

RECOMMENDATIONS FOR THE PUBLIC PROCUREMENT SYSTEM OF THE REPUBLIC OF KENYA



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Introduction

The following recommendations were prepared by the [Institute for Development of Freedom of Information](#) (IDFI), together with the [Institute for Economic Affairs](#) (IEA), based on the assessment of the Public Procurement Law (PPL) of Kenya, its sub-legal acts and other legal texts. The assessment itself is based on the Transparent Public Procurement Rating (TPPR) [Methodology](#), a tool created by a multinational alliance of CSOs, aiming at identifying strengths and weaknesses of PPLs around the globe.

The Methodology is largely based on best international standards from organizations, such as the EBRD, WTO, OECD, EU and OCDS, and covers all the major components of any public procurement system, from the nature of the legislation to the complaint review process, with focus on the transparency of public procurement systems. The assessment covers the following key characteristics (values) of a well-functioning public procurement system: **Efficiency, Transparency, Accountability and Competitiveness**.

The aim of this document is to offer insight into areas of potential improvement for Kenya's public procurement system considering the experience and best practices [identified](#) by the TPPR Project in 18 countries in the Eurasian region. The final results of the quantitative evaluation of Kenya's public procurement legislation will be made available on the TPPR [website](#) in January 2019.

Overview

Public procurement in Kenya is regulated by the Public Procurement and Asset Disposal [Act](#), adopted in December 2015. The procurement system is decentralized, with each procuring entity conducting procurement procedures separately, using standardized tender documentation. The public procurement law (PPL) has some transparency elements, but mostly accommodates paper-based procurement that is prevalent in the country. Electronic procurement is offered as one option (electronic reverse auction) among many and can only be used in "exceptional cases", if the procuring entity has a procurement portal that is approved by the Public Procurement Authority.

The National Treasury is charged with policy development, while the Public Procurement Regulatory Authority (PPRA) is given the management role, which includes monitoring of processes, data collection and analysis, developing standard documentation, dispute resolution, and so forth.

In June 2018, the President signed the [Executive Order No. 2](#) requiring all procuring entities to publish procurement information (detailed information about the tender winner, description of the subject of procurement, members of the Evaluation and Inspection Committees) on a variety of public platforms, and obligating the National Treasury to ensure that all procurement are undertaken through the e-procurement module by January 1, 2019. The National Treasury already runs an e-procurement [system](#), however, it is part of the Integrated Financial Management System that is currently accessible only for registered suppliers and not to outside observers.

The presidential order points to a realization of the importance of moving away from a paper-based system to an electronic one. This is a positive development that should pave the way for a full-scale transition later down the line. Centralized e-procurement offers tremendous benefits related to increased efficiency due to elimination of record keeping needs, speeding up of procurement processes, slashing corruption by reducing human-to-human contact, boosting competition through elimination of geographic barriers and various fees, and automatic generation of data that can be used for analysis. Currently, a large part of Kenya's PP legislation and guidelines prepared by the Procurement Authority

deal with the management of public procurement (PP) records. Moving to a centralized e-procurement system would eliminate this problem by removing the need to keep physical documents altogether.

Pursuant to the presidential Executive Order, the PPRA also runs a public procurement information [portal](#), where procuring entities are required to upload tender notices and results each month. However, the database does not seem to be complete; e.g. inspection/evaluation information is completely absent. This observation is in line with experience from other PP information portals, whereby, despite legal obligation, procuring entities fail to be consistent in uploading the required information and documents. The only cases where this problem is not serious enough to be a cause for concern are PP systems that are fully electronic and centralized, where information completeness is ensured due to the automated nature of procurement procedures. For example, Georgia and Ukraine both have centralized e-procurement portals, and have negligible problems with the completeness of uploaded information.

However, it is impossible to reap the full benefits of e-procurement without ensuring full transparency of public procurement information. In this regard, Kenya has improvements to make, which starts by launching discussions about PP transparency and the busting myths about the negative effects it may have on commercial and other interests.

