



# Public Procurement in Kenya's Counties





# **Public Procurement in Kenya's Counties**

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**Experiences from three counties**

# Table of Contents

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Abbreviations	vi
About us	vii
Executive summary	viii
1. Introduction	1
2. Kenya's procurement frameworks	3
2.1 What is public procurement?	3
2.2 What is the role of public procurement?	3
2.3 Why should public procurement matter to citizens?	3
2.4 The constitutional and statutory framework	3
2.5 The institutional framework and procurement procedures	5
3. Review of Kenya's nationwide procurement performance	12
4. Public procurement in three counties	13
4.1 Public procurement challenges identified by COB in three counties	13
4.2 Public procurement challenges experienced in the three county governments	18
4.3 Causes of the public procurement challenges experienced	20
4.4 Consequences of the public procurement challenges experienced	22
5. Recommendations	26
5.1 Development of staff capacity	26
5.2 Development of procurement plans	26
5.3 Pre-qualification of suppliers	26
5.4 Following due process	26
5.5 Inventory management	26
6. References	27

**List of Figures**

Figure 1: The stages of the National Open Procurement method	7
Figure 2: Absorption rates of the recurrent and the development annual budget (FY 2013/2014)	23

**List of Tables**

Table 1: Trends in PPARB cases since inception	6
Table 2: Procurement challenges in Wajir County	13
Table 3: Procurement challenges in Mombasa County	15
Table 4: Procurement challenges in Machakos County	16
Table 5: Analysis of expenditure on domestic and foreign travel	24
Table 6: Analysis of MCA sitting allowances for the year FY 2013/2014	24

## Abbreviations

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<b>COB</b>	Controller of Budget
<b>FY</b>	Financial Year
<b>IDS</b>	Institute for Development Studies
<b>IEA</b>	Institute of Economic Affairs
<b>IEBC</b>	Independent Electoral and Boundaries Commission
<b>LPO</b>	Local Purchase Order
<b>LSO</b>	Local Service Order
<b>MLG</b>	Ministry of Local Government
<b>OECD</b>	Organisation for Economic Co-operation and Development
<b>PPARB</b>	Public Procurement Administrative Review Board
<b>PPDA</b>	Public Procurement and Disposal Act
<b>PPOA</b>	Public Procurement Oversight Authority

## About us

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The Africa Centre for Open Governance (AfriCOG) is an independent, non-profit organisation that provides cutting edge research and monitoring on governance and public ethics issues in both the public and private sectors so as to address the structural causes of the crisis of governance in this country. The overall objectives of our programme activities are: to promote the implementation of the Constitution of Kenya 2010; strengthen anti-corruption and good governance in Kenya with objective, high-quality research and advocacy and to build Kenyans' capacity to be permanently vigilant and monitor progress on governance issues in the public and private sectors in Kenya. We also work with others at regional and international levels to promote collective efforts towards anti-corruption, accountability, transparency and openness in governance. Our reports, policy briefs and overall work add value to anti-corruption and governance reform processes in Kenya and the region by stimulating policy discussion and supporting evidence-based advocacy and the mobilisation work of our partners.

## Executive summary

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The Kenya government loses about one third of the national budget to corruption, with 80 percent of all corruption cases before the Kenya Anti-Corruption Commission being about procurement<sup>1</sup>. According to the World Bank, in order to secure a government contract, a gift whose value represents 8 to 10 percent of the contract amount is expected<sup>2</sup>, while, according to the Institute for Development Studies manufacturing firms in Kenya spend an average of 14 percent of the value of government contracts on kick-backs<sup>3</sup>. It is also estimated that procurement entities are buying goods and services at an average of 60 percent above the prevailing market price<sup>4</sup>. Evidently, corruption remains pervasive in procurement processes.

Given the level of haemorrhaging of public resources at the national level, the Africa Centre for Open Governance (AfriCOG) sought to highlight the constitutional, statutory and institutional frameworks of procurement in Kenya while reviewing the general procurement performance of three selected counties, Wajir, Mombasa and Machakos, in the 2013/2014 financial year. The main objective of the study is to generally highlight transparency and accountability concerns in the procurement processes in the three counties, which would in turn highlight the causes and consequences of procurement challenges experienced. The work also aims to make recommendations for county governments to consider, which will prevent the loss of public funds, even as they enhance public service delivery. The three counties were selected mainly on the basis of absorption rates of development funds and their location in the country for purposes of diversity.

With regard to legislative and institutional frameworks for procurement, Kenya has undergone significant development in the past three decades. It came from being a system with weak regulations in the 1960s to one regulated by Treasury Circulars between the 1970s and 1990s. In 2005, the Public Procurement and Disposals Act (PPDA) was enacted, becoming operational on 1 January 2007. However, the PPDA fails to provide strong enforcement mechanisms. Despite the enactment and commencement of procurement regulations, Kenyan public procurement continues to be marred by corruption scandals.

Other studies confirm that the PPDA's objectives of weeding out inefficiencies in the procurement process, removing patterns of abuse, and meeting the desire of the public purchaser to obtain adequate value for the expenditure of public funds, have never been fully achieved in practice. Although procedures supporting the systematic planning of procurement are well established, they are not always complied with.

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<sup>1</sup> Transparency International [TI]. (2014). *Public procurement in Kenya: Cash cow for the corrupt or enabler for public service delivery?* Adili, issue 145

<sup>2</sup> World Bank and IFC, 2007

<sup>3</sup> IDS, 2006

<sup>4</sup> PPOA, 2007



Overall, the low absorption of development funds, compounded by slow procurement processes, was cited among the issues that affected the 2013/2014 budget implementation nationally. Although there was a marked improvement in the overall performance compared to the previous year, the absorption rates for development expenditures still remained relatively low at 52 percent. Speeding up the procurement process was seen as one way of increasing these absorption rates. On the other hand, counties had inadequate staffing and low staff capacity, especially in public procurement and financial management, which affected budget implementation, contributing to the low absorption of funds.

Procurement challenges experienced by the three county governments in question during 2013/2014 contravene the key principles underpinning public procurement<sup>5</sup>, which include value for money, ethical standards, competition, transparency and accountability. Thus, these counties extensively violate the general procurement rules provided in legislation. The causes of public procurement challenges experienced by the three counties revolved around inadequate procurement planning, lack of pre-qualification of suppliers, failure to follow due process, lack of adequate numbers of qualified procurement professionals and poor inventory management. Consequently, the effects of the procurement challenges experienced include offences of financial misconduct, low absorption of resources, delays in project implementation, wasteful spending and unauthorised spending.

Owing to the fact that national policy objectives on devolution reforms are not being fully met<sup>6</sup>, county governments need to take into account various procurement considerations. These include: development of procurement plans; pre-qualification of suppliers; adherence to due process; development of staff capacity; and inventory management.

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<sup>5</sup> At the OECD Symposium and Global Forum on Integrity in Public Procurement in November 2006, participants called for the creation of an international instrument that would help policy makers reform public procurement systems and reinforce integrity and public trust in how public funds were managed. The instrument helps enhance good governance by checking waste, fraud and corruption in public procurement and is anchored on principles of transparency, accountability, prevention of misconduct (upholding ethical standards) and good management (key among them being value for money and competition). The overall aim is to enhance integrity efforts so that governments are fully part of an efficient and effective management of public resources.

<sup>6</sup> World Bank Group, 2014



# Introduction

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# 1

Corruption remains a serious obstacle to effective governance. The World Bank estimates that 25 percent of Africa's GDP is lost to corruption every year. According to a report by Transparency International, the Kenya government loses about one-third of the national budget annually to corruption<sup>7</sup>. The report also asserts that 80 percent of all corruption cases before the Ethics and Anti-Corruption Commission have a procurement element. Taking a percentage of an awarded tender, or inflating project costs, is the commonest means of dipping into government coffers. A World Bank and IFC enterprise survey<sup>8</sup> of 2007 indicated that in order to secure a government contract, a gift whose value represents 8 to 10 percent of the contract amount was expected. Similarly, according to the Institute for Development Studies (IDS)<sup>9</sup>, manufacturing firms in Kenya spend an average of 14 percent of the value of government contracts on kickbacks. The Public Procurement Oversight Authority (PPOA) in 2007 estimated that procuring entities were buying goods and services at an average of 60 percent above the prevailing market price.

