



**Public Sector Procurement in Kenya:
The Need for a Coherent Policy
Framework**

Fred Owegi

Eric Aligula

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**THE KENYA INSTITUTE FOR PUBLIC
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Public Sector Procurement in Kenya: The Need for a Coherent Policy Framework

Fred Owegi
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Infrastructure and Economic Services Division
Kenya Institute for Public Policy
Research and Analysis

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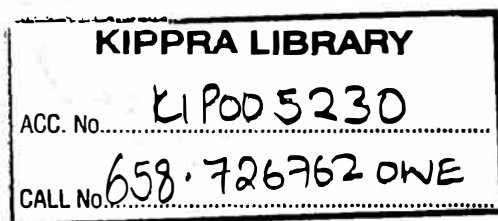
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Abbreviations and acronyms

ARC	Acquisition Regulatory Council
BEE	Black Economic Empowerment
CBS	Central Bureau of Statistics
CDF	Constituency Development Fund
CGP	Central Government Procurement
COMESA	Common Market for Eastern and Southern Africa
CTB	Central Tender Board
CUIs	Common User Items
EAC	East African Community
EEC	European Economic Commission
ERS	Economic Recovery Strategy (for Wealth & Employment Creation)
EU	European Union
FAR	Federal Acquisition Regulations (US)
FARC	Federal Acquisition Regulatory Council
GAO	General Accounting Office
GDP	Gross Domestic Product
G-EPS	Government-Electronic Procurement System
GITIS	Government Internet Tendering Information System
GPA	Government Procurement Agreement
GPAT	Government Procurement Adjudication Tribunal
GPPB	Government Public Procurement Board
IDF	Institutional Development Fund (World Bank)
IFMIS	Integrated Financial Management Information System
KEMSA	Kenya Medical Supplies Agency
LCC	Life Cycle Costing
M&E	Monitoring & Evaluation
MDGs	Millennium Development Goals
MFN	Most Favoured Nation
MTEF	Medium-Term Expenditure Framework
NEDA	National Economic and Development Authority
NSC	National Steering Committee
OECD	Organization for Economic Co-operation and Development
OFPP	Office of Federal Procurement Policy
PER	Public Expenditure Review
PCB	Public Complaints Bureau
PPAB	Public Procurement Appeals Board
PPCRAB	Public Procurement Complaints, Review & Appeals Board
PPD	Public Procurement Directorate
PPPF	Public Policy Procurement Framework
PPPs	Public-Private Partnerships

SEM	Single European Market
SMMEs	Small, Micro- and Medium Enterprises
TCGGP	Total Consolidated General Government Procurement
TGE	Total Government Expenditure
TSO	Technical Support Office
UNCITRAL	UN Commission on International Trade Law
VFM	Value for Money
WTO	World Trade Organization

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1. Introduction

Persistent controversies in Kenya's public procurement and the resultant negative impacts on efficient public service delivery can be explained, in part, by weak enforcement of the existing legislation.¹ They could also be attributed to the absence of a coherent policy framework.² A coherent public procurement policy can complement and broaden the scope of continuing legislative reforms to make government acquisition more predictable and less problematic. It can also support and contribute to national growth and development strategies, as enumerated in the Economic Recovery Strategy (Government of Kenya, 2003).

The ERS contains various public expenditure reform measures aimed at refocusing government spending in favour of poverty reduction and wealth and employment creation. Key among these measures are: aligning the government's budgeting with its fiscal strategy; institutionalizing the Public Expenditure Review (PER) process to improve expenditure management; and, implementing the Integrated Financial Management Information System (IFMIS). "Advancing the Procurement Bill into law", another key target of the reforms, was accomplished in October 2005 following enactment of the Public Procurement and Disposal Act. Whereas these reforms are important in ensuring that government spending in general leads to the attainment of broad social goals, they do not provide sufficient links between the country's overall macro-economic policy and public procurement, which constitute a large and ever-growing share of total government spending. Where such links exist, the government's procurement 'muscle' should, according to Pauw *et al.* (2002) be able to:

¹Throughout this study, the term legislation is used to refer to bills passed by Parliament, which as Acts become State laws. Legislation refers also to other general legal rules.

²As used in this study, policy implies a plan or course of action of a government intended to influence and determine decisions, actions, and other matters.

- Add stability to the country's macro economy by maintaining a modest budget deficit;
- Increase the levels of service delivery through efficient allocation of resources;
- Stimulate microeconomic activity, such as job creation through strategic areas of spending; and
- Assist groups that were previously disadvantaged to develop economically.

The basis for undertaking this study is the need to develop a sound policy framework outlining objectives of government procurement as well as channels through which public purchasing is expected to promote fairness, transparency, accountability and value for money (VFM), together with stability in the macroeconomic environment, efficiency in infrastructure and service delivery, increased productivity in all sectors, faster industrialization and deeper regional integration.

1.1 Research Questions

The study is guided by three questions. First, what fraction of Kenya's public expenditure or of its gross national income should be dedicated to public procurement? Since the government's acquisition needs are, for the most part, predetermined at the start of every financial year, the size of public procurement ought to be obvious. Answering this research question is expected to create a better understanding of public procurement and make its annual growth trends more predictable. Secondly, how can the integration between public procurement and other government policies and initiatives be improved to ensure better overall support to national development? To enhance this integration, it is important to understand existing correlations between public procurement trends and economic and financial indicators such as economic growth rates, pace of industrial

expansion, import/export account balances, money, interest and foreign exchange volatilities, among others. Answering this research question is expected to clarify these correlations and lead to formulation of a targeted public procurement policy. Thirdly, does public procurement help in the promotion of market openness, private sector participation and competitiveness in the business environment? Given the natural linkage between government purchasing and private sector business growth, public procurement policy can reveal much about a country's commitment towards freeing of markets and supporting private enterprise. According to the ERS, Kenya aims to achieve both. Answering this research question is expected to clarify the extent to, and the success with which this is being accomplished.

1.2 Study Objectives

The specific objectives of the study are threefold:

- (i) To analyse trends in Kenya's public procurement since independence;
- (ii) To compare the practice of public procurement in Kenya and selected countries within the region and internationally with the purpose of deriving relevant policy lessons; and
- (iii) To prepare a draft public procurement policy framework for presentation to the government for adoption.

2. Background to the Study

2.1 Public Procurement

Procurement may be defined as the acquisition of goods and services (i.e. purchasing) and hiring of contractors and consultants to carry out works and services.³ Procurement includes rental, lease, hire purchase, license, tenancy, franchise or any other contractual acquisition of works, services and supplies. Procurement also embraces clearing out unnecessary acquisitions. In essence, the subject of procurement runs at all times alongside that of disposal of public assets which once acquired may need to be discarded in accordance with the principles of their purchase. Therefore, sale by competitive bidding, transfer by way of donation, abandonment or destruction of stores whether excess, surplus or obsolete all fall within the same functional scope as procurement. According to Westring (1985), this scope covers:

- Specification of the kind and quality of goods or services to be acquired (or disposed);
- Investigation of the market for supply, and contacts with potential suppliers (or buyers);
- Placing the order or contract, including negotiation of terms;
- Supervising delivery and performance, and taking necessary action in the event of inadequate performance;
- Payment; and
- Dealing with any disputes.

³This definition, however, excludes employment of individuals into the civil service and work done by public officials.

2.2 Public and Private Procurement

Public sector procurement refers to procurement by or on behalf of ministries, departments of central government, organs of local government and state corporations. Procurement in the public sector aims to achieve multiple objectives. These include: economy, efficiency, fairness (i.e. non-discrimination among potential suppliers), accountability, transparency and, where more than one country is involved, respect for international obligations. Besides its business objectives, public procurement is an instrument for the attainment of broader national socio-economic objectives such as supporting employment of citizens and income creation through preference for local suppliers; promotion of indigenous small, medium and micro enterprises (SMMEs); and, enhancement of regional integration through improvement of cross-border trade. Accordingly, public procurement is checked by various regulations including laws, statutes and ministerial decrees specifically enacted to protect public interest. It is also subject to scrutiny by the auditing arm of government, which in itself assumes ultimate responsibility for obligations incurred in relation to third parties.

Procurement in the private sector, on the other hand, seeks merely to achieve efficiency and a good economic result for the buyer: securing the best price for goods and services is paramount. Consequently, procurement in the private sector does not follow any firm procedure. As a result of these and other differences, the public procurement process is much more complicated and slower, and not always as efficient as private sector purchasing. Table 1 compares procurement in the public and private sectors on the basis of six themes.

Table 1: Comparison of private and public procurement

Theme	Private sector	Public sector
Status of the parties	Supplier and buyer are equal legal entities, differing only in size and financial strength	Buyer sovereignty affects rule making, terms and conditions, and creates unilateral power to change or terminate the agreement
Accountability	Both parties are expected to meet general standards of law, precedent, and ethical conventions	Added standards to support public oversight of expenditures and compliance with public procedures, ethical perceptions and information policies
Process complexity	Relatively simple, practical solicitations, award procedures and documentation of contracts and claims	Detailed procedural guidance dictated by public oversight, concern for equity in public decisions, frequent use of cost type contracts and social policy imperatives
Operational objective	Systems designed for production support, non-product purchases, and commercial resale	Purchases are for consumption by the government, for public use and benefit, and often to support research, development or major systems innovations
End objectives	Operations are focused on profit and loss, and enhanced competitive position	Multiple objectives, primacy unclear, subjective measurement of success, and efficiency among many other objectives
Systems requirements and cost generation	Few, if any, non-product or non-programme-oriented requirements	Many non-product or non-programme oriented system requirements, such as formal representations and certifications, audit, post-award administration, flow down of clauses and policies

Source: Mueller (1998)

2.3 Economics and Policy Significance of Public Procurement

According to Arrowsmith and Hartley (2002), public procurement serves a greater role in developing countries and economies in transition than it does in developed countries. Since they are the major buyers (or in some cases the only buyers) of goods and services, governments in developing countries can influence the size, structure, conduct and performance of national industries. By allowing foreign firms to bid in public contracts or by favouring domestic firms, governments can determine entry and exit within an industry. Governments can also influence the form of competition, i.e. whether competition is restricted to price or includes non-price variables such as technical progress, delivery and product characteristics. Thirdly, governments can influence firm prices and profits directly by, for example, specifying profit rates in non-competitive contracts or indirectly by encouraging open competition for contracts.

