corruption in the process and the likely high risk areas. Corruption in public procurement covers an array of irregularities and illegal acts characterized by intentional deception. This fraud can take place at all points in the procurement process. To properly deal with ‘procurement corruption requires one to focus on the entire procurement process and develop an understanding of the high risk areas of the procurement process that are prone to fraud.

The table on page 15 illustrates a number of risk areas for corruption in the public procurement cycle in Kenya

Stage 1: Pre-tendering phase:	Needs assessment and market analysis:	<ul style="list-style-type: none"> • Lack of adequate needs assessment • Influence of external actors on officials decisions • Informal agreement on contract
	Planning and budgeting	<ul style="list-style-type: none"> • Poor procurement planning • Procurement not aligned with overall investment decision-making process • Failure to budget realistically or deficiency in the budget
	Development of Contract specifications	<ul style="list-style-type: none"> • Technical specifications are tailored for a specific company • Selection criteria is not objectively defined and not established in advance • Requesting unnecessary samples of goods and services • Buying information on the project specifications.
	Choice of procurement procedure	<ul style="list-style-type: none"> • Lack of proper justification for the use of non-competitive procedures • Abuse of non-competitive procedures on the basis of legal exceptions: contract splitting, abuse of extreme urgency, non-supported modifications
Stage 2: Tendering Phase	Request for proposal	<ul style="list-style-type: none"> • Absence of public notice for the invitation to bid • Evaluation and award criteria are not announced • Procurement information isn't disclosed and isn't made public
	Bids submission	<ul style="list-style-type: none"> • Lack of competition or cases of collusive bidding (cover bidding, bid suppression, bid rotation, market allocation)
	Bid evaluation	<ul style="list-style-type: none"> • Conflict of interest and corruption in the evaluation process through: • Familiarity with bidders over time • Personal interests such as gifts or future/additional employment • No effective implementation of the "four eyes-principle"
	Contract Award	<ul style="list-style-type: none"> • Vendors fail to disclose accurate cost or pricing data in their price proposals, resulting in an increased contract price (i.e. invoice mark0 /-ups, channel stuffing) • Conflict of interest and corruption in the approval process (i.e. no effective separation of financial, contractual and project authorities) • Lack of access to records on the procedure
Stage 3: Post Award Phase	Contract Management	<ul style="list-style-type: none"> • Abuses of the supplier in performing the contract, in particular in relation to its quality, price and timing: • Substantial change in contract conditions to allow more time and/or higher prices for the bidder • Product substitution or sub-standard work or service not meeting contract specifications • Lack of supervision from public officials and/or collusion between contractors and supervising officials • Subcontractors and partners chosen in an on-transparent way or not kept accountable
	Order and payment	<ul style="list-style-type: none"> • False accounting and cost misallocation or cost migration between contracts • False or duplicate invoicing for goods and services not supplied

Source: *Preventing Corruption in Public Procurement, OECD Report*

4.0 Study Findings

4.1 Overall Audit Results

The overall audit results as presented by the Office of the Auditor General’s reports provide a summary of the general assessment of the financial statements of all the ministries, departments and agencies. The expressed auditor’s opinion represents an overview of the financial records and provides an overall health check of the MDAs.

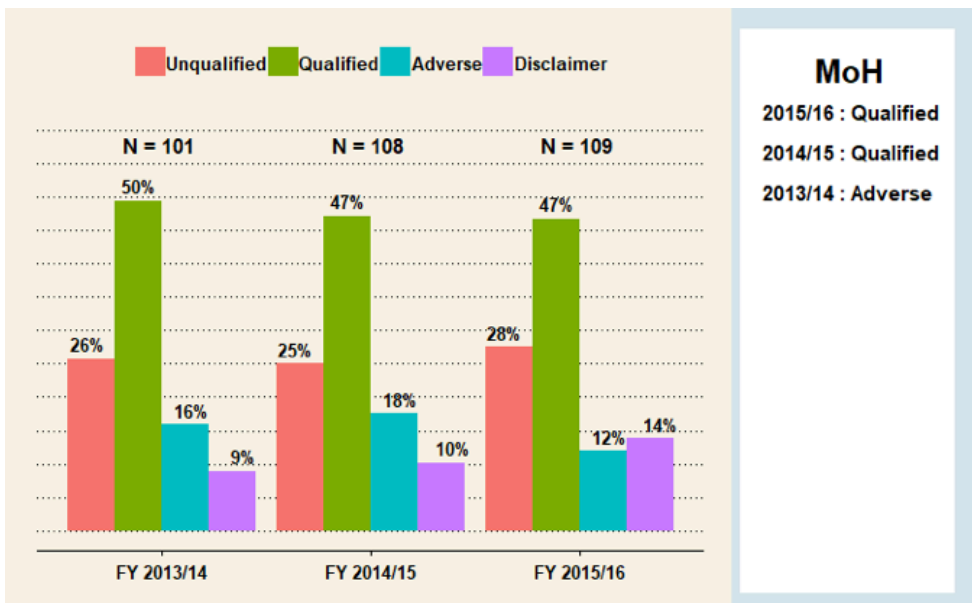
An **‘unqualified opinion’** is expressed when the financial statements give a true and fair view, in all material respects, the financial position of the MDA. It indicates that government procedures and regulations were lawfully applied and in an effective manner and this forms a clean bill of health.

A **‘qualified opinion’**, also known as “an except for opinion” is expressed when the auditor finds that the financial statements do not give a true and fair view of the financial position, even though the limitations are not material (major). This opinion is not a clean bill of health.

An **‘Adverse opinion’** is expressed when the auditor finds that the financial statements do not give a true and fair view of the financial position. The limitations are material (major) and pervasive.

A **‘Disclaimer of opinion’** is given when an auditor is unable to express an opinion due to the prevailing audit limitations, for instance, not being able to access financial records, which could portray potential gross violation of the law. In this case, it is not possible for the Auditor to establish whether expenditures were incurred lawfully and in an effective way. This is the worst bill of health.

Chart 1: Trends in the overall results by the auditor general for the MDAs, 2013/14 to 2015/16



Source: Auditor General Report 2015/16

The chart above illustrates the types of opinions expressed by the Auditor General on the financial records of all MDAs from the year ended 2013/14 to 2015/16. This includes the unqualified, qualified, adverse and disclaimer of opinion, with the clean opinion being the unqualified opinion and the worst being a disclaimer of opinion.

As illustrated in Chart 1, since commencement of devolution in 2013/14, the number of audited financial statements has increased from 101 to 109 in a span of three years. Majority of the statements (about half) have a qualified opinion which implies that the Auditor General finds audit limitations in most financial records, though not major to warrant an adverse opinion, cumulatively they present potential risk of systemic financial loss.

About a quarter of the statements give a true and fair view of the financial position, with a marginal increase from 26% (2013/14) to 28% (2015/16).