Corruption remains pervasive in Kenyan procurement processes. It increases the cost of doing business, which in turn adds to the cost of public tenders and leads to poor standards of project work as contractors seek to recover their bribes by cutting costs. These illegal pay offs have been found to lower the quality of business and business deals by 30 to 50 percent<sup>10</sup>. Evidence shows that an effective procurement system could save the Kenya government approximately 25 percent of its expenditure<sup>11</sup>.

In the 2013/2014 financial year, the national government allocated 13 percent of revenue to county governments<sup>12</sup>. The Africa Centre for Open Governance (AfriCOG) has been concerned with the level of haemorrhaging of public resources in the past, due to corrupt procurement processes at national level. Consequently, it undertook this study to highlight the Kenyan constitutional, statutory and institutional frameworks for procurement, while also reviewing adherence to their provisions in the three selected counties during the first year of devolution (2013/2014 financial year).

The three counties were selected on the basis of absorption rates of development funds and, for diversity, their location in the country. In particular, Wajir County was selected because it had the highest percentage of development spending (57.8 percent) and second highest absorption rate of its development fund (78.2 percent)<sup>13</sup>. It is also a county in the arid and semi-arid lands of Kenya, which has been marginalised for many years. Mombasa County was selected because it had the lowest percentage of development spending and the lowest absorption rate of its development fund.

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<sup>7</sup> TI, 2014

<sup>8</sup> World Bank and IFC, 2007

<sup>9</sup> IDS, 2006

<sup>10</sup> KPMG International, 2011 (November)

<sup>11</sup> TI, 2014

<sup>12</sup> Institute Of Economic Affairs [IEA], 2005

<sup>13</sup> The difference between development spending and absorption rate of development funds is the fact that the former describes the proportion of money that was used on development projects compared to the total amounts allocated in a county while the latter indicates the variation in utilization of these funds across counties

## **Public Procurement in Kenya's Counties:**

Experiences from three counties

It is also a fully urban county in Kenya's coastal region. Machakos County represents an interesting mix of both urban and rural settings. According to the Controller of Budget's County Report 2013/2014, this county had the highest development expenditure of Ksh2.7 billion (44.1 percent). This translated to a high absorption rate of 64.5 percent of the annual development budget. Based on media reports, the governor is also perceived to be efficient in his work.

The main objective of the study is to highlight transparency and accountability concerns in the procurement processes in the three counties, which should in turn highlight the causes and consequences of their procurement challenges, and to make recommendations for county governments to consider that would prevent the loss of public funds through procurement.

The first section of the report covers the constitutional, statutory and institutional frameworks for procurement in Kenya. It briefly defines procurement, its role and importance, before delving into the constitutional and statutory provisions. The second section reviews the literature on Kenya's nationwide procurement performance, while the third section reviews public procurement issues in Wajir, Mombasa and Machakos counties as highlighted by the 2013/2014 Auditor General's reports. The challenges identified are reviewed in relation to the five principles of procurement, giving the causes and consequences of public procurement and concluding with recommendations that counties should consider in order to improve their procurement procedures.

The study findings are limited by the fact that a field study was not conducted. The report will, however, help the public to have a general understanding of procurement in Kenya and the challenges experienced by county governments. It will also benefit civil society organisations that would like to monitor procurement issues in counties. County governments are also a target audience for this report as it gives various recommendations they could use to improve procurement in their counties.

# Kenya's procurement frameworks

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# 2

## 2.1 What is public procurement?

Public procurement is the process that public entities, such as national and county governments and their departments, go through to acquire or purchase goods and services<sup>14</sup>. Each year, government departments budget for staff, office expenses (such as stationery), and public goods (for example, construction of amenities). These amenities include public buildings (municipal buildings, schools, hospitals), transport infrastructure (roads, railroads, bridges, pipelines, canals, ports, airports), public spaces (public squares, parks, beaches), public services (water supply, sewage, electrical grid, dams), and other, usually long-term, physical assets and facilities. Public entities therefore pre-select individuals and firms that have the ability to provide the goods and services required at a reasonable price within required timelines.

## 2.2 What is the role of public procurement?

Public procurement enables the government to deliver services to the public by ensuring timely access to quality goods and services at fair prices. It should also ensure efficiency in government operations by promoting competition among bidders, who should be treated fairly, thereby increasing public confidence in government operations. Public procurement can also promote local industry and economic development.

## 2.3 Why should public procurement matter to citizens?

Public procurement should matter to citizens because they pay taxes so that the government can deliver its obligations to them, such as providing education, health, security, rule of law and protection of property. Consequently, the public is interested in the procurement function of achieving service delivery. Importantly, public procurement accounts for a high proportion of total government expenditure, with a Kenyan estimate of 60 percent<sup>15</sup>. Although several steps have been taken to reform the public procurement system, its processes are still shrouded in secrecy, and are inefficient and corruption-prone<sup>16</sup>, such that huge amounts of money are wasted. Given the large amounts of money involved in government procurement, it is in citizens' interests that the procurement process promotes prudent use of resources, integrity and fairness, ensuring value for money in the acquisition of goods and services.

## 2.4 The constitutional and statutory framework

A procurement study noted that the “Kenyan domain has undergone significant development in the past three decades (coming) from being a system with no regulations in the 1960s to a system regulated by Treasury Circulars in the 1970s, 1980s and 1990s”<sup>17</sup>. The Public Procurement and Disposals Act of 2005 became operational on 1 January 2007. The related Public Procurement Regulations of 2006 was legislated to assist in the implementation of the Act, establishing procedures for procurement and the disposal of unserviceable, obsolete or surplus stores and equipment.

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<sup>14</sup> Agaba and Shipman (2007)

<sup>15</sup> Onyinkwa J, 2013

<sup>16</sup> Odhiambo, W. & Kamau, P., 2003

<sup>17</sup> See Onyikwa (2013)

## Public Procurement in Kenya's Counties:

Experiences from three counties

On 5 April 2013 under Legal Notice No. 60, the Minister for Finance gazetted the Public Procurement and Disposal (County Governments) Regulations, 2013. This focused the Public Procurement and Disposal Act, 2005 on county governments, designed to promote local industries and support socio-economic development<sup>18</sup>. However, the principles and tenets of public procurement and disposal remain the same at the national and county levels.

According to Transparency International-Kenya<sup>19</sup>, the Public Procurement and Disposal Act, 2005 fails to provide strong enforcement mechanisms and public procurement in Kenya continues to attract corruption scandals. For example:

- the Anglo Leasing scandal which involved security contracts being awarded to phantom firms<sup>20</sup>
- the National Hospital Insurance Fund (NHIF) civil servants' medical scheme where, according to the Auditor general's report, the NHIF failed to account for Ksh3.5 billion<sup>21</sup>
- the procurement of Biometric Voter Registration kits by the Independent Electoral and Boundaries Commission (IEBC), which forced a government intervention to effect a government to government procurement agreement, (despite a major investment of funds, the voting technology spectacularly failed to deliver on election day 2013, forcing the IEBC to revert to the previously discredited manual system and casting doubt on the election results)
- the Tassia Estate scandal- a housing scheme that was allegedly grossly over valued<sup>22</sup>
- the Standard Gauge Railway, a new railway line under construction at what appears to be a highly inflated cost, despite a World Bank report showing that the new railway would not attract the freight volumes needed to pay for the investment<sup>23</sup>.

Article 227 of the Constitution states that: "When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective... and provides preference in the allocation of contracts." Parliament provides for categories of preferential allotment of contracts, protection of disadvantaged categories of persons and sanctions against non-performing contractors, and those guilty of corrupt practices, tax violations and labour laws. Protection for disadvantaged groups is affirmed by Article 27 (6) of the Constitution, which calls for affirmative action for vulnerable people: in procurement, such individuals may not meet competitive standards. Such vulnerable people include the youth, women and people living with disabilities, for whom a presidential directive has ring-fenced 30 percent of government procurement.