Public procurement involves a complex set of choices embracing what to buy, who to buy from, selection of the choice criteria and how to buy. Figure 1 summarizes these sets of choices, the range of selections making up each choice and their implications for the economy.

For each 'choice', the selection range shown in column 2 represents a continuum covering various combinations of the two converse decision possibilities. For example, where to buy, the continuum between "preferred supplier" and "competitively selected contractor" covers several selections, including different types of auctions, partnership sourcing, competitive sealed bids and competitive negotiations. Likewise, between "fixed-price contracts" and "cost-plus contracts" under how to buy, there is a broad menu of contracts across which cost overruns are shared between the contractor and the owner (i.e. the government). Under every 'choice', therefore, the actual public procurement practice for any country can be captured along the respective continuum. From this, it can be deduced that irrespective of the selection made by a particular government, public

Figure 1: Public procurement choices

Choice	Range of selection	Implications
What to buy	<ul style="list-style-type: none"> Simple items Complex items 	Public procurement results from government's choice, partly due to privatization, to outsource certain goods/services. Depending on the nature/value of items outsourced and type/size of firms contracted, choice on 'what to buy' can have major implications for employment creation, technology transfer, technical progress, etc.
Where to buy	<ul style="list-style-type: none"> Preferred supplier(s) Competitively selected contractor 	Single sourcing restricts entry/exit. Besides "policing" contractors' profits, competitive tendering causes efficiency, lowers prices and innovation. However, it introduces transaction costs (searching, negotiating, enforcing, etc), erosion of trust between principal and agent and may lead to corruption due to lobbying by contractors. Partnership sourcing, an emerging intermediary concept, may lead to "win-win" outcomes.
Choice criteria	<ul style="list-style-type: none"> Price, delivery & performance factors Wider policy objective 	Public procurement is often used to achieve wider policy objectives, for example stimulating local industrial innovation, poverty alleviation, job creation, etc. This leads to preferential or discriminatory purchasing, hence barriers to trade. Where the wider policy objectives are vaguely defined, use of this choice criterion complicates independent evaluation of the efficiency in public procurement decisions.
How to buy	<ul style="list-style-type: none"> Fixed price contract Cost-plus contract 	Fixed price contracts shift risks to contractors and hence provide incentives for efficiency. They may, however, lead contractors to earn 'undesirably' high profits. While fixed-price contracts minimize total project costs, cost-plus contracts ¹ are known to minimize total project completion time.

Source: Authors' compilation from Arrowsmith and Hartley (2002); Bajari and Tadelis (1999)

¹A cost-plus contract does not specify a fixed price. Instead, the contractor is reimbursed his total cost plus a stated percentage of profit.

procurement decisions will have diverse economic, social and possibly political policy implications. This underscores the need for a coherent and unambiguous public procurement policy framework covering the goals and objectives of government purchasing decisions as well as the strategies to be used.

Whereas public procurement has great significance for the national economy, Geroski (1990) argues that as a policy instrument, it has its limitations and failures, and "...can be blunted or perverted by misuse". For instance, preferential and discriminatory public purchasing might be used as a guise to favour individuals/constituencies associated with senior government officials rather than as a strategy to improve legitimately marginalized sectors. In the same way, national public procurement policies aimed at supporting domestic sectors are likely to conflict, say with market integration policies of economic trading blocs such as COMESA or customs unions such as EAC. Such conflicts have been experienced in Europe following the establishment of the Single European Market (SEM), which aims at integrating public procurement activities of European Economic Community (EEC) member.⁵ The potential for such policy conflict is responsible at least, in part, for reluctance by many developing countries to sign up to World Trade Organization's General Procurement Agreement (GPA),⁶ which seeks to open up members'

⁵The European Court quashed the requirement by Italy's government that all (Italian) public agencies buy a fixed quota of their supplies from firms operating in the southern Mezzogioma region. This was because the requirement was in conflict with the SEM's principles.

⁶This is a WTO voluntary agreement extending most-favoured-nation (MFN) and national treatment rules to government procurement. Under GPA, procuring agencies are required to make purchases exceeding specified threshold limits by inviting tenders open to participation by suppliers from other signatory countries. A separate action of accession is needed to join the GPA, which involves negotiations with all signatories to determine coverage of the Agreement. Provisions for Least Developed Countries provide for special and differential treatment, e.g. exclusion of certain products/services from the rule of national treatment for which the countries wish to continue to extend price preferences.

government purchasing markets above specified thresholds to participation by suppliers from other signatory countries.

2.4 Kenya's Public Procurement and the Reform Initiative

The subject of public procurement in Kenya has never been far from controversy. Many allegations of unscrupulous behaviour in public financial management in central and municipal governments or in state enterprises have been linked to procurement. The following are among the most recurring controversies with which public procurement has been associated over the last three or so decades:

- Corruption, rent-seeking and underhandedness between public officials and the business community;
- Making procurement commitments without funds and/or just because funds are available;
- Wasteful usage of government supplies, including fleets, and inadequate maintenance of equipment;
- Poor implementation of donor-funded projects due to procurement-related inefficiencies; and
- Lack of procurement planning and absence of procurement records, including data and statistics.

These controversies have been made more profound by the difficulty in estimating the exact magnitude and trends of government procurement and the executive arm of government's perceived interference in the acquisition process, particularly in the award of contracts. Prior to 1998, many public procurement problems could be explained by the absence of a uniform or transparent procurement system covering the entire public sector. Since independence, central government procurement decisions were in fact guided only by a Supplies Manual written in 1978, and

circulars issued from time to time by Treasury. Regulation was undertaken through multiple, often uncoordinated, statutes, including:

- (a) General commercial laws (e.g. Sale of Goods Act Cap 31, Law of Contracts Cap 23, Government Contracts Act, Cap 25, etc);
- (b) Laws governing state corporations;
- (c) Labour, tax, customs and banking laws among a myriad of other statutes containing aspects of procurement; and
- (d) Laws governing the practice of various professions.

Following a major reform initiative launched in 1997 to develop a comprehensive and consistent public procurement system, The Exchequer and Audit (Public Procurement) regulations, contained in Legal Notice No. 51 of 2001, were introduced. These regulations provided not only for structured organizations to undertake procurement but also basic rules to guide procuring entities, including handling of appeals and complaints. Contrary to expectations, these regulations did not lead to much success in eliminating public procurement controversies. It is difficult, given this setting, to predict the extent to which the Public Procurement and Disposal of Public Assets Act (2005) will improve the image of government procurement even if outstanding reforms are completed.

2.5 Outstanding Reforms

Future reforms in Kenya's public procurement are expected to focus on four principle areas: further institutional restructuring, training and capacity building, upgrading of procurement systems, and strengthening of operational activities. While the focus is well justified, it does not effectively cover some five critical areas, which earlier legislative and institutional reforms overlooked. The areas are:

1. Delayed adoption of electronic (e-) procurement,⁷ which has clear advantages over the current manual and paper-based method of procuring and supply chain management;
2. Slow implementation of joint and standardized procurement, especially for Common User Items (CUIs) across ministries, local authorities and state corporations as well as sparse usage of existing government suppliers, such as the Government Printer, and Kenya Medical Supplies Agency (KEMSA), among others;
3. Lack of Public-Private Partnerships (PPPs) in procurement due to the absence of a regulatory framework or strategy on the involvement of private sector, for instance, in completing public projects or seeking refinancing for the payment of goods, services or works;
4. Lack of concern for “green procurement” and community procurement initiatives. Green procurement involves building environmental sustainability considerations into the supplies management chain of activities. Community procurement, an emerging concept in public procurement developed by World Bank, involves public procurement through grassroot committees. Community procurement can benefit the Constituency Development Fund (CDF) programme, hence the need for clear policy guidance;⁸ and

⁷ This is a business process involving use of electronic methods in every stage of the purchasing process, from identification of requirement, tendering, through to payment and, potentially, to contract management. It entails: electronic creation of requisitions; automated approval process transforming requisitions into purchase orders; electronic routing of approved orders to government suppliers who, in turn, ship the goods and send the invoices back to the government, possibly electronically; and e-payment of invoices. Where government suppliers have not yet been identified, e-procurement can also entail e-tendering and updating of inventory and asset registers with goods received.

5. Non-integration of regional public procurement markets. Besides promoting economic cooperation, integration of government procurement markets by regional blocs can realize major scale economies and stimulate growth through trade links. Current initiatives by the Directorate of Public Procurement to formulate joint public procurement directives (within COMESA) and establish common thresholds, plus an IT public procurement support system (within EAC), remain formless as long as the country has no domestic policy detailing what public procurement is expected to achieve and how.

Much justification for this study comes from the view that a broad policy framework addressing the above concerns will help sustain the gains from past public procurement reforms and ensure that envisaged initiatives succeed.

*Tendering and contracting for CDF projects countrywide (valued at Ksh 7.2 billion in the 2005/06 fiscal year) is conducted through existing public procurement framework in which Project Tender Committees are the lowest levels in the government acquisitions decision-making hierarchy. Under community procurement, public participation in the procurement process would be achieved directly through Constituency Development Committees (CDCs) or indirectly through involvement of the National CDF Committee.

3. Conceptual and Analytical Framework

3.1 Public Procurement, Life Cycle Costing and Value for Money

Public procurement is generally conducted through competitive tendering, which occurs when suppliers make written quotations or bid to supply goods, services and works. Unlike single tendering,⁹ competitive tendering helps to avoid favouritism and to discourage the emergence of monopolies and cartels. Competitive tendering underpins contemporary procurement markets and differs substantially from pure competition found in conventional demand-supply exchange situations. The latter aims to achieve the "lowest bid price" while the former aims to achieve the "lowest total cost of ownership". This is accomplished through Life Cycle Costing (LCC),¹⁰ a key procurement-contract award technique that balances price and quality considerations against all other costs to be incurred during an item's lifetime. LCC is the basis of sustainable public procurement and helps in realizing value for money.