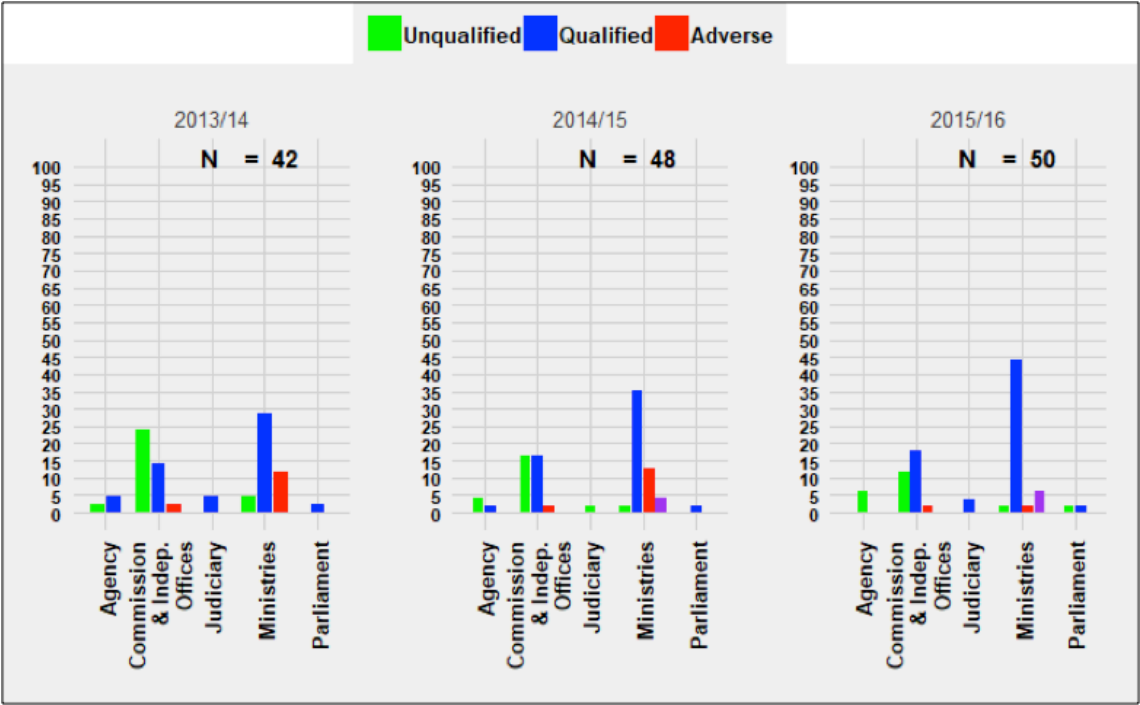
Adverse opinions are generally on a downward trend, from 16% (2013/14) to 12% (2015/16) which is positive, albeit the share is significantly high. It implies that in 2015/16, 14 of the financial records did not give a true and fair view of the financial position, had major audit limitations are material and thus misleading. This presents potential avenues of direct loss of public funds due to lack of accountability.

Noteworthy, statements with disclaimer of opinion increased from 9% to 14% and in 2015/16, they are above adverse opinions. This implies increase in gross violations of the financial law. The financial records are not accessible thus preventing the auditor from establishing whether expenditures were incurred lawfully and effectively.

Breakdown of Audit Opinions across Ministries, Departments and Agencies

The previous section the analysis focused on the breakdown of audit opinions by the number of financial statements assessed by the auditor general. This section further explores the audit opinions across the ministries, departments and agencies from 2013/14 to 2015/16 in order to ascertain the monetary value of each audit opinion across different MDAs and over the years.

Chart 2: Type of Audit Opinions across MDAs



Source: Auditor General's report

*The bar in purple represents disclaimer of opinion

In order to attach monetary value to the audit opinions, we begin by looking at the various types of opinions that each MDA obtained . Chart 1 above, illustrates the distribution of the total number of opinions across MDAs. It is shown that the number of MDAs have generally been expanding ; from 42 in 2013/14 to 48 in 2014/15 to 50 in 2015/16. The sum of the values for the bars under each year equals to 100%, such that the higher the bar the higher the number of opinions.

From 2013/14 through 2015/16, as can be observed by the towering blue bar, most qualified opinions are obtained under the ministries, 29% (12/42) in 2013/14; 35% (17 out of 48) in 2014/15 and 44% (22 out of 50) in 2015/16.

Given that Ministries, Departments and Agencies contain most of the statements and receive the bulk of the budget, obtaining a qualified opinion would imply wide spread violations of the rules and regulations pertaining public financial management thus a true and fair view of the financial position in majority of these agencies cannot be ascertained.

After the Ministries, Commissions and Independent offices are seen to have obtained the most qualified opinions; 14% (6 out of 42) in 2013/14, 17% (8 out of 48) in 2014/15) and 18% (9 out of 50), indicating consistency in the increase.

The red bar, which represents adverse opinions is seen to be relatively high in 2013/14 and 2014/15 in for The Ministries. Furthermore, the bar in purple which represents Disclaimer of opinion also happens to be highest in 2014/15 and 2015/16. This revelation suggests that Ministries not only have high tendency of poor recording keeping, they also have for major limitations preventing the Auditor general from forming an opinion.

An examination of the opinions across MDAs in the above section informs the evaluation of their corresponding monetary value. This is made possible by mapping the expenditure figures obtained from Office of the Controller of Budget and populating across different opinions across MDAs.

Chart 3: Trends in Total Budget across all MDAs with an Unqualified Opinion (KSh Billion)

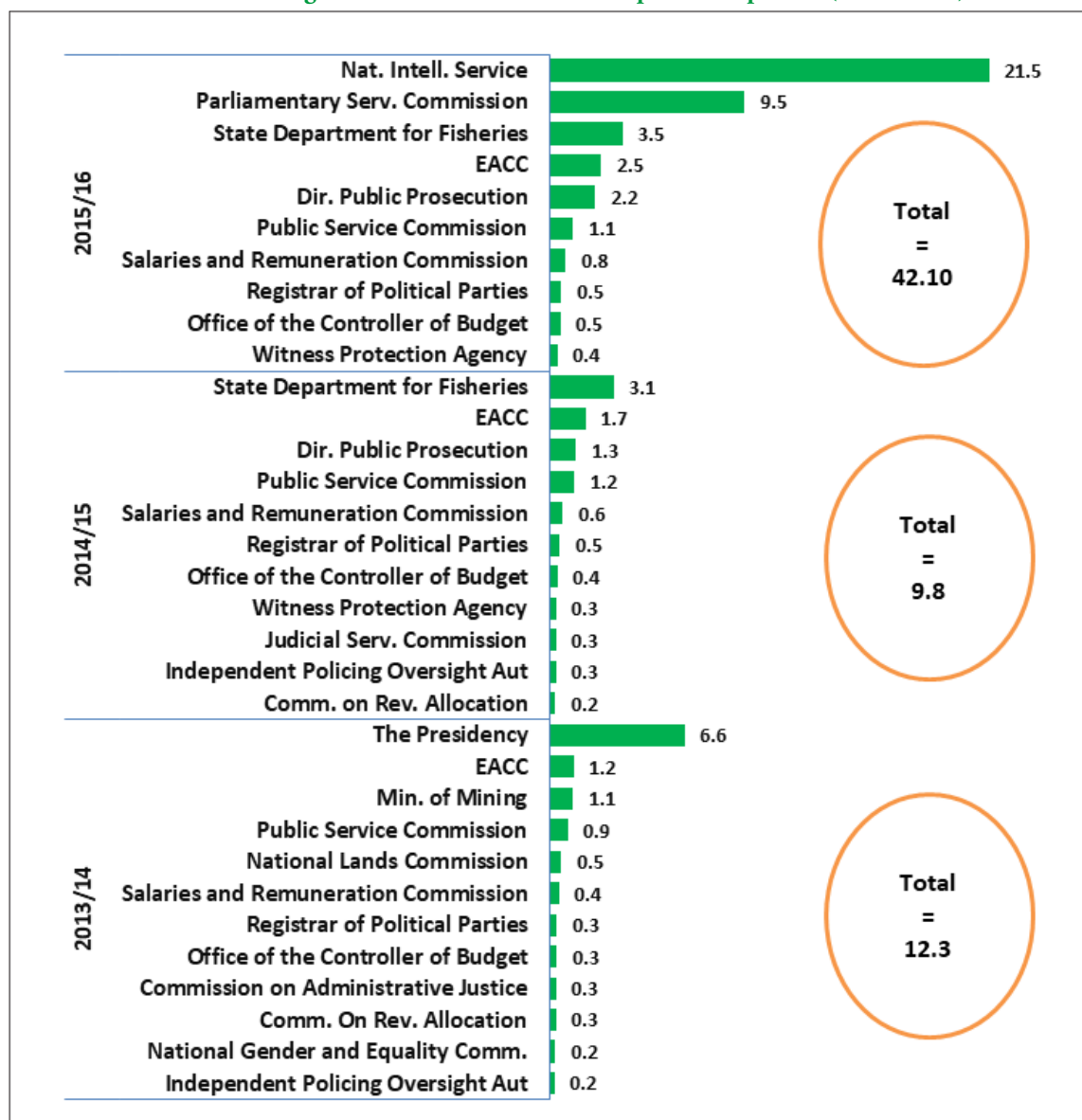
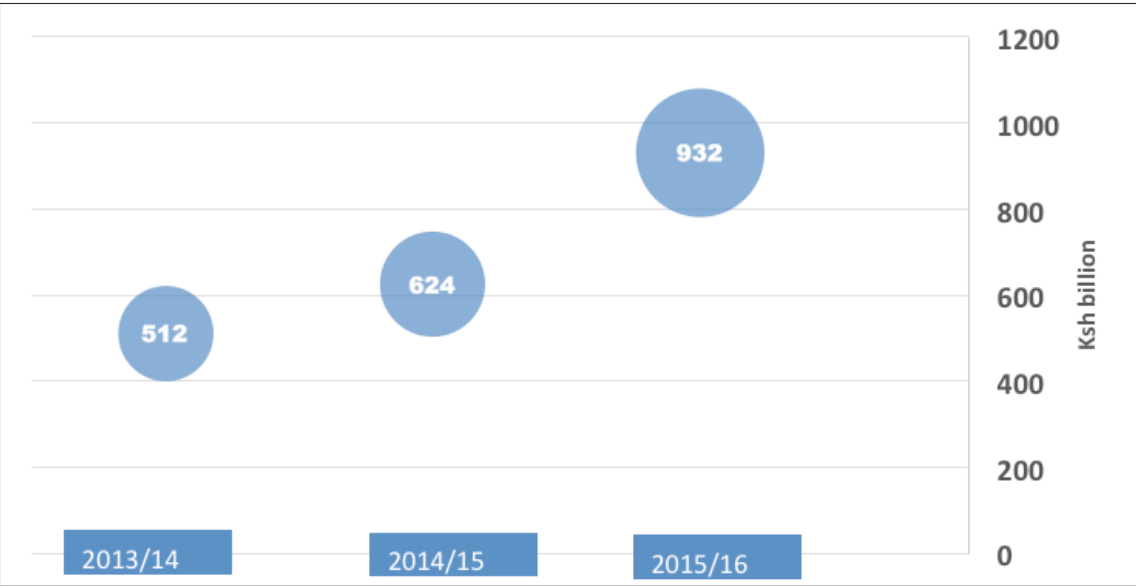