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<sup>18</sup> PPOA, 2013

<sup>19</sup> Transparency International, Kenya [TI-K]. (2014). *Public procurement in Kenya: Cash cow for the corrupt or enabler for public service delivery? Adili*, issue 145

<sup>20</sup> <http://www.bbc.com/news/world-africa-31733052> Accessed 9/6/15

<sup>21</sup> <http://www.businessdailyafrica.com/Civil-servants-NHIF-medical-cover-cash/-/539546/2533846/-/acrkn/-/index.html> Accessed 9/6/15

<sup>22</sup> <http://cotu-kenya.org/nssf-tassia-ii-infrastructure-development-scandal/> Accessed 9/6/15

<sup>23</sup> <http://www.scribd.com/doc/224030710/World-Bank-Report-on-the-Standard-Gauge-Railway#scribd> Accessed 9/6/15

<sup>24</sup> PPDA, 2005

## 2.5 The institutional framework and procurement procedures

### 2.5.1 Public Procurement Oversight Authority

The Public Procurement Oversight Authority (PPOA) is the executive body that oversees implementation of the Act. The PPOA therefore oversees all public procurement processes in the country and is mandated to ensure adherence to the Act by all State organs, including national and county governments<sup>24</sup>.

The roles of the PPOA as stipulated in the Act include:

- To ensure compliance with procurement procedures
- To monitor the public procurement system and report on its overall functioning
- To assist in the implementation and operation of the public procurement system through: preparation and distribution of procurement manuals and standard documents; advising procurement entities; supporting the training and professional development of those involved in procurement; issuing written directions to public entities with respect to procurement proceedings and information on procurement; and ensuring that procuring entities engage procurement professionals in their procurement units
- To initiate public procurement policy and to propose amendments to legislation, including regulations.

The PPOA is headed by a director-general appointed by a PPOA Advisory Board that consists of nine members appointed by the Minister of Finance from persons nominated by statutorily prescribed organisations, with the approval of Parliament. The Advisory Board gives general advice on the Authority's exercise of its powers and the performance of its functions. It also approves the estimates of revenue and expenditures of the Authority, and recommends the appointment or termination of the director-general in accordance with legislation.

### 2.5.2 Public Procurement Administrative Review Board

Section 25 of the PPDA provides for the Public Procurement Administrative and Review Board (PPARB), a continuation of the Public Procurement Complaints, Review and Appeals Board, which was established under the Exchequer and Audit (Public Procurement) Regulations, 2001. The Review Board was created to promote and uphold fairness in the public procurement system through judicious and impartial adjudication of matters arising from disputed procurement proceedings. The Board is autonomous and is made up of six members nominated by various bodies as prescribed in Regulation 68 (1) (a), and three other members appointed by the Minister of Finance. Upon receiving a complaint notice, the Review Board should inform the procuring entity to suspend the particular procurement until the matter is resolved. Based on its assessment, the Review Board may dismiss a matter presented before it if it considers it trivial. In cases where the board proceeds with the hearing, it must make a decision within 30 days.

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<sup>24</sup> PPDA, 2005

## Public Procurement in Kenya's Counties:

Experiences from three counties

Upon completing a review, the Review Board may do the following: annul a procuring entity's procurement proceedings; give directions to the procuring entity with respect to anything to be done or redone in the procurement proceedings; substitute a procuring entity's prior decision with its own; and/or order the payment of costs between parties to the review.

**Table 1: Trends in PPARB cases since inception**

Year	No. of cases
2001	12
2002	44
2003	33
2004	46
2005	52
2006	58
2007	8

Source: PPOA<sup>25</sup>

### 2.5.3 Internal organisation of procurement in public entities

To ensure that decisions are made in a systematic and structured way, a public entity is required to establish adequate procedures for making its procurement decisions.

All procurement must be within the entity's approved budget and must be planned through an annual procurement plan. In addition, it must be handled by different offices in respect of procurement initiation, processing and receipt of goods, works and services for purposes of transparency and accountability.

The PPDA requires that public entities establish two standing procurement committees: the Tender Committee and the Disposals Committee. The Tender Committee reviews the shortlisted bidders and awards the tender to the most qualified bidder based on criteria agreed prior to the submission of bid documents. The procurement unit (also set up by the public entity) is responsible for procurement below the threshold of the Tender Committee. The Disposals Committee devises ways of selling off used public assets. These committees must have at least five members each, with a secretary who is a procurement professional. In the case of all counties, the accounting officer of a Transition County Treasury –referred to in section 10 of the County Governments Public Finance Management Transition Act, 2013 as the 'transition principal officer' –also establishes the two standing committees, and any other bodies as prescribed by the Act.

<sup>25</sup> [http://www.ppoa.go.ke/index.php?option=com\\_content&view=article&id=100&Itemid=180](http://www.ppoa.go.ke/index.php?option=com_content&view=article&id=100&Itemid=180).



National government and county governments may also establish *ad hoc* committees based on need. Such committees include:

- a tender opening committee, which is tasked with conducting a public opening of the tender documents submitted for a bid
- a tender evaluation committee, which conducts a technical scrutiny of the bids and shortlists the most qualified bidders
- an inspection and acceptance committee which certifies that the procured goods meet the specification of the tender. These *ad hoc* committees enhance objectivity in procurement decisions, ensuring that the integrity of the process is maintained.

### 2.5.4 Procurement methods

Various procurement methods are available. These include: open procurement method/open tendering; restricted tendering; direct procurement; request for proposals, request for quotations, low value procurement; and specially permitted procurement.

Figure 1 below illustrates the eight critical procurement stages of the national open procurement method.

#### Stages of Open Procurement

##### Open procurement method/open tendering

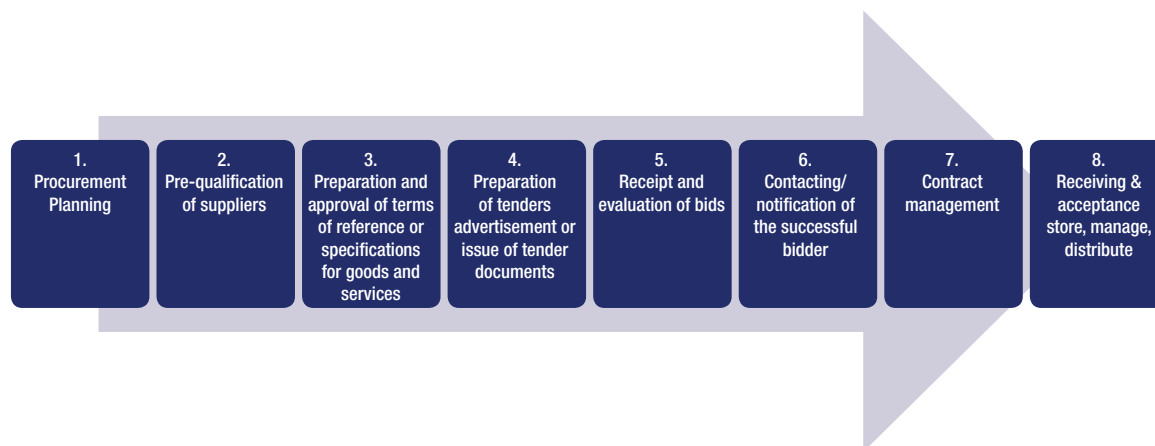


Figure 1: The stages of the national Open Procurement method

#### i. Procurement planning

In this phase, the public entity uses an approved budget to develop a plan for undertaking procurement.

#### ii. Pre-qualification of suppliers

The procuring entity is required to establish a list of potential suppliers for a particular financial year, generated through prior advertising and then make a choice as to who is suitable to provide the goods and services it needs.

