

**Investigating the Effect of Public Procurement Law on Government Parastatals: Case Study of Kenya Ports Authority.**

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**ABSTRACT.**

The port of Mombasa (KPA) is a government owned Parastatals dealing with handling both loose and containerized cargo (Import/Export) by sea transport. Ships of all mercantile goods dock at the port to deliver cargo. The Mombasa Port is among the largest sea ports in the east African region serving the entire region of East and Central Africa. This research is an endeavor to investigate the effects of public procurement laws on government Parastatals specifically Kenya Ports Authority with special references to Terminal Engineering Department.

This study introduces background information, statement of the problem, the objectives of the study, significance, limitations and assumptions. It generally gives relevant and available literature as it highlights the development and current trends of procurement processes by examining and discussing what other authors have contributed to the area of study. It outlines the research methodology that was used to achieve the objective of the study and outlines the research plan i.e. the research site, design, population, sample size, sampling technique and

source of information. Questionnaire was used as an instrument for data collection. The Data collected was analyzed using SPSS as the ideal statistical analysis tool.

## **Introduction**

Kenya Ports Authority was established by an Act of parliament effective from January 1978. The organization falls under the ministry of information, transport and communication as a parastatal body. It came into being after the collapse of the then East African Harbor Cooperation in June 1977. The Port was built stage by stage up to 1980 when the last berth (no. 18) was completed and dedicated as a container berth. (KPA 2014)

Procurement refers to the process of contracting for the acquisition or supply of goods, works or services that any individual or organizations need. The Public Procurement and Disposal Act 2005 defines procurement as the “acquisition by purchase, rental, lease, hire, license, tenancy, franchise, or by any other contractual means of any type of works, assets, services or goods including livestock or any combination”.( The Public Procurement and Disposal Act, 2005)

Public procurement is therefore the main process through which the government operates and spends public money. It is estimated that in Kenya public procurement accounts for over 10% of the Gross Domestic Product (GDP), making it a large market for suppliers and contractors with this amount of resource public procurement tops the list of sectors with high opportunities for corruption. This therefore means that every effort should be made to erect safeguards to check against corrupt malpractices in public procurement. It is against this background that Kenya Anti-Corruption Commission has partnered with the Public Procurement Oversight Authority (PPOA) to issue Corruption Prevention Guidelines in public procurement as part of its corruption prevention strategies and in line with the wider public financial management reforms that the Kenya Government has been initiating. Any improvements in the public procurement system can have a direct and beneficial effect on the overall economic situation of a country.

(KACC and PPOA 2009)

The purpose of this paper is to investigate the effect of the procurement law on government Parastatals. Has it made corruption easier for the nation, has it helped eradicate corruption, what has it done? This Are some of the questions this paper addresses (PPOA 2005).

### **Objectives**

The general objective of this study is to investigate the effect of public procurement law on government Parastatals in Kenya while the specific objectives of the research are; to investigate why the need arose for the procurement law and the applicability to the Kenya Ports Authority, to analyze the drawbacks of the procurement law to procedures at the Kenya Ports Authority, to examine the causes of delay in procurement activities and their effects to KPA and to identify and suggest possible ways the public procurement law can be more sustainable, effective and beneficial to KPA.

### **Procurement**

Procurement is the process of acquiring goods, works and services, covering both acquisitions from third parties. It involves option appraisal and the critical “make or buy” decision which may result in the provision of goods and services in appropriate circumstances (PPB, 2003).According to Sarpong (2007), procurement is the management of sustainable acquisition of goods, works and services to optimize value for money through a professional, auditable and transparent framework. He believes that any good procurement should be efficient and effective, competitive, ethical, fair and transparent.

### **Single -Source Procurement**

Procurement through placing direct orders (single sourcing) as a method is not encouraged; however, where it is necessary to be used, it shall be restricted to and reserved for:-

- Procurement of items which are proprietary in nature.
- Repeat orders to meet additional requirements of the same produce or for essential spares from the supplier of earlier procured equipment, provided there is no upward revision in the price of the item or a change in specification.
- Extension of works contract where this is deemed the most economic procedure.
- Exceptional cases such as in response to natural disasters.