Chart 3 represents a list of MDAs that obtained an unqualified opinion, and their corresponding annual expenditure. From the chart it can be deduced that majority of the MDAs with a clean opinion are commissions and independent offices. The only state department with an unqualified opinion is the state department for Fisheries which happens to be a relatively small department in terms of the average budget that it is allocated annually. The combined annual expenditure for the above MDAs amounts to Ksh 12.3 billion, Ksh 9.38 billion Ksh 42.1 billion for 2013/14 through 2015/16 which is equivalent to 2%, 1% and 4% of the total expenditure respectively.

Chart 4: Trends in Total expenditure across all MDAs with a Qualified Opinion (Ksh billion)

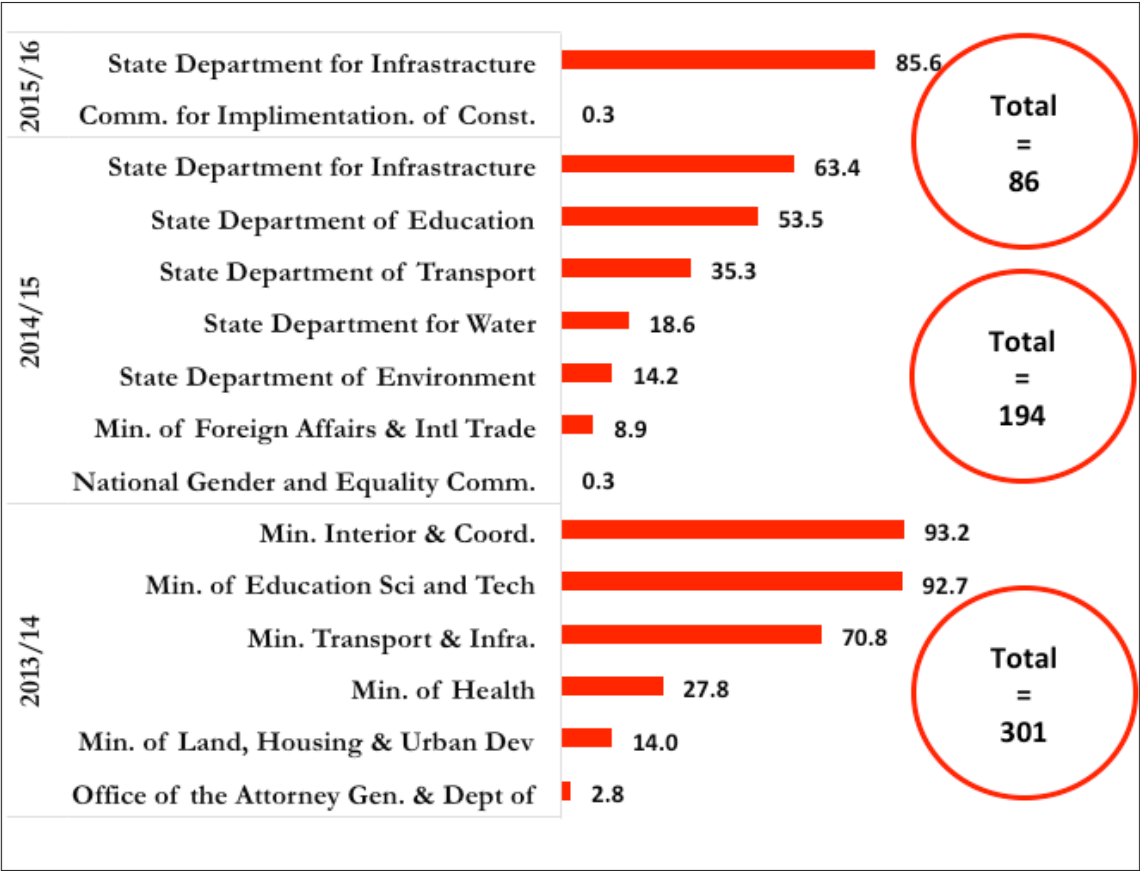


Source: Auditor General Report, various issues

Previous findings revealed that the qualified opinion is the most common across the majority of MDAs. Chart 4 provides a summary of the total sum of expenditure for the MDAs that obtained a qualified opinion—this is shown to be very significant and it increases over time from Ksh 512 billion to Ksh 932 billion, 82% rise. The size of the expenditure at this category is explained by the fact that this is the opinion for the majority of the Ministries who by virtue of their functions have relatively large budgets.

As a share of the total annual expenditure the above expenditure is equivalent to 95%, 80% and 82% from 2013/14 to 2015/16 respectively. The large share in terms of the expenditure for the MDAs with a qualified opinion further raises the likelihood of loss of the public funds through low level of transparency and accountability due to reduced level of compliance with financial rules and regulations.