**iii. Preparation of terms of reference or specifications for goods and services**

The public entities are required to prepare technical specifications or terms of reference for the goods and services required.

**iv. Preparation of tender advertisement or issue of tender documents**

The procurement department prepares tender documents based on a standardised set of documents provided by the PPOA. The tender documents must have enough information to allow fair competition among prospective suppliers, setting out the specific requirements of goods, works and services being procured. For example, relevant drawings and Bills of Quantities (BQs) are required. The procuring entity is allowed to amend the tender documents at any time before the deadline of submitting tenders. The national tender must be advertised in at least two newspapers with wide national circulation.

**v. Receipt and evaluation of bids**

A tender must be in writing, be signed and be sealed in an envelope. The procuring entity must ensure the place where tenders are submitted is open and accessible. In case a bidder would like to make any changes to bid documents before the due date, the bidder may change or withdraw the tender in writing. However, no changes can be made to the bid documents after the deadline. The procuring entity may extend the deadline of submission of bids only if this change is made before the original tender deadline.

After the due date, and upon receipt of the tender documents, the procuring entity's procurement unit invites the tender opening committee for the public opening of the tenders, and the tender evaluation committee for the technical assessment of the bids to shortlist successful bidders. A tender is not responsive if it does not conform to the mandatory requirements in the tender advertisement. The evaluation period for both the international and national open tenders is 30 days. The committee may request a bidder for clarification to assist in the evaluation process, but this does not change the content of the tender. The tender committee then reviews the shortlisted bids and a recommendation of award is made.

**vi. Contacting/notification of the successful bidder**

All bidders, whether successful or not, are supposed to be notified about the results of the evaluation process within 14 days, for both international and national open tenders.

**vii. Contract management**

The successful bidder is formally contracted by the public entity. The contract preparation period should be within 14 days after expiry of the notification period for both national and international open tenders. Once this process is finalised, the public entity is then required to manage the delivery of the goods or services, ensuring they are delivered at the right time and based on the specifications of the terms of reference.

#### **viii. Receiving and storage**

In the case of goods, the inspection committee reviews them on delivery to the government stores.

The actual prescribed timelines for the International Open Tender method is 88 working days while that of the National Open Tender is 79 days. Procurement therefore requires proper planning so that goods and services are received when required.

- **Restricted tendering**

Restricted tendering is used when the goods and services to be provided are of a complex or a specialised nature. The method is also applied if the cost and time required to evaluate a large number of tenders would be disproportionate to the value of the goods or services, or if there are only a few known suppliers of the particular good or service under consideration. In this case, the procuring entity shall invite tenders from all the known suppliers of the goods, works or services. The same provisions for open tendering also apply to restricted tendering.

- **Direct procurement**

A procuring entity can use the direct procurement method when there is only one person or company that can supply a good or service. In this case, prior approval of the tender committee should be sought before the procurement process begins. A procuring entity may use this method if there is an urgent need for goods or services that makes other procurement methods impractical, or if the circumstances that gave rise to the urgency were not foreseeable and were not as a result of the slow conduct of the procuring entity. The direct procurement method can for example, be used in the event of a disease outbreak for which goods or services have to be procured immediately to contain the outbreak. The procuring entity must ensure that the offer meets its own requirements and that the cost is at the prevailing real market price, otherwise similar provisions for open tendering also apply

- **Request for proposals**

This method of procurement is used to get services of an advisory or of an intellectual nature. In this case, the procuring entity is expected to prepare expressions of interest and advertise widely in two newspapers with nationwide circulation. The procuring entity will evaluate the expressions of interest and request the bidders who qualify to submit a proposal. In circumstances where national capacity to provide such services is limited, the procuring entity will be required to advertise in publications that also have an international reach, otherwise similar provisions for open tendering also apply.

- **Request for quotations**

A procuring entity may use the request for quotation where goods are readily available, and have an established market price. The request for quotation must be given to at least three people/institutions. The quotation with the lowest price is considered the most successful.

- **Low value procurement**

The procuring entity can use the low value procurement method if the anticipated cost is below Ksh 30,000 (about US\$345). The goods procured through this method are off-the-shelf goods for which an official receipt should be obtained as evidence of the purchase. Procuring entities can agree on a procedure for low value procurement.

### **2.5.5 General procurement rules**

Procurement entities are expected to use the open tender method of procurement whenever possible. However, the other procurement methods may be used upon fulfillment of a set of requirements provided by the rules, as follows:

- Procurement should not be split for the purposes of avoiding the use of the open procurement method.
- Standard goods and services should be procured at the prevailing market prices.
- A person is qualified to be awarded a contract if the person has the necessary qualifications, capability, experience, resources, equipment and facilities to provide what is being procured; has the legal capacity to enter into a contract for the procurement; is not insolvent, in receivership, bankrupt or in the process of being wound up; and is not the subject of legal proceedings. Procurement entities in both national and county governments are required to give preference to small and micro enterprises. However, the county guidelines are more elaborate and include other disadvantaged groups such as enterprises owned by women, youth and persons with disabilities that are located and operate within the counties as specified in the Public Procurement (Preference and Reservations) Regulations, 2011. County procuring entities are required to report application of preference and reservation schemes to the Authority on a quarterly basis.
- Persons disqualified from procurement as specified in section 31 (1) of the PPAD, 2005 cannot be awarded contracts by the procuring entities. Similarly, the procuring entity cannot enter into a contract with an employee of the procuring entity, a minister, a public servant or a member of a board or committee of the government or any of its departments.
- A procurement entity shall maintain procurement records for a period of six years.
- People who submit tenders should not solicit information from the evaluation panel or procuring entity.
- Candidates will have the opportunity to participate in procurement processes without discrimination, unless it is otherwise provided in the Act.
- The PPOA is required to maintain a register of contractors for goods and services.
- No individual, agent or employee of the public procuring entity is to be involved in corrupt practices. In instances where this happens, the individual, agent or employee will be disqualified from entering into a contract.
- In instances of conflict of interest during procurement proceedings, the affected person should not take part in the procurement proceedings or decision-making.
- Procurement information should be kept confidential at all times. Any person who contravenes this provision commits an offence.
- After a contract has been awarded or the procurement proceedings have been terminated, the procurement entity can, upon request, make the procurement record available to anyone who submitted a tender, proposal or quotation.

- The PPOA is mandated to publish the contracts awarded with the information prescribed.
- The tender committee must approve any amendments to a contract in writing. Contract variations are based on the prescribed price or quantity variations of goods and services.
- The procuring entity is mandated to pay interest on any overdue amounts. The interest rates should be charged in accordance with the prevailing commercial interest rates.
- The Director General of the PPOA, or his/her representative, should inspect procurement records and the accounts of a procuring entity, or the contractor, within a reasonable timeline. The Auditor General, or an auditor authorised by the Auditor General, may audit the accounts of the procuring entity and of any contractors, who are mandated to cooperate and assist during the inspection process.
- The procurement entity should use appropriate standard tender documents specific to a particular procurement and customise it accordingly. The standard tender documents are developed by the PPOA and are accessible to all procurement entities from the PPOA website ([www.ppoa.go.ke](http://www.ppoa.go.ke)). An example of a standard tender document is sent to the potential consultants that have an invitation letter to bid, together with information that the consultant requires to know about the bid, the terms of reference, the required format for the technical and financial proposal and the standard contract form.

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## Review of Kenya's nationwide procurement performance

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Studies carried out in Kenya to evaluate the efficiency of the public procurement process before the Public Procurement and Disposal Regulations of 2006 was launched, found that public procurement was not efficient, with the state losing large amounts of money through shoddy deals<sup>26</sup>. It seems that the objectives of the PPDA, to weed out inefficiencies in the public procurement process, remove patterns of abuse and ensure the public purchaser obtains adequate value in return for public expenditure, have never been fully realised<sup>27</sup>.

A study conducted by the PPOA in 2007 noted that although procedures supporting systematic procurement planning had been established, these were not always complied with. It found, for example, that there was a low share of procurements done through open tendering, an indication that most of the procurements were made on an *ad hoc* basis, by quotations and direct procurements. This suggests a lack of, or poor procurement planning in most of the surveyed government departments.