⁹The practice of directly approaching one supplier. Single tendering does not permit open and fair competition and can only be justified under public sector procurement in three circumstances: where procurement constitutes follow up work directly related to a recently completed contract, and the added value gained from the additional work being given to the same contractor outweighs any potential price reduction that may be derived through competition; where expertise required is available only from one source due, for instance, to ownership of exclusive design rights or patents, or where goods/services to be procured are of a complex nature and no well-developed market exists; and where the procurement value falls below a specified threshold and competition is deemed uneconomical.

¹⁰The total cost to government of procuring, operating, supporting and (if applicable) disposing of items procured. LCC has the following elements: acquisition costs (i.e. identifiable one time costs incurred during acquisition, for example, primary purchase price, installation, initial logistics and training; transport costs and operating (recurring) costs, i.e. operations and maintenance; project, asset and contract management costs incurred after acquisition (for example energy and water consumption costs, license fees, staff & training costs, insurance premiums and environmental taxes); and disposal costs, i.e. the ultimate costs incurred when already acquired goods and assets need to be discarded, such as site clean up, refuse collection and recycling costs.

Improvements in government purchasing, itself a major target of public procurement reform, can generate numerous benefits to a country. These benefits include:

- Economy, efficiency and transparency in public procurement and, hence, timely and cost-effective implementation of public sector activities;
- Enhancing aid utilization capacity in the country;
- Reducing business costs while improving the investment climate; and
- Developing the capacity of domestic contracting/consulting industries to penetrate regional and global markets.

It is also noted that advancements in e-commerce, the evolving role of government and the increasing need for Public-Private Partnership (PPP) mean that public procurement reform initiatives must now also aim at producing innovative, yet risk-free procurement approaches. This adds the element of comprehensive risk assessment to the reform agenda.

3.2 The Nature of Public Procurement Reform

Public procurement reform may be collapsed into five distinct though mutually dependent elements/activities, the scope of which is shown in Table 2. While there is no prescribed order (least of all one which fits all countries) in which these activities ought to be implemented, a coherent public procurement policy can help to converge the other four elements, more so if it comes early in the reform calendar. It is also the more logical approach. Such an approach is even more compelling if one considers the life-cycle costing connotations of public procurement and its relationship with public project planning.

Table 2: Scope of public procurement reform

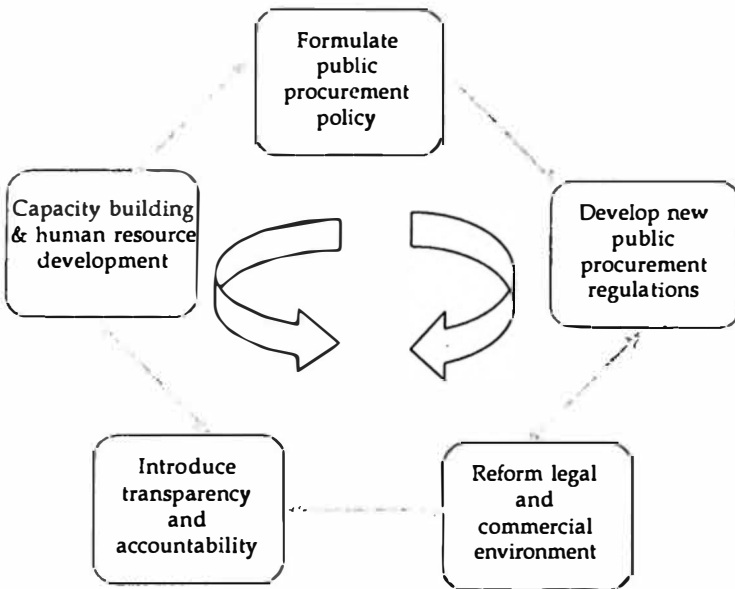
Formulation of public procurement policy framework <ul style="list-style-type: none">• Clear statement of the government's procurement goals and objectives• Adoption of an integrated management framework linking procurement with planning, programming, budgeting and requirements generation• Implementation of a Monitoring & Evaluation (M&E) strategy
Development of new procurement regulations <ul style="list-style-type: none">• Review and re-design of the public sector procurement structure• Appraisal of the regulatory framework for public procurement and development of recommendations to improve its suitability for contemporary operations• Review of the need for an oversight body and formulating its role and activities• Preparation of procurement guidelines and manuals of procedure• Development of procurement documents
Reform of the legal and commercial environment <ul style="list-style-type: none">• Reform of legislative, regulatory and institutional frameworks in accordance with relevant international standards and the UNCITRAL Model Law on Procurement¹¹• Harmonization of procurement laws, regulations and procedures with the requirements of WTO (GPA) and other international agreements• Review of laws, regulations and other legislation that impact upon public procurement• Training in the legal aspects of public sector procurement
Introduction of transparency and accountability mechanisms <ul style="list-style-type: none">• Broad publication of rules, procedures, deadlines, criteria and decisions• Provision of notice in ample time• Application of objective, measurable criteria previously defined and disseminated• Introduction of civil society-led oversight body• Adoption of professional standards and training for government procurement officials• Introduction of sanctions and penalties for non-compliance by both public officials and private sector bidders
Capacity building and human resource development <ul style="list-style-type: none">• Assessment of procurement skill levels, development of a skills enhancement programme• Definition of training needs to support implementation of reform programmes• Development of comprehensive training programmes for reformed procurement organizations• Public sector procurement training

Source: Compiled by authors from various resources

¹¹This Model Law, adopted by UNCITRAL in 1994, is designed to assist States in reforming and modernizing their laws on procurement procedures for goods, construction and services. The Law contains procedures aimed at achieving: a) competition; b) transparency; c) fairness; and, d) objectivity in the procurement process, thereby increasing economy and efficiency in procurement.

In order to effectively analyze the comprehensiveness of Kenya's public procurement reforms since 1997, Table 2 has been transposed into the cycle of activities shown in Figure 2. The figure, unlike the table, is a better illustration of *sequencing*, another important aspect in evaluating the success of any procurement reforms.

Figure 2: Cycle of public procurement reform



4. Study Findings

4.1 Major Developments in Kenya's Public Procurement

Kenya's public procurement between the early 1960s and the mid 1990s was conducted under guidance from Treasury Circulars (see Annex) containing instructions to procurement and supplies officers. These instructions, as noted in one circular (Ref. No. CFN/2/57/02 of January 19th, 1960), were meant to serve as administrative directives. They were not statutory regulations. Although the circulars contributed to the development of public procurement, practiced then under the field of supplies management, they had no legal backing. The unpredictable manner in which the circulars were issued also indicates that they comprised spontaneous responses to emergentshortcomings within the procurement system. Not until 1997 did the government begin systematic public procurement reforms. Given the absence of a legal framework, the reforms focused mainly on "reviewing the contemporary public procurement system, including framework procedures and institutional arrangements for the public procurement system and to prepare a comprehensive legal and institutional structure to govern public procurement ..." The review or 'diagnostic survey' of the procurement system conducted ahead of the reforms identified several weaknesses, the most important were:

- (i) Absence of a standard public acquisitions method covering central and local governments and state corporations;
- (ii) Poor procurement planning and lack of supervision and effective monitoring of procurement as an element in project implementation; and
- (iii) Weak and ambiguous role of procurement institutions, particularly the Central Tender Board (CTB).

The reform project's National Steering Committee (NSC) approved various initiatives, including drafting of a law governing procurement within the public sector. Pending the enactment of this law, the Minister of Finance released a comprehensive set of regulations (section 5A of the Exchequer and Audit Act, Cap 412 of the Laws of Kenya)¹² to govern public procurement. The Committee also approved abolishment of the CTB. In replacement, tender committees were established in all government ministries, local authorities, state corporations, cooperative societies and public learning institutions. Accounting officers were given full responsibility for procurement within their departments.

The NSC further approved two institutional changes. The first involved establishment of a Public Procurement Complaints, Review & Appeals Board (PPCRAB) with powers to restrain procuring agencies from awarding contracts in the event of verified anomalies. Between 2002 when it became operational and 2004, the private sector-led PPCRAB handled more than 130 complaints, 68 percent of which resulted in the procurement contracts being annulled and either awarded to the complainant(s) or tendered afresh. The second initiative involved creation of the Public Procurement Directorate (PPD) charged with oversight of the public procurement process. This mandate makes PPD the central organ within government responsible for both legislative and policy reforms to the public procurement function. As evidenced by the enactment of the Public Procurement and Disposal of Public Assets Bill, the PPD has made progress towards improving the legislative framework and procedural aspects of public procurement.

¹²Also known as the Public Procurement Regulations, the Act eventually came into operation on 15th March 2001 after being signed by the Minister on 30th March as Legal Notice No. 51.

4.2 Findings

Governments of the world are the biggest buyers of goods, works and services. In 1998, the value of the world's total contestable government procurement market was estimated at \$2,083 billion, equivalent to 7.1 percent of the world's GDP or 30.1 percent of the world merchandise and commercial services exports. A number of studies (for example Trionfetti, as quoted in Odhiambo and Kamau, 2003; Wittig, W. A., ITC/UNCTAD/WTO) have estimated that the size of Central Government procurement (CGP) in developing countries is higher and ranges between 9-13 percent of GDP. The authors did not find a one-stop data source containing Kenya's central government procurement statistics. Equally unsuccessful were efforts to obtain data on local government procurement. To estimate public procurement size and trends in the country, the authors adopted the methodology used by Odhiambo and Kamau (2003). This method subtracts wages and salaries, interest payments, transfers and net lending from central and local government expenditures. The resultant figures, while not accurate, provide sufficient evidence for the purposes of this study.

Based on the above methodology, it is estimated that Kenya's CGP over the 12 years up to 2004 was approximately 9.2 percent of the country's GDP (Table 3). In 2004 alone, Kenya's CGP was almost Ksh 95 billion.