Chart 5: Trends in Total expenditure across all MDAs that received an Adverse Opinion, (Ksh billion)



Source: Auditor General Report, various issues

An overview of all MDAs with an adverse opinion as illustrated in the above Chart reveals that they are mostly MDAs with large annual allocations. These are: Ministry of Interior and National Coordination, Ministry of Science and Technology and State department of Interior.

These findings could imply that that MDAs with high expenditure tend to have a high likelihood of experiencing challenges in proper financial management and adherence to standards of financial reporting which leads to large number of audit limitations that are material, that render the records to be misleading and thus not providing a true and fair view of the financial position.

The large sums of public funds involved at this level -Ksh 301 billion in 2013/14 to, Ksh 194 billion in 2014/15 and Ksh 86 billion 2015/16- points to the high risk of loss of public funds in these ministries.

Chart 6: Trends in Total expenditure across all MDAs that received a Disclaimer of Opinion



Source: Auditor General Report, various issues

The MDAs for which the Auditor General was unable to express an opinion due to the prevailing audit limitations include State Department of Planning, Ministry of National Coordination and Ministry of Devolution. These are areas of high level of potential loss of public funds. It is also noted that for the Ministries of Planning and National Coordination, this opinion was recurring.

4.1 Overall Audit results in the Ministry of Health

The overall audit opinion for the Ministry of Health in 2013/14 was an adverse opinion. In the two consecutive financial years that followed the ministry obtained a qualified opinion. This implies that overall, the ministry made improvements from the gross violations of the law in financial management and record keeping. However, the ministry still faces audit limitations on a number of financial statements which could be a potential risk of financial loss.

(a) Analysis of the Public Procurement processes in the Ministry of Health

This section provides an analysis of the procurement processes, in the ministry of health in order to ascertain the level of compliance in the government ministries and agencies with regards to public procurement regulations.

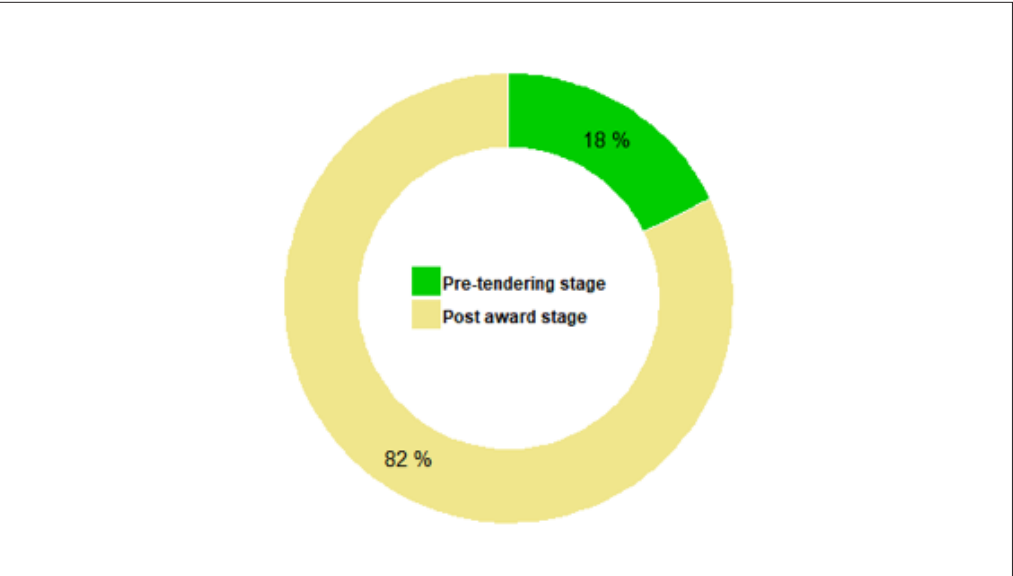
The methodology involved assessment of the public procurement transactions in the ministry of health as illustrated in the annual audit general’s report for 2013/14 to 2015/16. The violations are classified in terms of the stage and subsequent stages at which they occur frequently. The types of the violations are also categorized and their consequences analysed, as pointed out by the Auditor General.

(b)Procurement stage where most violations occur

The main stages in procurement processes are: Pre-tendering, Tendering and Post award stage. Pre-tendering stage mainly involves preparation processes such as needs assessment and planning and budgeting that are important in initiating a procurement process.

Analysis of the procurement transactions in the ministry of health reveal that out of 63 cases of procurement violations that were identified from 2013/14 to 2015/16, on average majority (82%) occur at the post award stage, the rest occur at the Pre-tendering stage.

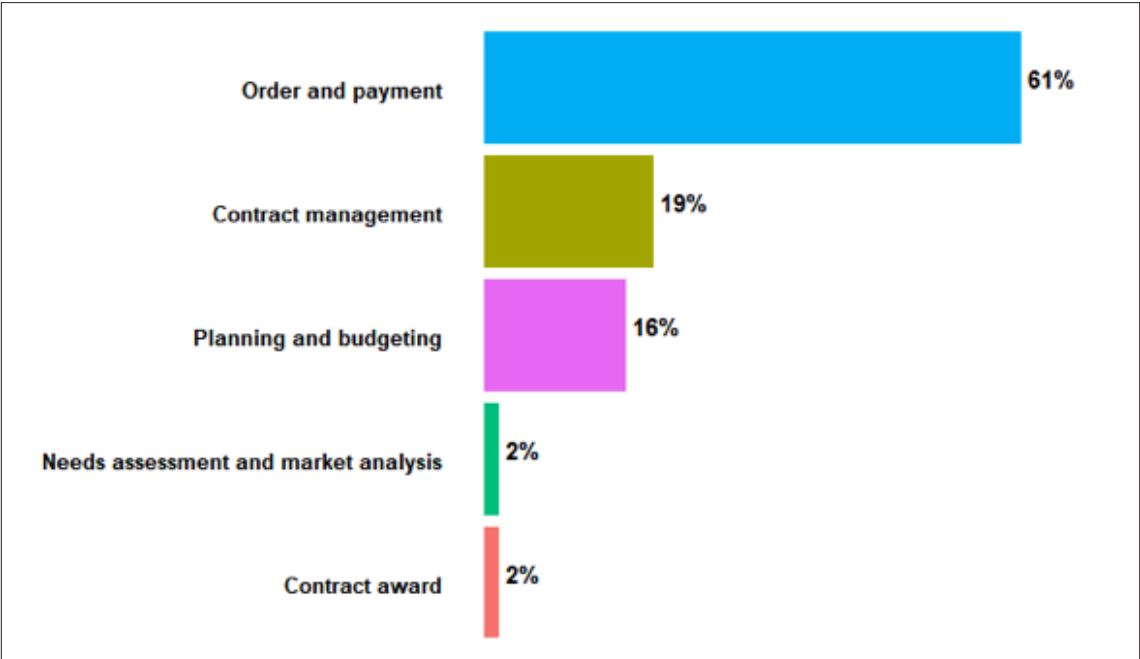
Chart 7: Procurement stage where most violations occur