Another study carried out after the introduction of the Regulations, found out that public procurement suffered from fraud and misconduct<sup>28</sup>. The study also noted that public officials distort the Regulations to restrict the participation of interested firms in procurement, or sometimes direct the outcome of the procurement process.

The Regulations were also meant to ensure that efficient training had been offered to professionals to serve in procurement. A study of procurement for public schools in Kisii County<sup>29</sup>, found that the overall lack of procurement knowledge was a major weakness, preventing efficiency of procurement operations. Short-term procurement training was also found to be in short supply, although it was noted that the PPOA is currently offering a series of sensitisation sessions targeting both the public and private sector. The author quoted the KACC (2007) study findings, which stated that the laws and procedures did not support timely procurement, contract execution and payment. For example, there were no legal provisions, procedures or guidelines on the time limits for the processing of invoices and payments.

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<sup>26</sup> See Onyinkwa, 2013

<sup>27</sup> Wanyama, 2010

<sup>28</sup> KPMG, 2008.

<sup>29</sup> See Onyinkwa (2013: 569)

## Public procurement in three counties

County governments in general have submitted their financial year (FY) 2014/2015 expenditure reports for audit to the Kenya National Audit Office. The audit reports will be publicly available in June 2015, in which case a follow up analysis should be done in order to keep track of the procurement challenges that counties continue to face. As such, this report focuses on the procurement challenges in the FY 2013/2014 expenditures, obtained mainly from the Auditor General reports for the case study counties, and the county government budget implementation review report 2013/2014 published in August 2014 by the Controller of Budget, among other publications as cited.

Overall, low absorption of development funds compounded by slow procurement processes are cited by the Controller of Budget among the issues that continue to affect budget implementation<sup>30</sup> nationally. Although there was a marked improvement in the overall national budget implementation, the absorption rates for development expenditures still remain low. The 52 percent absorption rate recorded in FY 2013/14 is an improvement on the 44.4 percent recorded in the previous FY. It is therefore necessary to enhance the absorption rate of development funds. In the Controller of Budgets (COB's) view, speeding up the procurement process is one way of increasing absorption rates.

In the COB's county reports<sup>31</sup> counties were faced with inadequate staffing and low levels of staff capacity especially in public procurement and financial management. This affected budget implementation, resulting in low absorption of funds.

### 4.1 Public procurement challenges identified by the Controller of Budget in three counties

**Table 2: Procurement Challenges in Wajir County**

Expenditure	Procurement Challenge
Capital projects (works) cost Ksh12,090,000.00 The payments relate to fencing of dispensaries, construction of classrooms, underground water tanks, staff quarters and administration block, among others. The payments also included supply of desks and office furniture	<ul style="list-style-type: none"> <li>• Payment was done without the necessary supporting documents and therefore the details of the transaction could not be verified.</li> <li>• No inventory records were maintained.</li> <li>• It was not clear how the payments were processed without any reference to local service orders (LSOs), Bills of Quantities documents, project files, contractor's invoices, completion certificates from technical departments and inspection and acceptance committee reports. Also, procurement documents like tenders or quotations were not made available for audit review.</li> </ul>

<sup>30</sup> RoK, 2014b

<sup>31</sup> RoK, 2014a

**Public Procurement in Kenya's Counties:**

Experiences from three counties

<p>Four firms were paid a total of Ksh3,880,000.00 for providing consultancy services on customer and employee satisfaction, corruption, alcohol, gender, automation of processes, and review of strategic planning and training services charter.</p>	<ul style="list-style-type: none"><li>• No bid documents were produced suggesting single sourcing.</li><li>• No LSO or procurement/tender committee minutes that deliberated on the evaluation and award of the said services were attached to the payments vouchers.</li><li>• No copies of the end products (reports) and Council's adoption minutes were provided to confirm that the services were rendered and the results implemented as desired.</li></ul>
<p>The County Government of Wajir received Ksh61,592,200.00 from the Transition Authority (TA) for the construction of the County Government office headquarters. However, an executive decision was made by the county executive committee to utilise the money to drill 10 boreholes. An advance payment of Ksh41,236,340.00 was given to the contracted company.</p>	<ul style="list-style-type: none"><li>• The legality of the executive decision to reallocate funds for purposes other than that initially intended without prior approval from the COB, was not indicated.</li><li>• A local service order number which was undated was issued to the National Water Conservation and Pipeline Corporation to undertake the exercise.</li></ul>
<p>Money was incurred on procurement of office stationery (Ksh2,449,750.00) and food stuffs (Ksh2,902,000.00).</p>	<ul style="list-style-type: none"><li>• No documentary evidence was provided to confirm that quotations were floated as required by the procurement law. It is likely the goods were single sourced.</li></ul>
<p>A payment of Ksh283,500.00 was made to East Gate Hotel.</p>	<ul style="list-style-type: none"><li>• There was no invoice to support the payment. It was therefore not possible to confirm the nature of services ordered, the related cost, and if the same was provided by the payee</li></ul>

Source: ROK, 2013 December 2005



**Table 3: Procurement challenges in Mombasa County**

Expenditure	Procurement issue
Payments of Ksh1,145,165.00, Ksh1,172,885.00 and Ksh1,166,861.00 were made in the months of July, August, and September 2013 to Matatu Welfare Association Coast Branch	<ul style="list-style-type: none"> <li>• There were no documents provided to support these payments.</li> </ul>
Ksh7,996,693.00 was paid by the County Government for motor vehicle running expenses (fuel, tyres and repairs).	<ul style="list-style-type: none"> <li>• There were no documents provided to support these payments. In some cases, the suppliers of these services were not pre-qualified.</li> </ul>
Six bulk filling cabinets were purchased for Ksh950,000.00 each.	<ul style="list-style-type: none"> <li>• Only two bulk cabinets had been budgeted for in the procurement plan.</li> <li>• By the time of audit, the cabinets had not been put into use.</li> </ul>
21 water dispensers were purchased at a price range of Ksh48,000.00 to Ksh51,000.00 per dispenser.	<ul style="list-style-type: none"> <li>• A market survey indicated that a similar dispenser would cost Ksh15,000.00.</li> </ul>
Purchase of sodium high pressure fittings.	<ul style="list-style-type: none"> <li>• Inconsistency on Payment Voucher (PV) 1302-0221 for supply of sodium high pressure fittings where the cheque was dated 27 February 2013 while payment authorisation and approval was made on 28 February 2013.</li> <li>• Additionally, the invoice was dated 25 January 2013 while delivery note date was 25 February 2013.</li> <li>• Goods Received Note and the Stores Ledger were attached to the payment voucher.</li> </ul>
Hire of a helicopter at Ksh738,715.00 for the Governor's visit to Nandi County.	<ul style="list-style-type: none"> <li>• An unauthorised expenditure.</li> </ul>