To use the single- source procurement method, a prior approval should be sought from the PPOA Board (Public Procurement and disposal Act (2005) cap 412C section 38)

### National Competitive Bidding (NCB)

National competitive Bidding procedure shall be where the entity decides that only domestic suppliers or contractors may submit tenders either by nature or by value of contract. The local currency (KSHS) shall generally be used for the purposes of bidding and payment unless specified otherwise in the bidding documents. Invitations to bid shall be advertised in at least one widely circulated national daily newspaper and the Public Procurement Bulletin, (Public Procurement and disposal Act (2005) cap 412C).

### Restricted Tendering

Restricted Tendering is like shopping for goods, it is a limited tendering which functions by direct written invitation without open advertisement, but from a selected list of contractors. Other exceptional reasons which justify restricted tendering as a departure from ICB and NCB procedure would be:-

- i). Limited number of interested/eligible contractors
- ii). Time constraints or emergency.
- iii). other mitigating factors.

In cases where restricted tendering is used in lieu of ICB or NCB, this method would require prior approval of the Public Procurement Board and/or Development Partners. (Public Procurement and disposal Act (2005) cap 412C section 30)

### The drawbacks of the procurement law to procedures at the Kenya Port Authority.

The procurement law has not fully succeeded in achieving its objective. This is due to the fact that there was no planning involved in the creation of the procurement systems in most of the parastatals. Also civil servants have easily manipulated the law. There was room for this to take place because there was no qualified procurement staff to look over the procurement system during its inception, (Odhiambo et al, 2003).

Lack of procurement professionalism in the public sector is a hindrance for compliance with the public procurement law. From this, public entities are not likely to comply with the directives of the procurement law (De Boer and Telgen, 1998).

De Boer and Telgen (1998) in their study reported that many public institutions were not conversant with the legal obligations to follow the stipulations of the public procurement laws thereby leading to non-compliance with the law. Further De Boer and Telgen (1998) argued that

both the principal and agent are motivated by their own self-interest when entering into contractual relationship and aim to maximize benefits or utility for themselves only

To many departments at KPA, the procurement laws are not exactly clear.

Therefore, familiarity of the rules by both purchasers and suppliers will influence the chance that public agents will comply with the rules. This is a major drawback that leads to negative impact of the public procurement procedures (De Boer and Telgen1998). Furthermore, organizational incentives are also a drawback with the procurement rules. De Boer and Telgen (1998) further argued that bureaucrats in the public sector try to exhaust fully their procurement budget so as to avoid reductions in their future budget. To these bureaucrats, cost reductions due to competitive procurement procedures in one year do not necessarily result in increase in subsequent budgets.

Corruption is a major challenge that has emerged with the devolved funding and management. It presents new opportunities for large scale corruption and fraud

(Poisson, 2010) discusses on how to deal with the issue of corruption in the government sector, how to improve accountability and transparency. He finally demonstrated that to improve accountability and transparency, action must be taken on development of transparent regulation systems and standards, the building of management capacity and the promotion of greater ownership of administrative and financial processes. It is interesting to note how corruption goes a long way to affect each domain of procurement planning and management at KPA. This is because the effectiveness of the procurement law is based on its transparency, and accountability. If these two words cannot be satisfied then it means that the procurement procedures are hindered.

The administrative burdens of public procurement law, its complications, the publication obligations, and fees are extraordinary burdens to be carried by actors, which in part increases their costs and ties down their resources. (Roodhooft and Van den Abbeele 2006)

### **Causes of delay in procurement activities and their effects to KPA.**

The procurement act itself delays the award of contracts. Cumbersome legal processes and unnecessary levels of approval hinder the flow of procurement and delay in the award of contracts (Odhiambo & Kamau, 2001).

A study conducted by SGS Consultants to assess public procurement systems in Kenya in 1986, came up with the finding that public procurement was not operating efficiently and that bureaucracy leaves no room for price negotiation and facilitates delays in release of funds thus, delay of project implementation. (Standard Group Newspaper 1986).

Kakwezi and Nyeko (2010, cited in Knudsen, 1999) agrees that inadequate project management resources delays procurement procedures. He further clarified that in most parastatals there are not enough qualified staff. Procurement is carried out by the existing staff that invariably has other pressing responsibilities besides the quick completion of the project.