(c)Procurement sub-stage where most violations occur

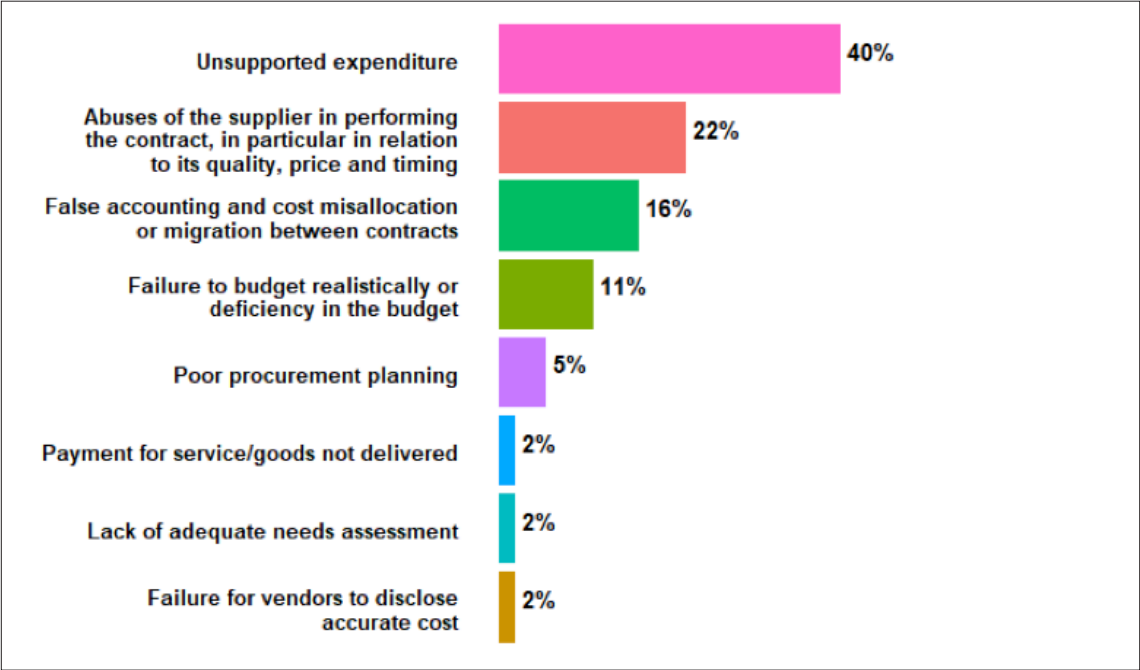
Further analysis indicates that the subsequent stage where the 63 cases of violations occur with regards to subsequent procurement stages. Findings show that out of 82% of the cases of violations that occur in the Post award stage, most are related to Order and payment (61 percentage points), Contract management (19 percentage points) and Contract award (2 percentage points). At the Pre-tendering stage, major cases of violations happen at the planning and budgeting stage (16 percentage points) while the Needs assessment and market analysis has approximately 2 percentage points of the cases.

Chart 8: Procurement sub-stage where most violations occur



Hence the areas that present higher risk in terms of potential financial losses are at planning and budgeting on one hand and execution of the contracts and payments on the other.

Chart 9: Classifications of the type of violations in the procurement process



Findings further suggest that out of 61% of the cases of violation at the Order and payment sub-stage, majority are related to lack of unsupported expenditure, at 40 percentage points, Abuses of the supplier in performing the contract in relation to the quality, pricing and timing (22 percentage points) and payment for goods not delivered (2 percentage points). With regards to 18% cases related to Contract management, about 16% of the violations concern false accounting and cost misallocation or migration between contracts (16 percentage points) and about 2 percentage points is relates to failure for vendors to disclose accurate cost.

On the other hand, with regards to the 16% of the cases of violations under planning and budgeting, 11 percentage points is due to the Failure to budget realistically or deficiently in the budget, 5 percentage points is due to poor procurement planning and about 2 percentage points is due to lack of adequate needs assessment.

(d)Consequences of the violations

Most violations have made it impossible for the Auditor General to confirm accurately the completeness of the financial transactions. Secondly, the value for public money could not be ascertained. In various instances, the procurement violations have led to the failure to complete the projects.

4.2 Overall Audit results in the Ministry of Education

The overall audit opinion for the Ministry of Education for the financial year 2013/14 was an adverse opinion. In 2014/15, audits were conducted separately for the State Department for Education which received an adverse opinion and the State Department of Science and Technology which received a qualified opinion. In 2015/16, both the State Department for Education and the State Department of Science and Technology received qualified opinions This implies that overall, the ministry made improvements from gross violations of the law in financial management and record keeping. However, the ministry still faces audit limitations on a number of financial statements which could be a potential risk of financial loss.

Analysis of the Public Procurement processes in the Ministry of Education

This section provides an analysis of the procurement processes, in the ministry of Education in order to ascertain the level of compliance in the government ministries and agencies with regards to public procurement regulations.

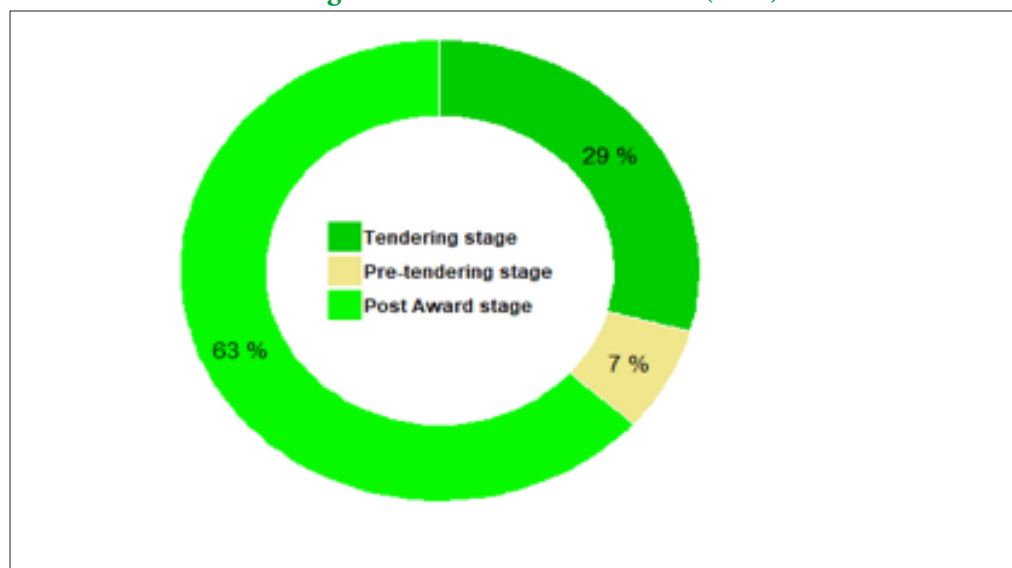
The methodology involved assessment of the public procurement transactions in the ministry of health as illustrated in the annual audit general's report for 2013/14 to 2015/16. The violations are classified in terms of the stage and subsequent stages at which they occur frequently. The types of the violations are also categorized and their consequences analysed, as pointed out by the Auditor General.

(I) Procurement stage where most violations occur

The main stages in procurement processes are: Pre-tendering, Tendering and Post award stage. Pre-tendering stage mainly involves preparation processes such as needs assessment and planning and budgeting that are important in initiating a procurement process.

Analysis of the procurement transactions in the ministry of Education reveal that out of 43 cases of procurement violations that were identified from 2013/14 to 2015/16, on average majority (63%) occur at the post award stage, 29% occur at the tendering phase while the rest occur at the Pre-tendering stage.