Source: ROK, 2014 February 17

**Table 4: Procurement challenges in Machakos County**

Expenditure	Procurement issue
A “confidential expenditure” amounting to Ksh7,500,000.00 was incurred by the Governor of Machakos County.	<ul style="list-style-type: none"> <li>• There was no budgetary provision in respect of the expenditure.</li> <li>• The payment vouchers were not supported by any relevant documentation.</li> <li>• The amounts were paid out in cash instead of using cheques as required in prudent management of cash resources.</li> <li>• The whole amount of Ksh7,500,000 was not accounted for to confirm whether it was lawful as a proper charge on public funds.</li> </ul>
Machakos County Executive paid an officer cash of Ksh100,000.00 for the purchase of Teleprompter vide Warrant No 1674541.	<ul style="list-style-type: none"> <li>• No quotations were attached to verify whether the procurement of the asset was competitively done.</li> <li>• There was no requisition from the user department to ascertain the need for the purchase.</li> </ul>
Funeral expenses for the late Makueni County Senator Hon. Mutula Kilonzo amounted to Ksh2,880,160.00. The Machakos Governor’s contribution was Ksh1,000,000.00 while another Ksh 1,000,000.00 was paid out to HomeBoyz Entertainment Ltd. for the provision of a public address system. Another Ksh880,160.00 was used to purchase a laptop, a projector, a receiver, microphones, microphone stands, speakers and amplifiers from Acutex Ventures.	<ul style="list-style-type: none"> <li>• No procurement documents were provided to support the procurement of HomeBoyz Entertainment Ltd., to warrant the payment</li> <li>• The payment to Acutex Ventures was based on <i>pro forma</i> invoices, meaning delivery was yet to be made.</li> <li>• It is also not clear under which expenditure item the total amount of Ksh 2,880,160.00 was charged, since there was no budgetary provision for the same.</li> <li>• The burial of the late Senator was in Makueni County rather than Machakos County, putting in question the validity of this expenditure.</li> <li>• The Head of State attended the function, meaning that a public address system would have been provided by the Presidential Press Unit, thereby questioning the integrity of the Ksh1,000,000.00 paid to HomeBoyz for a public address system.</li> </ul>
Goods and services were procured totaling Ksh14,062,627.00	<ul style="list-style-type: none"> <li>• The procurement of these goods and services lacked the requisite documentation, such as requisitions, prequalification registers, quotation registers, quotations, tender documents, signed contracts, inspection and acceptance reports, and market surveys</li> </ul>

<p>An amount of Ksh1,680,000.00 paid to Ms Tea Tot Hotel was incurred in respect of a workshop package for 30 people from 24 April to 4 June 2013.</p>	<ul style="list-style-type: none"> <li>• The requisite documentation to incur this cost such as the list of participants, invitations, LSO, quotation, requisition, or any other correspondence to indicate the purpose and nature and need for the said workshop, was not produced at the time of audit</li> </ul>
<p>Machakos County engaged Maanzoni Lodge during an investor conference and incurred an expenditure of Ksh 10,537,935. 00 In addition, Machakos County Executive further engaged the services of Wander Joy Party World Limited at a cost of Ksh 3,755,036.00 for provision of tents. The initial budget was Ksh1,116,700.00 The County therefore incurred an additional cost of Ksh 2,638,336.00. A further payment of Ksh765,600.00, being 50% of the total cost, was advanced to Homeboyz Ltd. for the provision of a sound system, screens, power generator lighting, stage and set up.</p>	<ul style="list-style-type: none"> <li>• The initial budget was for 500 persons. There was no plan to host an additional 1,400 people.</li> <li>• The payment voucher did not have a list of participants to ascertain their actual numbers.</li> <li>• Tender documents for hospitality services were not availed to verify whether the procurement of the service was competitive.</li> <li>• No quotations and tender committee minutes were availed for audit verification to establish how Homeboyz Ltd. was identified.</li> </ul>
<p>During the Maruba Dam event, the County paid Ksh2,020,500.00 to Peter Mulei and Sons for provision of a cocktail party for 400 persons at Ksh1,600 per person and provision of a PA system, tents and decorations.</p>	<p>There was no list of participants provided. Consequently, the audit could not verify how the service provider was identified.</p>
<p>The County office procured 16 used/second hand vehicles. It paid M/s Extreme Autos Ltd for the supply of 15 Subaru Outback 2500 cc at Ksh1,757,000 each (totaling Ksh26,355,000), and one Toyota Land Cruiser 4700 cc VX (V8) at Ksh.6,500,000.00.</p>	<ul style="list-style-type: none"> <li>• While the 16 vehicles were reportedly inspected, the inspection reports were not availed for audit verification.</li> <li>• No pre-purchase valuation was done by the Ministry of Public Works or a government registered valuer to establish the length of prior usage since these were used/second hand vehicles</li> <li>• There was no information as to how the vehicles and the supplier were identified.</li> <li>• Further, the vehicles were registered under different individual names and they were fitted with private registration numbers instead of the normal green plates used by the defunct Local Authorities.</li> <li>• At the time of the audit, these vehicles had not been transferred to the County Government, and were thus prone to misuse and even loss/ theft.</li> </ul>

## Public Procurement in Kenya's Counties:

Experiences from three counties

<p>The County procured used/second hand vehicles. They paid Osaka Motors Limited for supply of 1 Toyota Harrier Station Wagon 2360 cc Ksh. 2,600,000 and paid Muhammed Aden for the supply of 1 Toyota Prado of 2690 cc Ksh 7,000,000, all as per the sale agreements.</p>	<ul style="list-style-type: none"><li>• No pre-purchase valuation was done by the Ministry of Public Works or a Government registered valuer to establish the length of prior usage of the used/second hand vehicles.</li><li>• The invoice for the Toyota Prado registration KBV 393 C was issued by Bhinder Corporation Ltd. whereas the payment was made to one Muhammed Aden.</li><li>• It was not clear how the vehicles and the suppliers were identified.</li><li>• Further, these vehicles were fitted with private registrations and at the time of signing this report these vehicles had not been transferred to the County Government.</li></ul>
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Source: ROK, 2014

## 4.2 Public procurement challenges experienced in the three county governments

As demonstrated in the case studies, procurement challenges experienced by the three county governments in 2013/2014 revolved around the key principles underpinning public procurement<sup>32</sup> which are: value for money, ethical standards, competition, transparency and accountability, thus extensively contravening the provisions of procurement legislation as demonstrated below.

### 4.2.1 Value for money

In procurement, 'value for money' basically entails getting a good deal from public expenditure. It means achieving the best available outcome for the money spent in procuring the agency's goods or services. In the case of Wajir County (Table 2), four firms were paid to provide consultancy services on customer and employee satisfaction, corruption, alcohol, gender and automation of processes, as well as a review of strategic planning and training on services charter. However, the Auditor General considered these expenditures irrelevant since there was no demonstration of the link between the consultancy services provided and the county performance in the said areas. Additionally, 21 water dispensers purchased by Mombasa County (Table 3) were inflated by up to three times the actual price, thus contravening the general procurement rule that standard goods and services should be procured at the prevailing market prices. In Machakos County (Table 4), the auditor notes that the user department has not demonstrated the need for the teleprompter that was purchased.

### 4.2.2 Ethical standards

Chapter 6 of the Constitution is about integrity in leadership and states that "a state officer shall act in a manner that avoids

- Any conflict between personal interest and public or official duties
- Compromising any public or official interest in favour of a personal interest."

<sup>32</sup> Bauld and McGuinness (2006)

From the three counties studied, the unjustified hire of a helicopter (Table 3) by the Mombasa Governor, the governor's contribution of Ksh 1,000,000.00 for the funeral expenses of the late Makueni County Senator Hon. Mutula Kilonzo (Table 4), as well as the "confidential expenditure" incurred by the Governor of Machakos County (Table 4) can be categorised as unethical since they are cases of leaders making decisions that serve their personal interests and that may not be in the public interest. (See also 4.4.5 Unauthorised spending.)

#### 4.2.3 Competition in procurement

Competition in procurement is about fostering an honest contest to enable the government entity to obtain quality commodities and services at the lowest possible cost. Seeking competition also guards against favouritism, extravagance and fraud, while allowing interested vendors a fair and equal opportunity to compete. From the cases studied, single sourcing of goods and services was rampant. In Wajir County (Table 2), it was for stationery and foodstuffs, while in Machakos County (Table 4) it was the procurement of event venues, entertainment and tents. All of the foregoing would seem to be easily available and therefore could have been procured through competitive bidding.

#### 4.2.4 Transparency

Transparency in procurement concerns the timely access to easily understood information. Transparency assists in ensuring that any deviations from fair and equal treatment are detected very early, reducing the risk of such deviations. It protects the integrity of the process and the interest of the organisation, stakeholders and the public. Transparency therefore involves relevant entities taking steps to enable appropriate scrutiny of their procurement activity.