Currently, transparency is not among the guiding principles of PPL in Kenya, instead, the law limits openness of procurement information for reasons of confidentiality. To lay a stronger foundation for the planned transition to e-procurement, a serious discussion needs to be launched on the issue, taking into account the experience of other countries. Since the Kenyan PPL already obligates procurers to keep records of many important pieces of procurement information, adding the transparency component would be a relatively simple undertaking once a consensus is achieved among key stakeholders.

Considering the above and based on the TPPR Methodology, IDFI would like to offer the following recommendations for Kenya:

Transparency

Full Tender Documentation and Bid Content – Procuring entities in Kenya only publish notices of procurement, which serve as an invitation for suppliers to request full tender documentation, which is often associated with a fee. Article 67 of the law prohibits disclosure of information on the contents of bids offered by participants and their evaluation on the basis of confidentiality. As [demonstrated](#) by the Open Contracting Partnership as well as practical experience from countries that offer full transparency of bid contents (e.g. Albania, Ukraine, Georgia, Belarus, Kyrgyzstan and Romania), disclosure of bids and related documentation does not lead to any adverse effects on commercial interests. In fact, evidence is in favor of the contrary, opening of tender proposals further encourages competition.

Disclosure of full tender documentation, as well as all bidding documents serves as an invitation to all stakeholders to monitor how well the tender commission has performed its functions, and dispute its award decision if necessary, and potentially identify cases of collusion, corruption or inefficiency, price-fixing and other possible violations of the law. The mere fact that bidding documents is open for everyone to see discourages wrongdoers from engaging in misconduct in the first place. This effect is amplified with each additional type of procurement documentation that is disclosed.

Contracts – PPL does not ensure automatic disclosure of signed contracts. Procuring entities are obligated to report all contract awards to the PPRA, which then publishes this information on its

website. The contract awards are [published](#) in PDF format and contain minimal information (names of the procurer and supplier, subject of procurement, contract value), making them almost unusable for monitoring and other purposes.

Evidence suggests that publishing full contracts that can be easily tied to the relevant tender and bidding documents greatly raises trust towards public procurement and increases participation of the private sector. As an example, having opened its contracts, Slovakia increased its number of average bidders from 1.6 in 2010 to 3.7 in 2014.

Contract Implementation and Quality Control Information – PPL does not guarantee access to public procurement performance related documents, such as acts of delivery and acceptance, performance reports, quality check reports, transactions made to contractors. Therefore, a substantial part of the post-tendering information relevant to monitoring the efficiency of public procurement system is beyond the reach of economic operators, civil society sector and the general public. Making this information transparent is useful for analyzing the implementation of contracts and procurement performance in general.

While the Kenya's PPL does offer robust mechanisms for controlling contract implementation, there is no obligation to have this information made public. Because of this, it is hard to say whether this mechanism works well or not. Having public access to inspection and quality control mechanisms would enable citizens and other non-governmental stakeholders to participate in quality control processes.

Payment Receipts – Delays in payment is an often encountered problem. Introducing an obligation to publish payment receipts may serve as a stimulus for procuring entities to comply with their financial obligations. Ultimately, however, the best solution to delayed payments is the incorporation of the payment procedure inside the electronic procurement portal, where procuring entities have to upload payment receipts as an automated, mandatory step to completing a procurement.

Competition

Annual Procurement Plans – Annual procurement plans in Kenya are currently closed. These documents have an important potential to facilitate competition by enabling suppliers to prepare for future tenders. Best practice in this regard is to have standardized annual procurement plans (containing key information on the subject, volume, estimated time, location of each procurement) that are published on a central website and freely accessible to all. This allows the economic operators to better prepare for procurement opportunities well in advance and gives them the possibility to plan their investments accordingly.