It is not that governments do not appreciate the need for effective procurement procedures; they simply do not have adequate resources available. This aspect causes delay throughout the procurement process (ArrowSmith, 2010).

Hargreaves, John and PRICE, Ilfryn (2014, Cited in Amaratunga & Baldry, 2002) suggest that it is important that supplier's payment is made swiftly upon completion of contracts. Government funds are sometimes irregular. When it comes to releasing money for projects to be finished, the government takes a longer period of time to make payments. The Public Procurement Act states that a supplier shall be entitled to interest at the rate stated in the contract for each day the employer fails to pay beyond the agreed date of payment. (Public Procurement Act, 2005).

Delay in supplier payment negatively affects the suppliers cash flow and also increases The financial burden of the employer due to the fact that the high interest rates are often charged on such delays and can result in disputes and claims leading to arbitration or litigation

### **How public procurement law can be more sustainable, effective and beneficial to KPA.**

The main reason for the passing of laws related to public procurement in Kenya was to remove ineffectiveness in the procurement process, save on project completion time and ensure quality service delivery. The procurement laws therefore inexistence contain room for the procuring entities to go against the objectives stipulated in the Act, hence going against the principles of sound procurement.(Nyaoga 2008)

Following the recommendations of a team of consultants, the KANU government enacted the Exchequer and Audit (Public Procurement) Regulations (hereinafter Procurement Regulations) in 2001.The team of consultants recommended the enactment of a law on public procurement.

Because the team realized that it would take a long time for such a law to be enacted due to lack of support in government circles for a stringent procurement system, it recommended the promulgation of procurement regulations under the Exchequer and Audit Act, which empowers the Minister for Finance to make Regulations governing public procurement. (Exchequer and Audit Act, Chapter 412, Laws of Kenya, &5A)

Another major issue of concern is the fact that the entire procurement process is quite lengthy. This creates a lot of delays and losses both directly and indirectly. The entire procurement process should therefore be looked into so as to see how the procedures can be shortened to enhance efficiency (DAILY NATION, May 29, 2003)

The Public Procurement Board should expose corrupt practices in the procurement process. The Board should ensure that procuring entities adhere to the Regulations and should be able to develop very good case law on public procurement. (Caroli Omondi, 2005).

Where a procurement entity has not followed the Regulations, re-tendering should be required under supervision of the board. Indeed, the prospect of being required to re-tender should serve as an incentive for procurement entities to comply with the Regulations. (Patricia Kameri-Mbote, 2005).

### **The Public Procurement System**

The public procurement system in Kenya has evolved from a crude system with no regulations to an orderly legally regulated procurement system. The Government's Procurement system was originally contained in the Supplies Manual of 1978, which was supplemented by circulars that were issued from time to time by the Treasury. The Director of Government Supply Services was responsible for ensuring the proper observance of the provisions of the Manual. The Manual created various tender boards for adjudication of tenders and their awards (PPOA Act 2005).

There was no uniform procurement system for the public sector as a whole. It did not have sanctions or penalties against persons who breached the regulations in the Supplies Manual, other than internal disciplinary action. Consequently application of the rules was not strict and many of the norms were not followed. Records of procurement transactions in many cases were found to be inaccurate or incomplete or absent, which led to suspicions of dishonest dealings at the tender boards. The systems had other institutional weaknesses that not only undermined its capacity for carrying out their mandates effectively but also led to a public perception that the public sector was not getting maximum value for money spent on procurement. In view of the above shortcomings it was found necessary to have a law to govern the

procurement system in the public sector and to establish the necessary institutions to ensure that all procurement entities observe the provisions of the law for the purpose of attaining the objectives of an open tender system in the sector. Consequently the establishment of the Exchequer and Audit (Public Procurement) Regulations 2001 which created the Public Procurement Directorate (PPD) and the Public Procurement Complaints, Review and Appeals Board (PPCRAB).(PPOA Act 2005).

The Public Procurement and Disposal Act, 2005 created the Public Procurement Oversight Authority (PPOA), the Public Procurement Advisory Board (PPAB) and the continuance of the Public Procurement Complaints, Review and Appeals Board as the Public Procurement Administrative Review Board (PPARB). (PPOA Act 2005).