The Wajir County executives (Table 2) were not transparent over the reallocation of funds from the Transitional Authority meant for constructing the county government headquarters. There was no prior approval from the Office of the Controller of Budget to use the money for other purposes, such as drilling boreholes. In Mombasa County (Table 3), inconsistencies were noted in a payment voucher, highlighting the non-transparent nature of that transaction. In this case, the cheque used to pay for the procurement of the good was dated 27 February 2013, while the payment authorisation and approval was made a day *after* that date, contrary to standard practice. Additionally, the invoice used to request payment was dated 25 January 2013 while the delivery note was dated 25 February 2013, meaning that the goods were delivered one month after the request for payment, again contrary to standard practice. In Machakos County (Table 4), the vehicles bought were registered in individuals' names, and fitted with private registration numbers instead of the normal green plates used by the defunct Local Authorities. In some cases, the payment was made to someone other than the one who issued the invoice.

#### 4.2.5 Accountability

Accountability in procurement concerns officials being responsible for their actions and decisions in relation to procurement and resulting outcomes. It therefore entails ensuring that due process was followed, including relevant approvals supporting the decisions made, and that records for all the activities are maintained as required by the law.

In all the counties surveyed, there were cases of procurements lacking the requisite documentation, and as such, it was unclear whether the transactions actually took place. In Wajir County (Table 2), payments for capital projects undertaken were processed without any reference to LSOs, Bills of Quantities, project files, contractors' invoices, completion certificates from technical departments, as well as inspection and acceptance committee reports. Also, procurement documents like tenders or quotations were not available; nor were inventory records maintained. In Mombasa County (Table 3), there were no documents provided to support payments to the Matatu Welfare Association, Coast Branch. In Machakos (Table 4), goods and services are considered to have been irregularly procured in that there were no requisitions, no prequalification register, no quotations, no tender documents, no signed contracts, and no inspection or acceptance reports. In one instance, a good (the teleprompter vide Warrant No 1674541) was purchased in cash.

### **4.3 Causes of the public procurement challenges experienced**

#### **4.3.1 Inadequate qualified procurement professionals**

The audit reports repeatedly point to the lack of adequate procurement professionals, hence the procurement challenges in many counties. According to the Controller of Budget's report 2013/2014, low levels of staff capacity, especially in public procurement and financial management, affected budget implementation, resulting in low absorption of funds<sup>33</sup>. Lack of capacity in terms of knowledge of The Public Procurement and Disposal Act 2005, by some procurement professionals, is also contributing significantly to the inadequate fulfilment of procurement requirements.

#### **4.3.2 Inadequate procurement planning**

It is a requirement under the Public Procurement and Disposal Act, 2005 to prepare a procurement plan by the beginning of the financial year and monitor its implementation to ensure adherence to it. According to the Auditor-General's report, most counties have had *ad hoc*, unplanned spending<sup>34</sup>, which is evident in the three examples studied. This unplanned spending may indicate the total lack of procurement plans, or the ineffective use of existing procurement plans in anticipating all the activities to be undertaken. There were also over-estimations of costs in some instances, which compromises the value for money principle.

#### **4.3.3 Lack of pre-qualification of suppliers**

The case studies evidently point to the lack of pre-qualification of suppliers, hence the numerous cases of single sourcing. As indicated in the Controller of Budget's report, single sourcing could also be rampant due to the interference of the Executive in procurement matters, through instructions that undermine the principle of competition. These executive interferences are likely to increase the risk of corruption, particularly if government officials involved in the procurement process are the ones receiving the tenders under the guise of someone else; or if they are colluding with service providers to gain from the tenders in exchange for elimination of competition and to ensure a particular service provider subsequently wins the tender.

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<sup>33</sup> RoK, 2014

<sup>34</sup> ROK, 2014,

Another aspect of lack of pre-qualification of suppliers involves selecting a supplier based only on the information provided in writing, without verification of a supplier's actual ability to deliver, or without a proper site visit. A case in point was in Machakos County (Table 4) where a supplier of motor vehicles did not have the capacity to supply all the cars and therefore acted as a middleman. According to the Auditor-General's report<sup>35</sup>, this can lead to reduced competitiveness, poor delivery from unqualified suppliers, and risks losing financial resources and incomplete projects. It is also a contravention of the procurement law –the general rules of procurement, section 31(1), which provide that a person is qualified to be awarded a procurement contract only if the person has the necessary resources, equipment and facilities. Interestingly, Machakos County had the highest expenditure on the purchase of motor vehicles in the country at Ksh863 million. This expenditure exceeded their budget allocation by 20.9 percent.

#### 4.3.4 Not following due process

Some county governments ignore the requirement that they should get formal procurement approval from an appropriate oversight agency within government, and proceed to make unilateral decisions, suggesting a difficult working relationship between the national and county governments, or ignorance of the requirement. According to the Auditor-General's report<sup>36</sup>, Machakos County recruited an additional 156 employees in the month of April 2013. The following anomalies were noted:

- There were no advertisements for the job vacancies.
- There was no County Public Service Board in place in April when these appointments were made.
- Appointments were done in September in total disregard of the existence of the County Public Service Board.
- No proper records were maintained in respect of the appointments to indicate whether there were any applications made and received or interviews conducted.
- No budgetary provisions were made for the recruitment.
- The appointments were based on non-existent salary structures, job designations, placements and terms of employment.
- An examination of the payroll data indicated that tax pin numbers for 43 staff were invalid, thus casting doubt on how their tax deductions had been effected and remitted to the Kenya Revenue Authority.

These appointments have added an additional Ksh13 million per month to the county wage bill. Unfortunately, the appointments were done with the full knowledge of the Transition Authority, as the appointment letters were signed by the Interim County Secretary, who should instead have advised the county government of the irregularity of the undertaking. An incident like this can result in the entire procurement process being invalidated. Harmonisation of procurement procedures with other government procedures can help speed up the procurement process<sup>37</sup>.

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<sup>35</sup> RoK, 2014

<sup>36</sup> ROK, 2014

<sup>37</sup> RoK, 2014

### **4.3.5 Poor inventory management**

Poor inspection of goods and services has resulted in non-delivery of certain items, under-delivery, or delivery of sub-standard goods. In the case of Machakos and Wajir counties, it is not clear whether the inspection and acceptance committees had been established to ensure that the procured goods and services were delivered as required, because the inspection and acceptance reports were not availed for audit.

## **4.4 Consequences of the public procurement challenges experienced**

### **4.4.1 Offences of financial misconduct**

Procurement inefficiencies have led to financial misconduct. Such offences include, but are not limited to: public officers acting without authority; incurring wasteful expenditure; failure to provide financial information required under the Act; failure to keep proper records; taking possession of public funds without authority; misappropriation of funds or assets; concealing information on public finances to obtain financial benefit; and engaging in a corrupt act (including soliciting or receiving an inducement). These issues arise in the three counties studied.

### **4.4.2 Low absorption of resources**

According to the World Bank<sup>38</sup> inefficiency of public expenditure, including procurement challenges, has contributed to the weak absorption of the development budget. This is confirmed in the Controller of Budget's Report which states that "although there was a marked improvement in the overall performance in (national) budget implementation, the absorption rates for development expenditures still remain low. However, the 52 percent absorption rate recorded in FY 2013/14 is an improvement on the 44.4 percent recorded in the previous year"<sup>39</sup>.

Figure 2 shows absorption rates of the annual budget in all the counties. With the exception of Trans Nzoia and Turkana counties, all other counties absorbed more of their recurrent budgets than their development budgets. On average, Tana River (34%), Mombasa (38%) and Lamu (39%) counties had the lowest absorption rates of both the recurrent and the development budgets. Only Turkana County absorbed less than half of its recurrent budget, compared to 30 counties that absorbed less than half of their development budgets.