As a percentage of total government expenditure (TGE), Kenya's CGP over the period of study averaged 34 percent (Figure 3), making it the single biggest item of public spending ahead of salaries and wages. Over the 12-year period, the country's CGP also grew quite irregularly (Figure 4). Between 1992 and 1997, for instance, procurement in central government increased on an annual basis by between 11 and 47 percent. Over the next three years, it shrunk each year by 21, 3 and 17 percent, respectively. In 2001, the volume of public procurement shot up by an unprecedented 110 percent before declining again in 2002 by 16 percent.

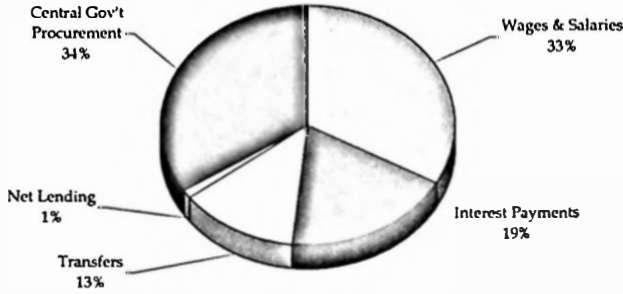
Table 3: Central government procurement (Ksh million) (1992-2005)

Year	Total Gov't Exp*	Less Wages & Salaries	Less Interest Payments	Less Transfers	Less Net Lending	Central Government Procurement (CGP)	GDP at Market	CGP as % of GDP	CGP as % of TGE	TGE as % GDP
1992	70,345	24,187	15,059	6,953	1,102	23,044	342,503	6.73	32.8	20.5
1993	102,460	29,228	34,425	4,038	876	33,893	424,224	7.99	33.1	24.2
1994	130,950	37,188	46,652	6,842	2,516	37,752	507,923	7.43	28.8	25.8
1995	135,160	44,358	31,823	5,072	1,592	52,315	602,393	8.68	38.7	22.4
1996	152,187	47,029	37,245	5,076	2,848	59,989	687,998	8.72	39.4	22.1
1997	168,403	55,159	34,786	5,659	2,476	70,323	770,312	9.13	41.8	21.9
1998	194,965	62,700	37,971	35,903	2,622	55,769	850,808	6.55	28.6	22.9
1999	197,341	64,557	40,055	35,197	3,336	54,196	906,928	5.98	27.5	21.8
2000	175,120	67,048	29,387	31,630	1,880	45,175	967,838	4.67	25.8	18.1
2001	232,921	73,180	31,035	29,823	3,957	94,926	1,020,023	9.31	40.8	22.8
2002	226,915	81,606	30,384	33,206	1,862	79,857	1,022,208	7.81	35.2	22.2
2003	282,365	90,469	36,026	52,772	1,799	101,299	1,145,286	8.84	35.9	24.7
2004	289,865	100,731	29,978	62,173	1,114	95,869	1,282,505	7.48	33.1	22.6
2005	356,854	111,251	33,079	80,471	831	131,222	1,415,156	9.27	36.8	25.2

* Total government expenditure is net of public debt redemption and is inclusive of military expenditures.

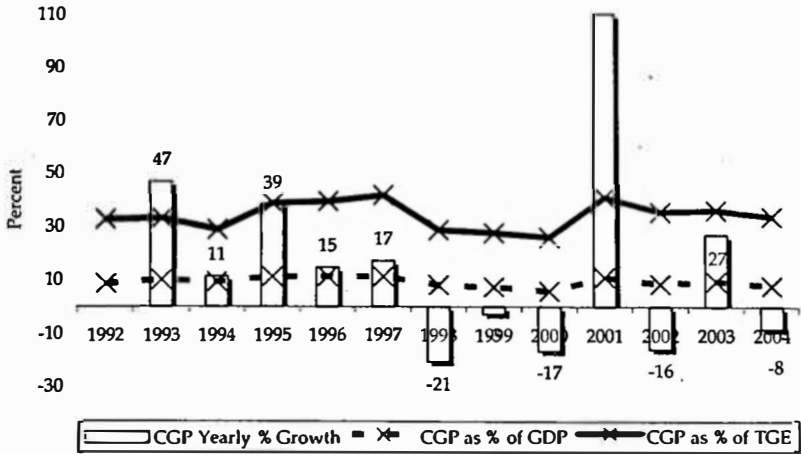
Sources: Statistical Abstracts (Various), Economic Surveys (Various) and Quarterly Budget Reports (various).

Figure 3: Breakdown of Kenya's central government expenditure (1992-2005)



Source: Economic Surveys (Various)

Figure 4: Trends in Kenya's central government procurement (1992-2004)



Source: Economic Surveys (Various)

In 2003 and 2004, CGP grew by 27 percent before decreasing by 8 percent, respectively.

In attempting to explain the factors behind this erratic performance, the authors observe some developments in public procurement practice over the review period (Table 4), which would appear to coincide with distinct shifts in the performance of government acquisition.

Table 4: Major policy activities in Kenya's public procurement (1997-2005)

1997	Government commences public procurement reforms with support from World Bank
2000	Treasury Circular Ref. No. 8/2000 establishes the Public Procurement Appeals Board (PPAB)
2001	Ministry of Finance issues The Exchequer & Audit (Public Procurement) Regulations placing all public entities under one procurement system; public entities establish tender committees and begin procuring independently; Public Procurement Appeals Board (PPAB) dissolved and replaced by PPCRAB; suppliers and contractors participating in public procurement given the right of appeal
2002	Newly-established PPD mounts public procurement system awareness campaigns and commences training of more than 700 procurement officers country-wide
2003	Government dismisses about 2,000 procurement officers in ministries and state corporations and suspends procurement activities unless specially approved by the Treasury. Later in the same year, government employs 'some qualified procurement officers' and lifts the suspension of procurement activities
2004	The first National Procurement Consultative Meeting is held; PPD undertakes a training needs assessment and develops training programmes; government employs new procurement staff and deploys them to ministries; an induction workshop for new staff is held
2005	The Public Procurement and Disposal Act is enacted, but not operational, pending the adoption of subsidiary legislation, i.e. The Regulations

Source: Compiled from Government of Kenya (2004)

The initial shrinkage in the volume of CGP (1998-2000), for instance, came noticeably after the start of public procurement reforms in 1997. The reforms, initiated under the World Bank's Institutional Development Fund (IDF) programme, were aimed at introducing efficiency, economy, accountability and transparency in the public procurement system. The expansion in public procurement recorded in 2001 followed substitution of central procurement with independent procurement at all levels of government. PPD's extensive sensitization and training programmes and the drastic measures to suspend purchasing in 2002 and 2003, respectively, also precede sharp public procurement trends recorded during these years. Apart from demonstrating the back and forth nature of Kenya's public procurement policy (e.g. the formation of PPAB and its replacement with PPCRAB in less than 2 years, the firing of 2,000 'unqualified' officers and their replacement in the same year with others needing retraining), the above activities also confirm the extent to which policy, or the lack of it, has influenced the performance of public procurement in the country.

Odhiambo and Kamau (2003) estimated that procurement by Kenya's local authorities comprises less than 1 percent of GDP. According to Table 5, the size of procurement by Kenya's local authorities averaged approximately 0.4 percent of GDP over the period between 1998/99 and 2003/04 fiscal years.

Figure 5 further indicates that unlike in the central government, purchase of goods and services has over the same six year period comprised the second largest item of expenditure (31%) by local authorities. Labour costs take up more than half (51%) of total annual spending.

According to Figure 6, annual changes in the volume of Kenya's local government procurement has, over the study period, exhibited the same irregular pattern observed in the central government's procurement trends.

Table 5: Volume of Kenya's local government procurement (1998/99-2004/05)

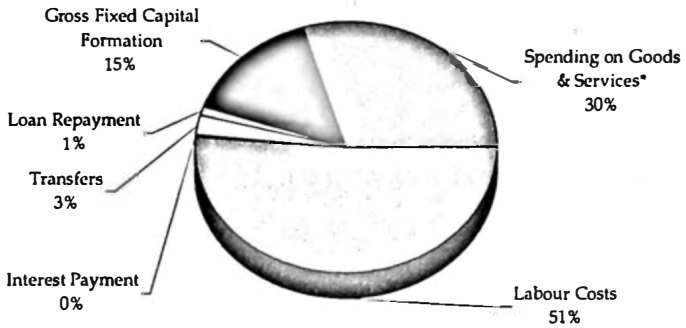
Except percentages, all figures in Ksh millions	98/99	99/00	00/01	01/02	02/03	03/04	04/05
Total local gov't revenue	7,212	8,136	10,094	11,484	12,128	9,581	10,738
Total local gov't expenditure (TLGE)	9,858	9,784	10,066	10,981	14,867	14,146	14,437
Less labour costs	4,692	5,350	5,019	5,535	8,034	6,715	7,013
Less interest payments	12	10	7	5	7	38	39
Less transfers ¹	301	286	215	208	404	338	477
Less loan repayment ²	93	123	103	129	177	221	218
Gross fixed capital formation	1,781	1,316	1,397	1,343	2,079	2,225	2,886
Local government procurement	2,978	2,793	3,324	3,414	4,166	3,566	3,804
LGP % of TLGE	30.2	28.5	33.0	31.1	28.0	25.2	26.4
GDP	718,754	771,362	838,988	920,708	1,027,163	1,165,305	
LGP % GDP	0.41	0.36	0.40	0.37	0.41	0.31	

Source: Economic Surveys (various)

Notes: ¹ Includes transfers to households and enterprises, and transfers to funds (current & capital); ² Includes interest.