### **Research methodology**

This research was based on explanatory research design. According to Gay (1990) “explanatory research involves collecting data in order to answer questions concerning the current status of the subject of the study” The research study focused on the staff of Kenya Ports Authority, Mombasa County. There are about 1,000 employees of Kenya Ports Authority in Mombasa County spread in various locations. The departments are Human resources management, container terminal, Marine operations, Information technology department and procurement and supplies department. The sample was made up of a total of 52 respondents. 10 respondents from HR department, 10 from IT department, 10 from container terminal, 12 from the procurement and supplies department and 10 from the marine department as the questionnaires were divided into two main sections. Section one contained questions on the demographic variables of the respondents while section two solicited on four main objectives making up the framework of the research. The wording and language used in the questionnaire was kept as simple as possible to enable the respondents answer the questions with ease.

### **Data Analysis**

The data collected was analyzed using SPSS which the researchers considered as a universally accepted statistical tool and was appropriate for this research. A total of 52 questionnaires were distributed within the five departments to respondents at KPA, (Mombasa) who were identified through simple random sampling. Fifty two (52) questionnaires were returned for analysis. The reason for the 100% response was because of the researcher’s constant follow up with the



respondents to avoid delays. All the departments answered the questionnaires as was required by the researcher. The response rate was found to be positive, resulting to 100% response rate

Staff members representing 80.76% are the ones mainly handling procurement procedures followed by supervisors representing 9.62% and the managers at 9.62%. This is mainly because at the staff level they have the bigger responsibility of meeting targets and delivering on time. The supervisors and managers play more supervisory and decision making roles. The sample had more male employees than female with a representation of 60% male and 40% female. Majority of the respondents, in the sample group, (more than 73%) fall in the age group of 16 to 45 years old. All the respondents have at least 'O' Level education qualification. The levels of training at procurement department showed that majority of the respondents represented by 76.92% have received training in procurement.

Eight of the respondents making (15.38%) of the population at the procurement department were found not to have any professional training in procurement. Only 4 of the respondents (7.7%) have professional training in procurement.

Only 22 (42.31%) respondents confirmed that they properly understand the public procurement law. Majority 30 (57.69%) said that the procurement law is too complex and cumbersome to understand.

40 (76.92%) respondents agreed that there was a need for procurement law to ensure fair process of procurement procedures, while 12 respondents representing (23.08%) had no idea why the procurement law was introduced.

Only 20 respondents representing 38.46% agreed that the procurement law has managed to address the issues of accountability and integrity. Majority 32 (61.54%) said that the procurement law has failed. They explained that it has largely failed to tame corruption and related irregularities in public procurement. 57.69% of the respondents strongly agreed that public procurement law causes delay in procurement procedures, while 42.31% only agreed that it causes delay. None of the respondents disagreed or was uncertain.

## **Conclusion**

Procurement quality is a mixed measure of the quality of purchased products and the performance of the procurement process itself since there is, not only, a need to purchase quality products by companies, but also the need for quality companies to purchase products. Hence, the

definition of procurement quality is complex yet can be summarized as the inclusion of all and any aspects that involves the purchasing of products. The simplicity of this definition assumes that specifications for design and production are well defined, including the determination of product conformance, measurement procedures, reliability and maintainability, packaging and delivery, environmental and legal issues have all been given required consideration. The study can conclude that if the government cannot reduce these bottlenecks then Kenya will remain at a competitive disadvantage against other states of the world.

### **Recommendation**

In order to achieve greater economies of scale, an organization's procurement functions may be joined into shared services. This combines several small procurement agents into one centralized procurement system. Dealings between quality control and quality assurance functions must be conducted in a manner to credit the organization and individuals involved, Both the customer and the supplier should address the fulfillment of all contractual requirements and objectives. The legal aspects of a contract cannot be ignored, but there is also a moral obligation to achieve a satisfactory end production and also for procurement quality. There are key quality aspects of the procurement process itself; good communication between the purchasing agents is one such important aspect. Due to the introduction of the e-procurement systems in Kenya by the government of Kenya, a further study may include identification of available loopholes in the systems and how to do away with them in order to ensure efficient, effective timely and quality procurement service by government agencies. A revision of the existing laws to capture e-procurement activities will also help in guiding any e-procurement activities by government for quality procurement practices.

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