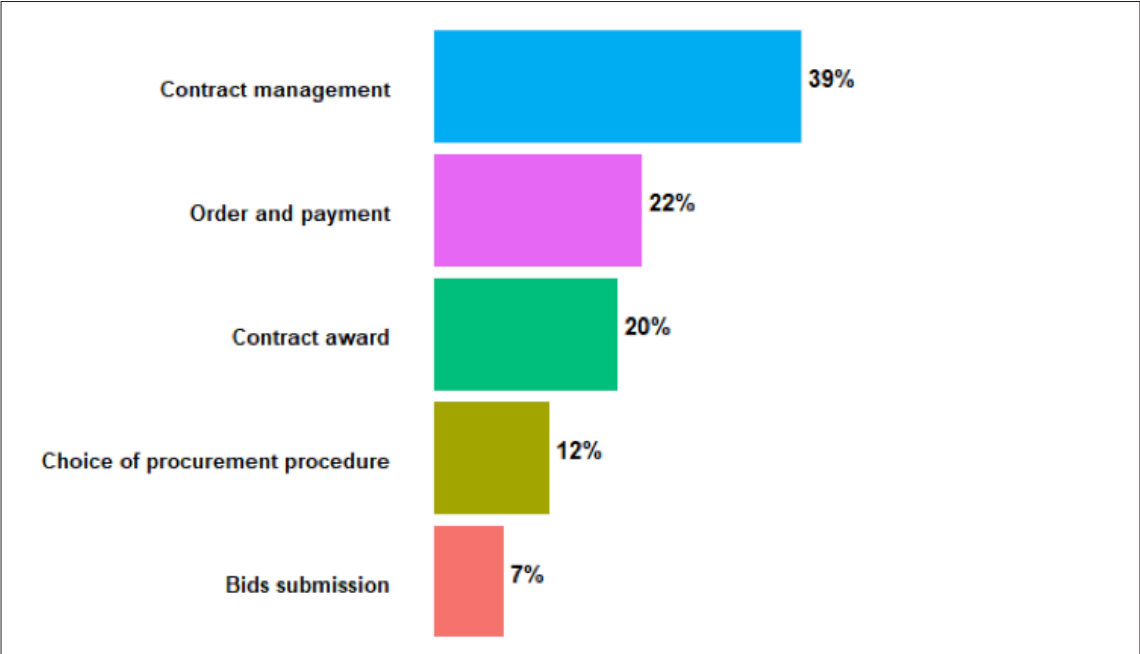
Chart 10: Procurement stage where most violations occur (MoE)



(II) Procurement sub-stage where most violations occur

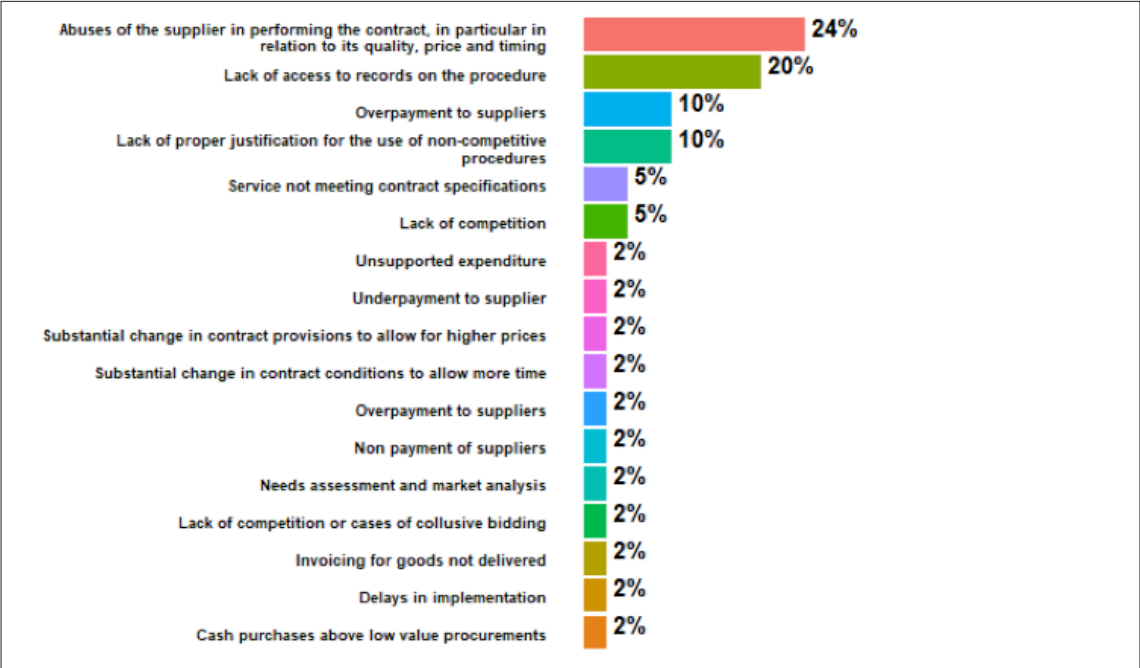
Further analysis indicates that the sub sequent stage where the 43 cases of violations occur with regards to subsequent procurement stages. Findings show that out of 63% of the cases of violations that occur in the Post award stage, most are related to Contract management (39 percentage points), Order and payment (22 percentage points), Contract award (20 percentage points). At the Pre-tendering stage, major cases of violations happen at the choice of procurement procedure stage (12 percentage points) while the Bids submission has approximately 7 percentage points of the cases.

Chart 11: Procurement sub-stage where most violations occur



From the above chart, the areas that present higher risk in terms of potential financial losses are at contract management, order and payment.

Chart 12: Classifications of the type of violations in the procurement process



Findings further suggest that out of 39% of the cases of violation at the Contract Management sub-stage, majority are related to abuse of the supplier in performing the contract, in relation to its quality,

price and timing, at 24 percentage points, Order and payment follows with overpayment to suppliers at 10%, service not meeting contract specifications at 5%, lack of competition and underpayment to supplier at 2%. The other sub-stages score about 2 percentage points each.

Procurement related queried expenditure

Table 2: Total amount queried in relation to Public Procurement under the Ministry of Educ. Sci. and Technology

Year	Total Amount Queried (Ksh billion)	Total Amount Queried (Ksh billion)	Queries amount as a Share of the total expenditure
2015/16	0.8	108.0	0.74%
2014/15	1.3	102.5	1.23%
2013/14	0.4	13.8	3.01%

Source: Auditor General Reports

The table above illustrates the total queried amount by the Auditor General as the amount involving procurement related transactions that did not adhere to various procurement regulations. The findings show that the amount queried is significant; in 2015/16 the queried amount totalled to Ksh 0.8 billion, compared to Ksh 1.3 billion the previous year and Ksh 0.4 billion in 2013/14. This works out to an average of Ksh 0.8 billion annually.

As a share of the total, in 2015/16 the queried amount comprised 0.74%, representing a decline by 0.5 percentage points. In the context of the entire amount queried, significant public funds are potentially at a risk of loss thus leading majorly to the lack of ascertainment by the auditor general as to whether the government obtained value for money.

Consequences of the violations

Most violations have made it impossible for the Auditor General to confirm accurately the completeness of the financial transactions. Second, the value for public money could not be ascertained in most of the cases. In various instances, the procurement violations have led to delays in implementation or complete failure to complete the projects.

5.0 Comparative Approaches to Sealing Corruption in Public Contracting

Different countries across the globe have adopted various tools to reduce corruption while reinforcing competition and efficiency in procurement procedures. Over 40 countries have commitments between civil society and government to make government procurement more open through the Open Government Partnership. Several countries including Colombia, Canada, Mexico and Romania are implementing the Open Contracting principles. Colombia, Georgia, Korea, Slovakia and the United Kingdom are innovatively using technology to increase the transparency and effectiveness of procurement processes through online platforms.

Mongolia, Mexico and the Philippines have institutionalized roles for civil society participation and monitoring of public contracting in the legal and regulatory framework. Guinea and Liberia have created centralized portals for the disclosure of contracts related to extractive industries. Civil society organizations are officially monitoring public contracts in Afghanistan, Costa Rica, Dominican Republic, Ghana, Lithuania, Mongolia, Montenegro, Nigeria and Slovakia.

Several governments have adopted integrity pacts to instil integrity in public procurement when dealing with private companies. Integrity Pacts are essentially an agreement between the government agency offering a contract and the companies bidding for it that they will abstain from bribery, collusion and other corrupt practices for the extent of the contract. To ensure accountability, Integrity Pacts also include a monitoring system typically led by civil society groups. Only companies that certify that they meet anti-corruption commitments should be eligible for contract awards.