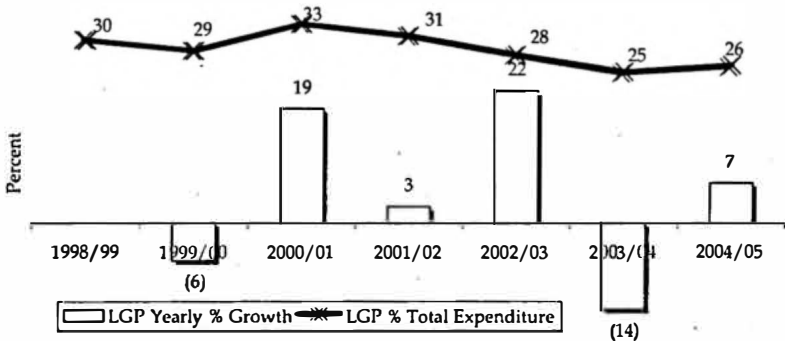


Figure 5: Breakdown of Kenya's local government expenditure (1998/99-2004/05)



Source: Economic Surveys (Various)

Figure 6: Trends in Kenya's local government procurement (1998/99-2004/05)



Source: Economic Surveys (Various)

4.3 Comparative Analysis of Public Procurement

In accordance with this study's second objective, a comparative analysis of public sector procurement has been undertaken primarily to identify strengths of policies practiced by different countries and regions, and lessons derived thereof in order to make proposals for the formulation of Kenya's policy framework. Besides looking at the relative magnitude of public procurement markets in seven countries/regions studied, the analysis draws comparisons between policies of the respective governments by asking the following seven lead questions:

- (i) Does the country or region have a central and well-articulated policy containing social and economic objectives of public procurement, its linkage with other government functions and national strategies, and a mechanism for its audit?
- (ii) Has the country enacted distinct legislation to guide the public procurement process?
- (iii) Is public procurement conducted through an institutional framework with clear roles and responsibilities for each agency involved?
- (iv) What measures have been put in place to promote access by SMMEs (or small businesses) to the government's procurement market and facilitate linkages with larger enterprises?
- (v) How are public procurement contract disputes resolved?
- (vi) Is the country or region part of a multilateral pact or association focussing on government procurement?
- (vii) Does the country or region have an electronic procurement strategy?

Table 6 summarizes the comparative analysis, whose details are also provided in the ensuing sections. According to the analysis, each country or region studied has at least one strong feature of its public procurement

framework. The effective merger by the EU of its 25 members' procurement systems is, for instance, obviously outstanding. Other similarly remarkable examples are: Malaysia's successful fusion of public procurement with the country's Vision 2020; The Philippine's detailed public procurement institutional structure incorporating eleven government departments, besides other key statutory and private sector oversight bodies; South Africa's 'preferential' strategy of leveraging government procurement in support of SMMEs and the empowerment of Black-disadvantaged groups; and, USA's highly integrated public procurement framework, which adequately connects planning, requirements generation, budgeting, acquisitions and project management activities of more than 60 federal agencies. These examples offer valuable lessons which, if carefully studied and customized, can enable Kenya to formulate an effective public procurement policy and also strengthen existing procedures and practices.

Procurement in the United States

The US federal government, whose procurement budget exceeds \$200 billion is the world's largest purchasing entity of both private and public sectors.¹³ Development of statutory policies and procedures for the federal government's acquisitions system (comprising more than 60 federal agencies) is vested with the executive branch of government, whose structure and functions are detailed in Figure 7 and Table 7. All procurement-related legal cases involving the federal government, including contract disputes, are tried by the US judiciary and court decisions become a source of federal acquisition regulations (FARs). Budget appropriations and procurement oversight powers are vested with Congress (the legislature), which passes laws establishing procurement

¹³This is only procurement spending at the Federal government level (See US Federal Procurement Report, 2003 <http://www.fpdc.gov/fpdc/FPR2003a.pdf>). It is estimated that another \$400 billion is spent annually on procurement at the state and local level (Wittig, W. A.)

Table 6: A comparative analysis of public procurement

Country or region / size of public procurement	Central/coherent procurement policy	Public procurement law/ regulations	Clear institutional procurement structure	Procurement policy on small business	Procurement contract dispute resolution	Regional public procurement pact	E-procurement strategy
EU: On average 14% of GDP	EU's single market policy contains a central and coherent public procurement policy as one of its main elements. This policy includes the region's strategy targets, e.g. "green procurement" ¹⁴	1987 Single European Act establishes a legislative programme eliminating all barriers to intra-EU trade. 2004 legislative package of Public Procurement Directives adopted by EU's parliament & Council of Ministers simplifies region's common procurement procedures				Public procurement is conducted within a 25-member-country single European procurement market framework in which government procurement is opened up and rules harmonized to reflect EEC's common internal market policies	
Kenya: Central government procurement approx. 7.5% of GDP in 2004	Other than efficiency promotion and corruption deterrence stipulations, objectives of Kenya's public procurement are not spelt out in a policy document	Currently, Section 5A of Exchequer & Audit Act, Cap 412. Public Procurement & Disposal of Assets Bill not yet enacted		Sessional Paper on MSE dev't supports allocation of 25% procurement quota to SMEs and promotion of sub-contracting, but this is not reflected in actual procurement contract award	A private sector-chaired Public Procurement Complaints, Review & Appeals Board (PPCRA B) was established in 2002		

¹⁴Integration of environmental considerations (e.g. the use of renewable resources, the energy consumption, the potential environmental impact for global warming, etc) into public procurement

Country or region / size of public procurement	Central/coherent procurement policy	Public procurement law/ regulations	Clear institutional procurement structure	Procurement policy on small business	Procurement contract dispute resolution	Regional public procurement pact	E-procurement strategy
Malaysia: No definite figures but estimates suggest approx. 10% of GDP in 2003	Government procurement supports National Development Policy (to create a Bumiputera business community), and Vision 2020 Policy (to attain developed nation status by 2020)	Government Contract Act 1949, Financial Procedure Act 1957, and Treasury instructions/circulars & central contract circulars	Procurement structure comprises: agents (federal & state governments and their departments & local authorities); legal & regulatory framework; and, tender process	Preference given to Bumiputera agents and for locally-produced goods constituting prescribed value of procurement contract. Public procurement directly supports domestic industries	Complaints initially heard by Public Complaint Bureau (under Prime Minister's Dept.), and thereafter by the Permanent Committee on Public Complaint, which decides on action/redress	None, but the country is a member of WTO's Working Group on Transparency in Government Procurement ¹⁵	Government Internet Tendering Information System (GITIS)
Philippines, The	The Government Procurement Policy Board (GPPB), an independent inter-agency body formulates and implements policy, and monitors its effectiveness		Detailed institutional structure of the GPPB, which incorporates 11 key government departments among other statutory and private sector oversight bodies				Government Electronic Procurement System (G-EPS)

¹⁵This is one of the 4 "new issues" included in WTO's 1996 Singapore Ministerial Conference. It involves: i) Broad publication of rules, procedures, deadlines, criteria and decisions; ii) Notice in ample time; iii) Application of objective, measurable criteria previously defined and disseminated; iv) Civil society oversight; v) Professional standards and training; and vi) Dissuasive sanctions and penalties for non-compliance by both public officials and private sector bidders. Efforts to increase the transparency and integrity of public procurement include an obligation to have corporate anti-bribery codes of conduct and compliance programs to promote private sector compliance with legal requirements and the highest ethical standards. Source: <http://www.summit-americas.org/CEGCI%20Meetings/16-FEB-01-CEGCI/Transparency%20Internacional-Eng.htm>

Country or region / size of public procurement	Central / coherent procurement policy	Public procurement law / regulations	Clear institutional procurement structure	Procurement policy on small business	Procurement contract dispute resolution	Regional public procurement pact	E-procurement strategy
Singapore: 3% of GDP in 1998	Government procurement policy formulated by the Ministry of Finance	Government Procurement Act plus 4 other subsidiary legislations. Also, there is a Government Instructions Manual on procurement procedures	There is no central public procurement office/ structure. Government procurement is decentralized into individual ministries, departments and Statutory Boards, which undertake own acquisition	Track record requirements overlooked for SMEs registering to supply government; SMEs permitted to bid jointly; and procurement guide being developed for SMEs, which contribute 1/3 of national output	Government procurement-related complaints handled by Ministry of Finance; complaints of non-compliance with WTO's GPA handled by Government Procurement Adjudication Tribunal (GPAT)	Member of WTO's GPA and of ASEAN Preferential Trading Agreement, whose members are entitled to 2.5% margin of state contracts	All procurement is done via government electronic business (GeBIZ) website. Save for small value purchases, all quotations & tenders are invited and contracts awarded on this site
South Africa: Total Consolidated Government Procurement approx. 13% of GDP in 1995/6	Objectives of public procurement policy contained in the Constitution. Policy provides for categories of preference in contract award, and for protection/ advancement of persons & groups disadvantaged by unfair discrimination	State Tender Board Act (1968); Preferential Procurement Policy Framework Act (2000); Construction Industry Development Board Act (2000); Broad-based Black Economic Empowerment Act (2003); etc		Preferential Procurement Policy Framework (PPPF) Act leverages government procurement in support of SMMEs and Black Economic Empowerment (BEE) objectives			Integrated Financial Management System (IFMS) master plan including e-procurement to fully support the adoption of the proposed integrated supply chain management function
USA: Approx 3% of GDP	The Office of Federal Procurement Policy (OFPP) develops and coordinates implementation of a single government-wide procurement policy	Federal Acquisition Regulations, written in 1984, provide a single consistent set of rules for contracting with US government	Structure comprises Office of Management & Budget (OMB), OFPP, Federal Acquisitions Regulatory Council (FARC), and Boards of Contract Appeal (BCAs)	Congress established policy requires that small businesses receive 23% of federal government prime contracts	US Judiciary tries all cases involving federal government. Decisions by courts become source of federal procurement regulations		Integrated Acquisition Environment (IAE) comprising federal procurement data, business opportunities web page, contractor registration & past performance records

Source: Compiled by authors from various sources

policies and procedures, oversees federal procurement through its various Standing Committees and authorizes the US General Accounting Office (GAO) to recommend decisions to agency heads on contract award and non-award protests. Like court verdicts, these decisions also become sources of FARs.