Efficiency

While most efficiency related benefits originate from the speed and automation that come with centralized e-procurement, including timed and automated reverse auctions, which, as an example, have led to an average of 12% saving (more than USD 600 million since 2011) in Georgia, the following change could also be beneficial:

A Classification System for Goods, Works and Services – The Kenyan public procurement system does not use a system of classification of goods, works and services. The CPV system (Common Procurement

Vocabulary) is one such option that can be introduced in order to avoid confusion and to have a way of keeping track of what is being purchased. Introducing a standardized classification system is a necessary step to a successful e-procurement system.

Accountability

Basis for Using a Non-Competitive Procedure and Appeal of Procurement Method – Kenya’s PPL does not obligate procuring entities to disclose the basis for using a non-competitive procedure. Furthermore, the choice of a procurement method may not be appealed. The combination of these two provisions means that procuring entities can use less competitive procedures more freely and without actual need. This lowers competition, creates grounds for corruption and conflict of interest, and creates a possibility for misuse. whereby procuring entities may seek to use direct procurement in order to favor a particular economic operator.

In addition to introducing a legal obligation to disclose the basis for using a non-competitive procedure/direct procurement, one of the best practices in this regard is to have the Procurement Authority authorize the use of non-competitive procedures. This practice exists in Georgia, where all procuring entities have to submit a request to the Procurement Authority and justify why a direct procedure is necessary, with all documents available online. After its introduction in 2015, this practice greatly discouraged procuring entities from using the often unnecessary but easier option of direct procurement and reduced the number of above-threshold direct procurement contracts by as much as 61% in one year.

Institutionalization of Citizen and Civil Society Complaints – Kenya’s PPL only allows tender participants that claim loss or damage to appeal to the Public Procurement Administrative Review Board. In addition, appealing entities have to pay a refundable cost of no less than 10% of the contract, which, IDFI believes, is too high and unnecessary. Kenya should consider institutionalizing and opening the processing of complaints received from other stakeholders, including citizens. Such possibility is given to the general public in Georgia, Slovakia and Ukraine. This would increase public trust in the system by allowing all stakeholders to fully take part in the process of monitoring the public procurement system, raise awareness about how to engage in public procurement, and generate data for analysis about frequent problems.

The PPL already states that one of the functions of the PPRA is to consider complaints received from procuring entities, tenderers, contractors or the general public that are not subject of administrative review. However, the disclosure of these complaints and responses to them is not ensured. Citizen and other stakeholder complaints can be institutionalized either within the existing mechanism of the Public Procurement Administrative Review Board, or as a separate mechanism under the PPRA.

The common concern arising here is that allowing citizens to appeal would enable certain individuals to misuse this opportunity to deliberately delay the process. However, this should not be a problem in case of Kenya, where the law already allows the Review Body to dismiss appeals it deems to be made solely for the purpose of delaying the procurement proceedings.

Complaints and Dispute Resolutions – Public disclosure of appeals and dispute resolutions is not guaranteed by Kenya’s PPL. In practice, dispute resolution documents are being [uploaded](#) as scanned PDFs, which is a good first step; however, more can be done. Ideally, the information contained in these

PDFs should be freed, i.e. made machine-readable, which would allow for searchability, automatic connection with the tender documentation and the received bids.

Of similar importance is the transparency of complaints filed by the general public and other stakeholders and decisions made in response to them. Since this area is not institutionalized, no information is available about what concerns citizens, civil society and potential suppliers have.

Civil Society Participation in Dispute Resolution – Kenya should consider including civil society representatives in dispute resolution processes. Civil society members can bring a unique perspective about the challenges of the public procurement system to the table, allowing for a fairer dispute resolution.

Private Sector, Civil Society and Public Consultation Mechanism – Kenya’s PPL should include a mechanism for wider consultations with the business sector, civil society and the general public on public procurement policy matters. Such mechanism can be mandatory and frequency for such consultations can be defined by law. This mechanism will prove increasingly useful if Kenya decides to continue transitioning from a paper-based to an electronic procurement system by allowing policy makes to take into account the needs and suggestions coming from all possible stakeholder groups.