Below are highlights of five countries that have adopted integrity pacts in their contracting processes:

India	Integrity Pacts are an essential part of the Draft National Anti-Corruption Strategy. The Central Vigilance Commission (CVC) issued the Directive 008/CRD/013, which refers to the implementation of integrity pacts as ‘standard operating procedure’ in procurement contracts of any major government department
Indonesia	Integrity pacts have been adopted and applied to local government contracts in up to 20 districts
Germany	An Integrity pact has been implemented for the construction of the Schönefeld International Airport in Berlin, a project worth €2.4 billion
United Kingdom	Integrity pacts have been adopted and implemented with particular focus on the defence sector.
Italy	Integrity pacts have been introduced mainly at municipal level in the Milan City Council.

In Hong Kong, government procurement is conducted under the Stores and Procurement Regulations (SPR), issued as administrative regulations under the Public Finance Ordinance (PFO). Financial circulars supplement these provisions. The SPR set out the steps on the whole procurement process including drawing up requirements and specifications of services required, issue of public notice of tender invitation, information to be included in the tender documents such as tender specifications,

assessment criteria to facilitate suppliers to prepare response offer, tender evaluation, tender negotiation, issue of public notice of tender award and contract management and monitoring. The Prevention of bribery Ordinance (PBO) has penal provisions for bribery. The procurement rules in the SPR are binding on all government bureaus and departments except financially autonomous public bodies, which are empowered to define their own procurement procedures.

6.0 Policy Recommendations

- **Adopt Open Contracting Principles and Data Standard:** Kenya should adopt open contracting principles of disclosure and public participation and begin to publish and publicize government contracts throughout the procurement cycle, from the pre-tendering to the post-award stage. Specifically for the post-award stage (stage three of the procurement cycle) where most procurement violations seem to occur, (relating to price variations, false accounting, costs migration between contracts) clear mechanisms should be instituted for tracking public contracts. The country should consider adopting the Slovakia model where a government contract is not legal until it is published. This includes putting an unambiguous public disclosure clause in all government contracts and publishing data on contract milestones and performance. Adopting open contracting, through all the stage of the procurement cycle should help the public including civil society and the private sector to analyse government spending and check that contracts are executed properly.
- **Transparency and Fairness in Access to Information on Public Procurement:** To address the issues arising in the tendering phase of the procurement cycle (phase two), all persons participating in a public procurement process for a specific contract should access the information relating to request for proposals, bids submission, bids evaluation and contract award at the same time. Some suppliers accessing crucial information on tenders earlier than their competitors have undue advantage over the other suppliers.
- **Penalties and sanctions:** The Government should implement stiff penalties for breaches to procurement requirements. Section 45 (2) of the of Anti-Corruption and Economic Crimes Act criminalizing the commission of breaches related to public procurement procedures as well as all other statutory prescriptions regulating the sector should be implemented effectively.
- **Capacity strengthening of procurement practitioners on adherence to procurement regulations:** The law regulating public procurement in Kenya should make it mandatory for all public institutions to undertake regular training of their procurement practitioners on procurement laws, regulations, record-keeping, and other procedures to improve adherence to procurement regulations.
- **Instituting proper records management tools for public procuring entities:** Procurement violations related to the second stage of the procurement cycle (tendering phase) on lack of access to records on procedure can be cured by instituting proper records management tools and protocols for public procuring entities
- **E-procurement:** E-procurement is less prone to manipulation. In spite of the adoption of e-procurement by most Ministries, Departments and Agencies, the strategy has not been completely effective especially at the post award stage in relation to contract management, riddled with supplier breaches in terms of product quality, price variations, adjustments to timelines and delivery of sub-standard work. More robust mechanisms should be implemented in e-procurement to enhance its functionalities at all the stages of the public procurement cycle.

- **Strengthen internal audit processes:** Government should place more investments in enhancing the capacities of internal audit processes within MDAs. Improved internal audit processes will promote strict adherence to procurement regulations at the various stages of the procurement cycle for MDAs and avert most of the gross violations to PFM leading to the OAG's expression of adverse and disclaimer of opinions. This will not only enhance accountability within the public sector but will also improve the quality of the MDA's outputs and overall performance.

Annexes

Snapshots of the Auditor General's Report Findings on Violations to Procurement Regulations in the Ministry of Education FY 2014/15.

1. Ministry of Education, Science and Technology- Vote 1061

Audit statement-Qualified Opinion

Breach: Payment made but software was not delivered, seven months after the payment

341. Shamberere Technical Training Institute

341.1 Undelivered Software

Examination of expenditure records at the Institute revealed that Kshs.260,000 was paid in favour of a firm vide payment voucher No.1856 dated 24 November 2014 and invoice No.1035 dated 12 October 2014 in respect of supply of software.

However, the software had not been delivered as at 30 June 2015, more than seven (7) months after payment. This is contrary to the provisions of Public Finance Management Act, 2012, other Ministry's guidelines and Public Procurement and Disposal Act, 2005 and its regulations of 2006 which require that payment for goods procured be made after delivery, inspection and acceptance of the goods by the users. The Institute was therefore in breach of the law.

Breach: The institution failed to provide relevant supporting procurement records

342. Eldoret Polytechnic

342.1 Construction of Institutional Management Laboratory and Kitchen Annex

Examination of payment vouchers and summary records of Eldoret Polytechnic revealed that the Institute engaged a contractor for a labour only contract towards erection and completion of institutional management laboratory that also included a kitchen annex. Further scrutiny of the payment records revealed that, the Polytechnic contracted for consultancy services and separately procured materials from prequalified suppliers. However, the Institute failed to provide relevant supporting procurement records. Further, as at the time of site visit, the only records available were payment vouchers and expenditure summaries which indicate that the Institute had spent Kshs.39,486,190 for purchase of building materials and Kshs.31,486,190.00 for labour and consultancy services. No other supporting documents such as works valuation certificates were availed for audit review. However, scrutiny of the payment vouchers supporting disbursements availed by the Ministry revealed that the Institute received Kshs.105,850,000 in the financial years 2010/2011 – 2013/2014. The certificates examined for the main food laboratory revealed that the initial cost of Kshs.152,000,000

Breach: No procurement or payment records were availed for audit review

343. Construction of an Applied Science Laboratory

Examination of available records in the Ministry indicate that in 2011/2012 and 2012/2013 financial years, funds totalling Kshs.49,650,000 were disbursed to Eldoret polytechnic towards the construction of an Applied Science Laboratory project. However, scrutiny of the Public Works certificates availed by the Ministry indicated that the initial estimated project cost of Kshs.62,000,000 was varied to Kshs.285,000,000 by unexplained variance of Kshs.223,000,000.00 or about 360%. Further, no procurement and payment records relating to the project were availed for audit review and the project had stalled as at the time of the audit.

In the circumstances, the propriety of the variation of Kshs.223,000,000 could not be confirmed.

Breach: No evidence of approval of variation of scope of work was availed for audit review

Further, records held at the Institute revealed that a variation of Kshs.11,858,435 or approximately 38.35% of the contract sum was sought from the parent Ministry by the project manager. The Ministry declined the variation and thereafter the project manager scaled down the works to save an estimated amount of Kshs.11,422,025. As at the time of audit Kshs.25,542,506.40 had been paid to the contractor yet the building had only been done up to first floor and thereafter stalled. No evidence of approval of variation of scope of works as required by section 47 of the Public Procurement and Disposal Act, 2005 was availed for audit review. The variations also exceeded the 15% acceptable threshold as per the then Act. Although the project was incomplete, the contractor had written demand notices of payment of the outstanding balance on certified amount together with the accrued interest. In the circumstances the stakeholders may not have obtained value for their resources.