In addition to supplying federal agencies with required goods, services and works, US government acquisition is also used as "a public policy tool to achieve certain socioeconomic goals" (Drabkin and Thai, 2003). For this reason, various non-procurement agencies, and state and local governments are involved in procurement projects touching on their spheres. The most visible and sensitive socio-economic programme of the US government's procurement policy is its commitment to small

Figure 7: Structure of US federal procurement system (within the Executive Branch)

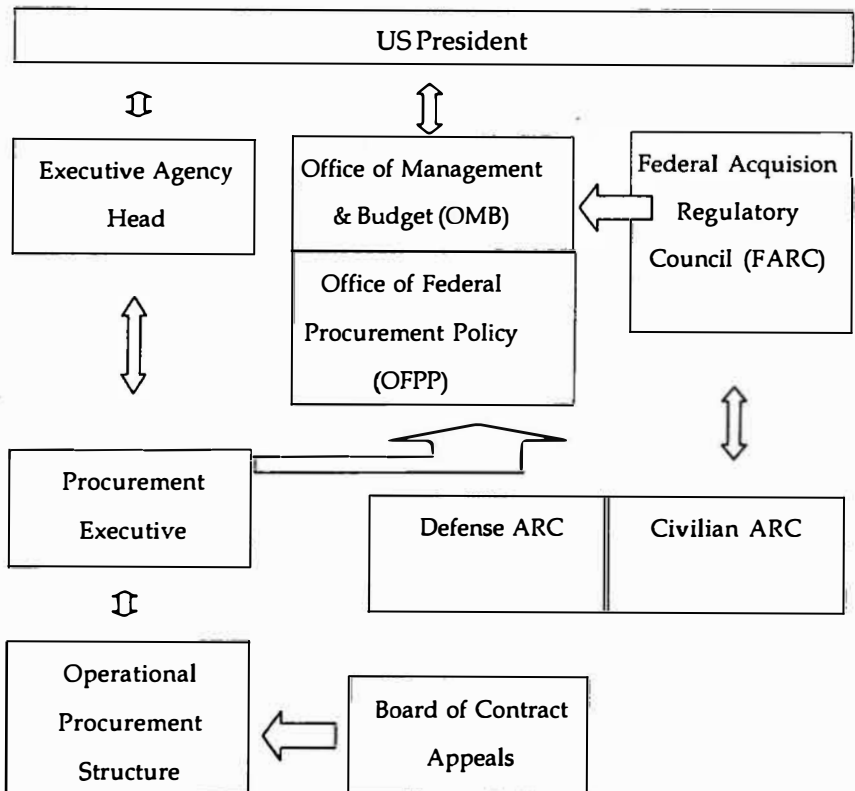


Table 7: Functions of US federal procurement system (within the Executive Branch)

OMB	OFPP	FARC	BCAs
Recommends programmes, funding levels & procurements	Overall leadership in establishment, development and maintenance of federal acquisition regulations and systems	Coordinates general federal procurement policy and regulatory activities	Resolve contract disputes between contract officers and contractors
Monitors programmes and adjusts funding levels	Coordinates development of procurement systems standards	Develops defense and civilian procurement regulations via DARC and CARC, respectively	
Develops and issues procurement policy guidance through OFPP			
Reviews proposed regulations for compliance with policy guidance			

NB: Because they have a significant acquisition function, several large executive agencies (e.g. Department of Defense, Department of Transport, Department of Education, the General Services Administration, etc) run semi-autonomous procurement structures.

businesses, which between 1995 and 2003 received on average 21 percent of the federal government's prime contracts (which excludes contracts in which small businesses participated as first, second or third tier subcontractors).¹⁶ According to the Federal Procurement Data Centre 2003, the US government awarded over \$50 billion worth of prime procurement contracts to small businesses in the financial year 2001.

Procurement within the EU

Public procurement within the European Union (EU) takes place within the Single European Market (SEM) framework, conceived in the early 1980s to combat economic threat posed to the EU by American and Japanese high-tech industries, and by the newly industrializing countries in assembly industries. The 1987 Single European Act consequently established a legislative programme designed to remove physical, technical and fiscal barriers to intra-EU trade. One cornerstone of the programme was formation of a Single Procurement Market opening up public sector procurement and harmonizing it within the European Economic Commissions (EEC) internal market. In 2002, total public procurement within this market was estimated at about 16 percent of the EU's GDP or Euro 1,500 billion. Its importance in the 25 Member States varies, however, between 11 and 20 percent of each country's GDP. The opening up of public procurement in the EU has not only increased cross-border competition and improved prices paid by public authorities but has also

¹⁶Different goals exist for each of the numerous categories of small businesses, for example 5 percent for women-owned small businesses; 10 percent for Historically Underutilized Business (HUB) zone small businesses; 5 percent for veteran-owned small businesses; etc. Other categories of small businesses include: disadvantaged small businesses; Native American's owned small businesses; and, Historically Black Colleges and Universities and Minority Institutions (Drabkin & Thai, 2003).

led to significant savings for taxpayers and, hence, to huge value for money (VFM) gains.¹⁷ Public procurement within the EU is, to a large extent, controlled both by EEC and international rules whose principle is transparent open procedures ensuring fair conditions of competition for suppliers. Some procurement (notably, of military equipment for the defense sector) is, however, excluded and purchases below thresholds must respect the principles of the Treaty only. The legislative package of Public Procurement Directives, approved in 2004 by the European Parliament and the EU's Council of Ministers, further helps to simplify and modernize procurement procedures, for example by facilitating e-procurement in the public sector.

Procurement in South Africa

Total procurement by South Africa's government and organs of state was estimated at R56 billion in the 1995/96 financial year. This constituted approximately 13 percent of the country's GDP, representing 30 percent of all government expenditure. The largest share of procurement spending (45%) went to provincial governments, with central government and local authorities accounting for 39 percent and 16 percent, respectively. In terms of categories, goods and services accounted for approximately 79 percent, while the rest (21 %) was taken up by capital assets.

Besides targeting to achieve good governance through efficiency and elimination of waste and corruption, public procurement policy in South Africa aims to support the country's overall economic objectives, and serve as an instrument for attaining those objectives, which include:

¹⁷The optimum combination of whole life costs and quality capable of meeting the procurer's requirements. Increased VFM, a major objective of public procurement reform is achieved through: i) Reducing purchase costs & time spent on processing orders, seeking and evaluating tenders, and taking deliveries; ii) Improving negotiations with suppliers for lower prices and higher quality, or aggregating demand to get greater leverage on suppliers; and iii) Improving the procuring agency's capacity for project, contract and asset management.

- Implementation of an affirmative participation programme for SMME;
- Promoting employment-intensive practices; and
- Affirming marginalized sectors of society in construction projects and the development of an affirmative procurement policy (APP).¹⁸

Accordingly, the Green Paper on Public Procurement Reform aims at making the tendering system more easily accessible to SMMEs, and at greater policy co-ordination across the different levels and departments of government.

Besides its Constitution, South Africa's public procurement is governed by several pieces of legislation, including:

- (i) The broad-based Black Economic Empowerment (BEE) Act 2003, which establishes a code of good practice informing development of qualification criteria for issuance of licenses/ concessions, sale of state-owned enterprises, PPPs, and implementation of a preferential procurement policy;
- (ii) The Construction Industry Development Board Act (2000), which applies to all organs of state involved in construction industry-related procurement, and

¹⁸APP enables organs of State to operationalize policies in a targeted, transparent, visible and measurable manner when engaging in economic activity with the private sector, without compromising principles of fairness, competition, cost efficiency and inclusion. APP comprises participative programmes aimed at: a) engagement of SMMEs owned by previously disadvantaged persons, b) increasing the volume of work available to the poor and the income generation of marginalized communities. APP involves recognition that procurement may be used as an instrument of government policy, and that participation of targeted individuals/groups/communities/enterprises can be secured using a development objective. APP has 2 components viz. a) A development component ensuring that the target group is capable of participation; and b) A structured participation component ensuring that the target group is actually engaged in provision of goods/services/works (Abridged from: <http://www.info.gov.za/greenpapers/1997/publicproc.htm>)

(iii) The Preferential Procurement Policy Framework (PPPF) Act (2000), which establishes the manner in which preferential procurement policies are to be implemented.

The PPPF Act was enacted with the aim of providing socio-economic opportunities to enterprises and individuals historically excluded from equitable participation in the economy. As part of the government's promotion of procurement reform, the Act also aimed at introducing uniformity in public procurement, besides providing guidelines for government acquisition policy. Thus, the cross-sectoral PPPF provides for creation of categories of preference in the allocation of contracts, as well as the protection and/or advancement of disadvantaged groups. Effectively, it leverages government purchasing power in support of its broad BEE policy objectives, as well as of small enterprise development. As a result, direct preferences are accorded to 'targeted' enterprises to tip the scale in their favour on small contracts with a value below a predetermined financial threshold. Targeted enterprises are, thus, able to participate in public procurement either directly as prime contractors (or as joint venture partners with larger firms), or indirectly as subcontractors, suppliers, service providers and manufacturers to prime contractors in the supply chain. Targeted procurement 'un-bundles' or 'unpacks' procurement contracts to make them accessible to targeted enterprises. Consequently, small-scale enterprises, which by their size have limited access to capital, can increase the labour component of their technologies, thereby promoting employment.

In 2003, South Africa adopted a strategy to promote uniformity in the procurement reform processes. The concept of supply chain management and uniformity in the implementation, thereof, are some of the initiatives under this strategy, which was followed by development of an Integrated Financial Management System (IFMS) master plan including e-procurement, to fully support the adoption of the proposed integrated supply chain management function.

Procurement in Malaysia

Malaysia's Ministry of Finance conducts all public procurement through Government Procurement Management Division, which issues all Federal Central Contracts. Federal and state agencies are required to purchase from these contracts, although government-owned companies are not bound by the government's procurement procedures. Malaysia's procurement policies support its government's objective of achieving developed-nation status by stimulating local industry through maximum use of local materials, resources and technology transfer, supporting Bumiputera (indigenous groups) business and promoting local service industries. Accordingly, some tenders are strictly restricted to Malaysian bidders who receive preferences varying with contract size. Bumiputera Malaysians enjoy an additional preference factor.

Public procurement in Malaysia is legislated by several Acts, including the Contract Act (1949), which provides legal validity for ministries to represent government in making procurements; and the Financial Procedure Act (1957), which outlines the mode of control and management of public finances, lays out procedures for collection and payment of public monies and procedures for purchase, custody and disposal of public property. Procurement is, additionally, controlled through Treasury instructions, including central contract circulars. Complaints regarding issuance of public procurement contracts are first directed to the procuring agency, which reviews the complaints and, if found valid, may cancel the tender and require that new specifications be issued. Complaints on other aspects of government procurement are brought before the Public Complaint Bureau (PCB) located in the Prime Minister's Department, or the Permanent Committee on Public Complaint, which decides what action ought to be taken by the ministry. The Auditor General also has authority to monitor and audit procurement procedures and to order corrective actions where necessary.

Malaysia's public procurement policies are aligned with the aspirations contained in the National Development Policy and Vision 2020, which spells out strategies to help the country attain developed nation status by the year 2020. Thus, procurement and other policies are specifically formulated to stimulate the growth of local industries, support and encourage the involvement of Bumiputera entrepreneurs, and enhance the capability of local institutions and industries. Malaysia has also implemented an electronic procurement system for online processing of government procurement. Consequently, all government procurement information is made available through the Treasury's website.

Procurement in Singapore

The annual value of Singapore's government procurement declined from almost 6 percent of GDP in 1995 to around 3 percent in 1998. The country, whose procurement policies are formulated by its Ministry of Finance, joined the WTO Agreement on Government Procurement (GPA) in 1997. Since there is no centralized procurement agency, individual ministries, departments and statutory bodies carry out their own procurement; some centralized purchasing is undertaken by the Ministries of Finance (through the Expenditure & Procurement Policies Unit), Defense, and Health, as well as the National Computer Board. Singapore's public procurement is legislated mainly by the Government Procurement Act.

Singapore supports SMMEs in their quest for government procurement mainly through various methods. One is the relaxation of rules and regulations to enable SMMEs to have greater access to the government procurement market and lower their costs of doing business with the government through, for example, removal of the track record requirement, and lifting of the financial cap on start-ups as a result of which SMMEs without sufficient track record to pre-qualify as government suppliers can now register and bid for government procurement tenders above

\$70,000—supplier registration is not required for procurement below \$70,000. In addition, government agencies are encouraged to accept combining of bids by several SMEs to enable them participate in high value contracts for which, individually, they are not eligible. Thirdly, the government has developed a procurement guide to help SMEs unfamiliar with the government procurement market to understand the rules and, thus, be better positioned to participate in the government procurement market. All these changes put SMEs on a more equal footing with large enterprises in competing for government contracts and, thus, broaden their access to more business opportunities.

As a result of these changes, out of the 594 government tender contracts with value up to \$100,000 awarded between April and December 2004, 69 percent (or 410) went to companies with net assets (capital net worth) below \$50,000 while 90 percent (or 535) of the contracts were won by companies with net assets less than \$500,000. This does not include supplies procured through quotations and government work performed by such small and medium-size companies through sub-contracting.

Although Singapore opens its government tenders to bids from foreign suppliers, special grants are allowed for national suppliers. A 2.5 percent preference margin is allocated to members of the ASEAN Preferential Trading Arrangement, to which Singapore belongs. This margin may not, however, exceed US\$ 40,000 per tender and is applied on the basis of the lowest evaluated and acceptable tender. In addition to being advertised in the local newspapers, open tenders (i.e. those for procurement valued at above S\$30,000) are published in either the National Gazette or the Government Internet Tendering Information System (GITIS), which also publishes details of tender offers received and subsequent awards. GITIS's site also contains information on suppliers who have been evaluated by the relevant authorities for procurement purposes. Singapore has also developed the Mindef Internet Procurement System (MIPS), which allows electronic submission of quotations, issuing of purchase orders to

suppliers, and invoicing by suppliers. The MIPS, currently used by the Ministry of Defense, is being enhanced and extended to all other Singapore public sector procurement agencies. In June 1998, Singapore participated in demonstrations of the use of information technology in government procurement at the WTO.

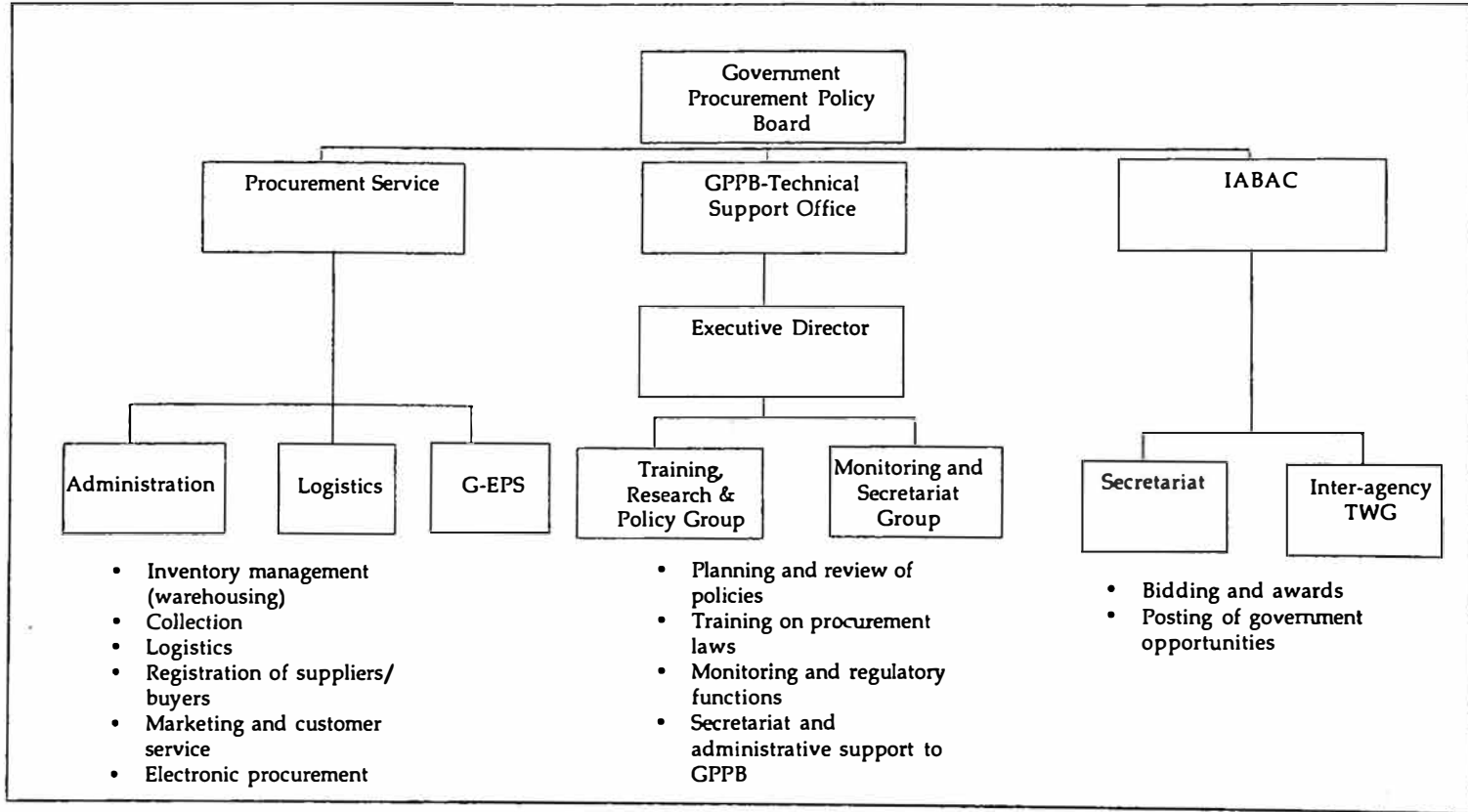
Complaints related to government procurement in Singapore may be directed to the Ministry of Finance, which investigates all complaints and appeals from suppliers and initiates any remedial action if judged necessary. In addition, a Government Procurement Adjudication Tribunal set up under the Government Procurement Act handles complaints of non-compliance with the WTO Agreement on Government Procurement.

Procurement in The Philippines

As a primary aspect of the Philippine Government's public sector procurement reform agenda, the Government Procurement Policy Board (GPPB) was established as an independent inter-agency body with private sector representation (Figure 8). GPPB's general duties and responsibilities include:

- Public procurement policy formulation;
- Formulation, review and, when necessary, amendment of procurement laws, rules and regulations;
- Evaluation of the effectiveness of the government's procurement reform programme;
- Ensuring compliance by all procuring entities with the government's procurement reform programme;
- Professionalization of government procurement practitioners through the management of procurement training programmes, the establishment of a procurement course, and the development

Figure 8: Institutional structure of public procurement in the Philippines



and updating of the procurement manual and the standard bidding documents; and

- Supervising the management of the Government Electronic Procurement System (G-EPS).

The GPPB comprises representatives from eleven key departments: i.e. Departments of Budget and Management, Education, Energy, Finance, Health, Interior and Local Government, National Defense, Transportation and Communication, Science and Technology, Public Works and Highways, and Trade and Industry. Its membership also includes the National Economic & Development Authority (NEDA), the Commission on Audit, and the Philippine Constructors Association, who represent private sector interests. Considering that the GPPB is an inter-agency body basically composed of high-level public officials, it is supported by its very own Technical Support Office (TSO) capable of undertaking the tasks of monitoring the implementation of public procurement reforms in the Philippines, acting as the Secretariat of the GPPB, and conducting nationwide training programmes on the procurement law. The TSO provides research, technical and administrative support to the GPPB. Among its specific functions are:

- Research-based procurement policy recommendations and rule-drafting;
- Evaluation of the effectiveness of the government procurement system and procurement reform programme, and conduct of studies to improve and develop the system, coverage and procedures;
- Procurement training, development of procurement manuals and standard bidding documents; and
- Monitoring the implementation and effectiveness of the G-EPS.