345. Kiirua Technical Training Institute

345.1 Stalled Library Complex Project

Examination of the procurement records at the Kiirua institute revealed that on 20 December 2011 the tender committee awarded a contract for the construction of phase one of the proposed library complex to a contractor at a contract cost of Kshs.32,923,770 for a contract duration of 25 weeks. The contract was signed on 13

Breach: Management did not provide explanation for stalled project in spite of unutilized disbursements paid.

346. Rwika Institute of Technology

346.1 Construction of the Multi-Complex Hall

Examination of available records indicate that on 22 September 2011, the Institute awarded a contract for the construction of a Multi complex hall to a contractor at a contract sum of Kshs.51,435,699 for a period of 52 weeks. Examination of records held at the Ministry revealed that Kshs.53,000,000 had already been disbursed to the institute towards completion of this development project out of which only Kshs.28,351,830.29 had been paid to the contractor as at 30 June 2015 leaving an unutilized balance of Kshs.24,648,170. The resultant difference of Kshs.24,647,025 has not been accounted for. Further, physical verification of the project/building revealed that the project stalled at the superstructure level and there are no progress reports indicating the percentage of completion. It was also noted that the contractor vacated the site in 2013. It is not clear and management has not explained if and when the project will be completed and when the stakeholders will obtain value for their resources.

Breach: Project cost varied and not supported by relevant procurement documents

349. P.C. Kinyanjui Technical Training Institute

349.1 Construction of Resource Centre at PC Kinyanjui Technical Training Institute

In 2012/2013 financial year, the Institute awarded phase II of the above works to a contractor at a contract sum of Kshs.20,225,192. A physical verification of the project in August 2015 revealed that the project was incomplete as finishes and metal fabrications had not been done. Thereafter, the contractor presented a claim for unpaid dues amounting to Kshs.11,944,946. Although the institute disputed the claim, the management had not computed the actual amount due to the contractor.

Further, the contractor raised a parallel bill of quantities dated 7 April, 2015 comparing the original bill of quantities and the re-measured works for the project indicating that the project cost varied from Kshs.20,225,192 to Kshs.25,264,778 by Kshs.5,039,586

Breach: No evidence of extension of contract period was availed for audit and no explanation was given

350. Construction of Muranga Technical Training Institute

Records availed for audit review indicated that on 29 January 2014 the Ministry awarded a contract for the construction of classrooms, workshops and laboratory blocks for mechanical and civil engineering departments at the proposed Muranga Technical Institute at a contract sum of Kshs.261,365,108 for a duration of seventy two (72) weeks ending 2 August 2015. However, examination of payment records and available progress reports as at 31 July 2015 revealed that Kshs.62,932,631.54 representing about 24% of the contract price had been paid to the contractor and the works were not complete as anticipated yet the completion period had almost lapsed.

No evidence of extension of contract period was availed for audit review and no explanation has been given for delay in completion of the project.

Breach:Irregular procurement of goods and services

364.3 Irregular Procurement of Goods and Services

As previously reported, four (4) schools purchased various goods and services worth Kshs.5,072,032 from various suppliers, without inviting quotations, contrary to Public Procurement and Disposal Act, 2005, and therefore denying the Government the benefits of competitive bidding. A review of the four (4) schools during the year under review indicated that one (1) school had documents showing that it procured laboratory furniture and grill door amounting to Kshs.151,300 through a competitive process. However the remaining three (3) schools with purchases totalling Kshs.4,920,732 used single sourcing and the issue was still outstanding as at 30 June, 2015. It is doubtful if the stakeholders got value for their money from the above transactions.

Breach: Irregular payments occasioned by overpricing

365. Irregular Payments

As previously reported, Kimorori Primary School in Central province made payments amounting Kshs.1,262,918 to a contractor between January and June 2008 for supply of building materials. An inspection conducted by the Ministry of Education in July, 2008 however revealed a loss of Kshs.302,820 which had been occasioned by overpricing of goods and services and a recovery for the loss was ordered. Subsequently, an amount of Kshs.275,573 was recovered, leaving a balance of Kshs.27, 247 outstanding as at 30 June 2014.

Breach: Contract awarded and works not carried out. No explanation was provided

368. Construction of Mechanical Engineering Workshop-Gusii Institute of Technology

The Ministry of Education awarded a firm a contract in July 2011 for the construction of mechanical engineering workshop in Gusii Institute of Technology at a contract sum of Kshs.11,790,032.10 for a duration of twelve (12) months. The works as per Bills of Quantities included putting up kerbs and improvement of the driveway around the workshop at a cost of Kshs.1,018,050 and installation of air-conditioning equipment in the server room and the computer lab at a cost of Kshs.452,000 all totalling Kshs.1,470,050. However, during a site visit to the Institute in April 2015, it was observed that the above works with costs totalling Kshs.1,470,050 had not been carried out. No explanation has been provided for the anomaly.

Breach: Supply, delivery and installation of electrical and electronics engineering equipment without formal contract

370.2 Supply, Delivery and Installation of Electrical and Electronics Engineering Equipment-Tseikuru TTI

On 30 December 2013, the Project Management awarded a contract for the supply of workshop equipment to a supplier at a contract sum of Kshs.45,713,849.21. Although, the equipment was delivered to the Institute on 2 January 2015, as at the time of this audit the same had not been installed at the institute's workshops. The equipment was left with the contractor without a formal agreement and without arrangements on the equipments security. In addition, the Electrical Workshops were not secure as the windows had no grills.

Further, the contract involved training on installation, maintenance and use of the equipment for ten (10) members of the teaching staff. It is not clear who was trained as the Institute did not have teaching staff as at the time of the visit.

In the circumstances, the stakeholders may not have gotten value for their resources as the equipment has not been put to its intended use.

Breach: Non-payment of supplier resulting to non-delivery of equipment

373. Unresolved Prior Year Matters

373.1 Non Delivery of Equipment

As reported in 2013/2014, information available indicates that on 30 December 2013, the Ministry signed contracts with various firms for the supply, delivery, installation, commissioning and training on use and maintenance of various equipment to eight (8) new Technical Institutes at a total cost of Kshs.363,135,374. However, a review of procurement documents availed for audit indicated that the Ministry had not paid the contractors and as result the equipment had not been supplied to the intended Institutes as at the date of this report, contrary to Section 6 of the Contract Agreement which required goods to be delivered at the project site not later than eight (8) weeks after signing the contract and completion date not later than twelve (12) weeks after contract signing. No satisfactory explanations have so far been provided by the Ministry for not paying the contractors. The non-performance of the contract for delivery of the equipment impacts negatively on the cardinal objective of the Project, to improve access, quality and relevance of skills development opportunities for the youth in Kenya.

Breach: No supporting documents were availed for verification indicating the procurement method used in sourcing for the services.

318.4.2.2 Hire of Transport and Payments in Cash

The Ministry of Education made payments to different Ministry officials totalling Kshs.932,000 in cash for hire of motor vehicle services. The motor vehicle was to ferry students from Kipkeikei Secondary School to various venues for extra co-curricular activities. However, no supporting documents were availed for verification indicating the procurement method used in sourcing for the transport services thus contravening Section 17.3.1 of the Government Financial Regulations and Procedures that require all procurement of goods and services to be made through open competitive tenders or quotations which are subject to approval by the appropriate tender board before orders are placed.

The payment vouchers did not also have the requisite supporting documents attached to them such as approved schedule of participants and officials, requisitions from user departments, local service order, timetables and schedule of events and venues contrary to Section 5.5.14(c) and (d) of the Government Financial Regulations and Procedures.

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