5. Conclusion and Recommendations

5.1 Conclusion

Discussions on improving public procurement in Kenya as well as reform initiatives have centered on making the government acquisition process more efficient, essentially by blocking legal and procedural loopholes believed to be avenues for waste and corruption in the system. Consequently, much effort has been devoted in bringing together existing procurement regulations, including directives, into a single document – the Public Procurement and Disposal of Assets Act, 2005 – and to making this document clearly understood, easily accessible by and properly enforceable. These efforts remain valid and justified especially considering the general legislative and regulatory weakness that has characterized procurement in Kenya's public sector over the last four or so decades.

Evidence assembled in this study, in particular the comparative analysis, appears to suggest that streamlining legislation alone may not sufficiently improve the performance of public sector procurement. Equal attention is required in at least three other important areas. First is the need to develop a broad procurement policy framework to ensure that government acquisition contributes meaningfully, alongside other economic growth strategies, to the achievement of desired national development outcomes. Indeed, besides fulfilling the business function, the sheer size of public procurement makes it a potent social, micro and macro-economic tool. Many of the countries surveyed have, for example, successfully exploited the immense government purchasing power to promote SMMEs in the manufacturing, services and construction sectors. Others, notably in Europe, Latin America and South East Asia have coalesced their procurement markets and used these to bolster initiatives on regional integration. A few have managed, through carefully designed tendering and pre-qualification regulations, to encourage good corporate practices and the use of environmentally acceptable production methods and inputs.

In Kenya, the scope is huge for making public procurement work towards poverty reduction, wealth and employment creation and the attainment of the Millennium Development Goals (MDGs).

The second area pertains to making the acquisition process more comprehensive through adoption of an integrated management framework, which aims to forge close and effective interaction between the three key decision system elements: planning, programming and budgeting; requirements generation; and management of the entire purchasing system itself.

Planning, programming and the national budgeting ensures that procurement projects submitted to government for approval are within allocated departmental ceilings. It is important for the Ministry of Finance to certify that the projects are also fully justified through benefit-cost analysis (including life-cycle costs), and that all costs are understood in advance. This helps to mitigate project risks, thereby increasing the probability that public programmes will succeed.

Requirements generation or the determination of procurement needs, ought to be planned well in advance of the fiscal year in which contract award is necessary. This allows for timely completion of the process and also helps to avoid the crisis of having an inordinate percentage of contract awards being made just before the fiscal year closes. Even where regulations have been adhered to, such flurry of activities in government acquisition have in the past generated costly inefficiencies in Kenya's public sector procurement.

A comprehensive acquisition process must, under the third element, be implemented and managed by an integrated procurement project team comprising skilled and experienced professionals drawn from different ministries and sectors of the economy. Additionally, the procurement process ought to be accompanied with objective classification of goods, services or works into appropriate expenditure categories. Cibinic and

Nash (1998) as quoted in Drabkin and Thai (2003) contend that proper procurement classification is not only an important guide in determining the types of acquisitions to be used and the applicability of contract clauses but can also assist the government to decide on funding options as well as coverage of socio-economic provisions.

Management of the procurement system involves institutionalization of monitoring and evaluation (M&E) mechanisms and adoption of clear strategies for periodic auditing of government acquisition. Procurement legislation takes time to draft and undergo parliamentary debates before it can be implemented. Procurement policy, on the other hand, is more flexible and can be reviewed periodically, not only to correct any emergent shortcomings, but also to synchronize the policy with evolving socio-economic realities or government goals and objectives. In this respect, consistent M&E of the public procurement and auditing of its performance can form a sound basis for continuing reform and hopefully pre-empt crises in the acquisition system. Apart from this, establishing a M&E strategy ensures that the goals and objectives of government acquisition are effectively met. Since it requires creating of clear measures of success (e.g. thresholds for variances from desired performance targets) against which actual procurement performance is to be assessed from time to time, M&E involves identification of possible reasons for underperformance. In this regard, complaints brought before a public procurement dispute resolution agency, such as Kenya's PPCRAB, are critical barometric indicators of the success or failure not only of a country's public procurement policies but also its practices and procedures.

Ultimately, the effectiveness of public procurement in Kenya, or any other country for that matter, will depend not merely on the soundness of government acquisition policy as encapsulated in the three areas mentioned above. Public procurement as shown by comparative country analysis in this study is shaped by and remains under the great influence

of numerous other factors, among them domestic, social and economic policies, regional and international trade agreements entered into, and the regulatory framework, including institutions set in place by government. In Kenya, as in most developing countries with significant portions of their national budgets externally funded, public procurement is additionally influenced by policies of international development partners, chiefly the World Bank, which has specific preferences on where and how aid money should be spent.

For these reasons, formulating Kenya's public procurement policy will also require a carefully selected mix of related policies to:

- (i) Obtain value for money, avoid wastage and improper usage of public funds and secure successful completion of projects while allowing for national security, industrial development and environmental protection;
- (ii) Harness procurement power to promote economic recovery, wealth and employment creation, and social goals while enforcing compliance with established public procurement rules; and
- (iii) Balance pressures to buy from domestic and informal sources without compromising the formal private sector's enabling environment for business or losing out on the well-recognized economic benefits of international competition.

5.2 Recommendations

Based on the above conclusions, this paper makes the following four broad recommendations:

- There is need to escalate the pace of government procurement reforms even after the anticipated enactment of the public procurement law. For better focus, the outstanding reforms mentioned in this paper should, however, be recast and

implemented as interconnected rather than disjointed elements/ activities of a wholesome reform discipline.

- There is need for the Central Bureau of Statistics (CBS) to begin collecting, processing and disseminating quantitative data on Kenya's public procurement across ministries, departments and sectors. Such data will provide a useful basis for further analysis of the challenges facing government purchasing and, thus, more detailed recommendations of how these challenges may be overcome.
- There is need to begin broad stakeholder consultations with a view to preparing and, thereafter, presenting to the government a public procurement policy framework paper. The paper should contain specific policy targets of government purchasing, clear strategies towards the attainment of these targets, as well as methods to be used periodically in evaluating progress.
- Procurement planning should be included as a core activity under the Public Expenditure Review (PER), Medium-Term Expenditure Framework (MTEF) and budget preparation cycles. This activity, aimed at generating the acquisition requirements by all departments of government, state corporations and local authorities should ideally be coordinated by the Directorate of Public Procurement but working with all other Ministries.

5.3 Other Determinants of Successful Reform and the Benefits

Adoption of the above recommendations will only lead to successful public procurement reforms if:

- The government sustains political will and perseverance to see the reforms through;

- Citizens, particularly public sector employees, are well motivated to support and participate in the reforms;
- Public procurement reforms are synchronized with other public sector reforms: namely financial management, anti-corruption, introduction of performance contracts, civil service salary/career system review, decentralization and market reforms, among other measures; and,
- Different stakeholders, including top government officials, public project managers/procuring entities, business (associations), international development partners and civil society are duly involved and mobilized to support the reforms.

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Annex: Selected Treasury Circulars (1960-1996)

Jan 19th, 1960, CFN2/57/002

The Ministry of Works, Stores & Services Fund Regulations. This is the oldest known Treasury circular, addressed to government accounting officers. The Fund's accounting officer is the Permanent Secretary, Works. The regulation is still in force, and the Supplies Branch of Ministry of Roads and Public Works operates under the fund.

Dec 6th, 1961, No. 18

The Circular directed that all provisions of stationery, typewriters, duplicators and office equipment of non-specialized nature to be included in Government Printer's Vote and not in departmental votes. Government Printer continues to provide common services, e.g. printing, although its institutional role in the reformed public procurement system remains unclear.

Mar 26th, 1965, No. 8

Circular transferred control and handling of all accountable documents (except medical treatment forms and sick sheets) from departmental officers to District Treasuries.

May 22nd, 1968, No. 14

Circular emphasized the need for safe custody and effective control of stores, and introduced internal checks exemplified by the advent of Government Vehicle Check Unit.

Feb 17th, 1970, No. 2

Circular directed that hiring of private aircraft by ministries should be done through the Commandant, Kenya Police Air Wing and only in the absence of police aircraft. The Circular has been rendered ineffective by the Exchequer & Audit (Public Procurement) Regulations 2001. Since many corporations now charter aircraft through annual contracts, the Police Air Wing could be reformed to enable it provide the service to the enlarged public sector.

Apr 13th, 1971, No. 10

Circular introduced standard procurement documents, e.g. the Standard Request for Quotations (Form S10).

Aug 30th, 1971, No. 18

Circular introduced standard Issue & Receipt Voucher (Form S12), replacing stores receipt, demand and numerous other vouchers used to transfer possession of stores from one holder to another. This document is still in use and is printed by the Government Printer. However, these and other paper documents are cumbersome and there remains need to introduce electronically-generated documents.

Nov 26th, 1973, Oct 28th, 1974, No. 15

Circular spelt out roles of the Central Tender Board, Ministerial Tender Boards, and the Chief Mechanical & Transport Engineer's

Department in contract awards for purchase of machinery, mechanical equipment and plants. The Central Tender Board has since been abolished from the procurement system; the Chief Mechanical Transport Engineer's Department in the Ministry of Roads and Public Works continues to value services to be provided to central government institutions and the enlarged public sector.

Apr 13th, 1987; HAS13. 011 (24)

Circular established the Mechanical Transport & Plant Maintenance Fund under the Ministry of Transport and Communications to facilitate repairs and maintenance of government vehicles and mechanical plants. The role of the Chief Mechanical Transport Engineer's Department needs to be reviewed in light of recent public procurement reforms.

Source: Compiled from Government of Kenya (2004)

Other Related KIPPRA Papers

1. Were M., Ngugi R W, Makau P, Wambua J and Oyugi L (2005), Kenya's reform experience: What have we learnt? KIPPRA Working Paper No. 12.
2. Public procurement policy in Kenya: The need for a coherent policy framework. KIPPRA Policy Brief No. 3/2006.
4. Njiraini, P and Moyi E (2006). Supporting MSEs to access public procurement market in Kenya, KIPPRA Discussion Paper No. 65.