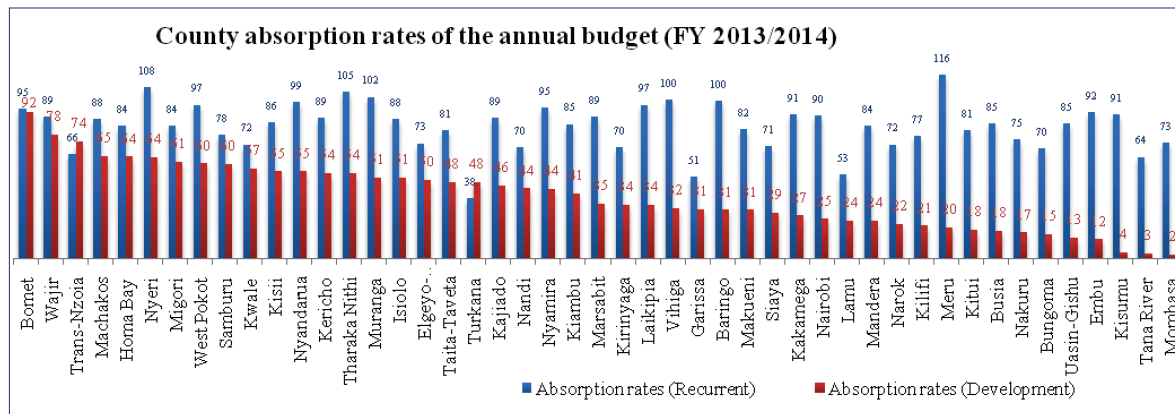
Absorption rates of above 100 means that the counties overspent on their recurrent funds, and that they ate into their development funds.

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<sup>38</sup> World Bank Group. (2014)

<sup>39</sup> ROK, 2014: 47





Source: RoK (2014)

Figure 2: Absorption rates of the recurrent and the development annual budget (FY 2013/2014)

#### 4.4.3 Delays in project implementation

Public procurement should enable public entities to efficiently deliver services to the public. However, public procurement inefficiencies, including delays in preparation and submission of departmental procurement plans, have led to delays in project implementation. This increases the gestation period and cost overruns<sup>40</sup> ultimately leading to the low absorption of funds.<sup>41</sup>

#### 4.4.4 Wasteful spending

Available studies<sup>42</sup> estimate that the leakage and wastage of public funds costs the country over 20 percent of the annual national budget. In IEA's view, the bulk of the problems in the national budget lie with the utilisation of the funds and the actual implementation of programmes.

According to the Controller of Budget's report, about 5 percent of total expenditure is on domestic and foreign travel – significantly on study tours<sup>43</sup>. The main concerns about these travels are that they are frequent and involve large delegations; that they cover the same subject matter across the counties; that participants travel without informing the parent ministry or the Kenyan mission abroad; and the delegates travel without making prior appointments. The report recommends that foreign travel be minimised and coordinated by the Ministry of Foreign Affairs and International Trade, which most county governments ignore.

<sup>40</sup> (World Bank, 2014),

<sup>41</sup> RoK 2014

<sup>42</sup> IEA, 2005)

<sup>43</sup> ROK, 2014

## Public Procurement in Kenya's Counties:

Experiences from three counties

As shown in Table 5 below, Wajir County spent money on domestic and foreign trips even though it had not budgeted for either. Mombasa County spent within the budget, while Machakos County Assembly overspent on their foreign trips by 4 percent.

**Table 5: Analysis of expenditure on domestic and foreign travel**

County	County Executive						County Assembly					
	Domestic travel			Foreign travel			Domestic travel			Foreign travel		
	Budget (Ksh. M)	Expenditure (Ksh. M)	% Absorption Rate	Budget (Ksh M)	Expenditure (Ksh M)	% Absorption Rate	Budget (Ksh. M)	Expenditure (Ksh M)	% Absorption Rate	Budget (Ksh. M)	Expenditure (Ksh. M)	% Absorption Rate
Wajir	0	97.6		0	0		0	40.3		0	5	
Mombasa	95.5	16.9	18%	57	18.2	32%	69.4	23.9	34%	11.5	7	61%
Machakos	142.1	97.1	68%	92.3	67.5	73%	56	34.9	62%	100.5	104.7	104%

Source: RoK, 2014

There is also evidence of administrative spending building up rather quickly, to the point where a number of county assemblies have exceeded their annual allocations on sitting allowances and will therefore be forced to reallocate funds from priority areas of spending to compensate for this<sup>44</sup>. As shown in Table 6 below, Machakos County spent 4.5 percent more than they had budgeted on Members of County Assembly (MCAs) sitting allowances. Wajir County MCAs are among the highest paid in the country.

**Table 6: Analysis of MCA sitting allowances for the year FY 2013/2014**

County	Budget allocation Ksh (M)	Expenditure Ksh (M)	% Absorption	No. of MCAs	Average sitting allowance per MCA (Ksh)
Wajir	76.1	76.1	100%	46	137,779
Mombasa	58.8	14.5	24.7%	46	26,296
Machakos	46.1	48.1	104.5%	60	66,864

Source: ROK, 2014 August

<sup>44</sup> World Bank, 2014

#### **4.4.5 Unauthorised spending**

Public procurement should ensure the prudent use of resources in acquisition of goods and services. However, some counties incurred costs that were not authorised. According to the Auditor General's report, payment of transport expenses for officers of the Public Service Commission is covered under the Code of Regulations and terms of service together with Paragraph F.13 of the County Human Resource Manual 2013<sup>45</sup>. An officer seconded to a county as a chief finance officer was paid a transport allowance from 4 March to 29 March for the distance from Kahawa West Nairobi to Machakos County, amounting to Ksh140,000.00. This was contrary to the provisions of a Circular from the Office of the Prime Minister, Ministry of State for Public Service<sup>46</sup>, which stated that the only payable allowances were consolidated top up allowances. The audit report recommended that the payment should be recovered from the officer and payments for services to undeserving officers and not provided for, should not be made. The same county incurred an expenditure of Ksh2.8 million for the burial of the late Senator Hon. Mutula Kilonzo, who was from Makeni County (see Table 4). The Auditor General's report highlighted this as an irregular transaction and recommended that the relevant officers be surcharged for the apparent loss of public funds in an invalid expenditure.

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<sup>45</sup> ROK, 2014

<sup>46</sup> Circular Ref MSPS/10/27A/VOL.II/ (114) of 27th February 2013 from the Office of the Prime Minister, Ministry of State for Public Service

# 5

## Recommendations

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Public investment is prone to high inefficiencies, which emanate from cost overruns, benefit shortfalls, waste and low completion rates<sup>47</sup>. As such, county governments need to take into account various considerations.

### 5.1 Development of staff capacity

To improve budget execution, county governments should consider improving the capacity of procurement staff in order to improve operational efficiency and avoid delays in the implementation of development activities. A similar recommendation was made by the Controller of Budget -that counties consider liaising with the Ministry of Devolution and Planning for possible staff secondment. Continuing education and capacity enhancement, based on lessons learnt from past experiences, should also be encouraged. Part of enhancing citizen capacity in procurement matters is the distribution of simplified procurement manuals in all counties (based on the procurement rules) to ensure all procurement processes are clear and well understood by the public.

### 5.2 Development of procurement plans

All departments should develop work-plans to enable the procurement departments to prepare harmonised annual procurement plans and cash flow projections to enhance implementation of development projects. Effective harmonisation of county procurement procedures with national government procedures would help speed up the procurement process and enhance efficiency.

### 5.3 Pre-qualification of suppliers

For efficiency, a county could advertise for a prequalification exercise for the provision of regular goods and services they need in a given period and conduct a comprehensive exercise that helps them identify service providers for each category, that they can use in that given period. Training of local suppliers to enhance competitiveness in the procurement processes could also help in diversifying the service providers and enhancing competitiveness.

### 5.4 Following due process

Since the PPOA is mandated to provide oversight of the procurement process in Kenya, it should do so regularly in order to help counties comply with required procedures. Any procurement that does not follow due process should be nullified and the necessary disciplinary action taken to deter such cases in future.

### 5.5 Inventory management

County governments should ensure the timely management of procurement procedures to guarantee timely delivery of services. Additionally, the simultaneous procurement of goods could save on costs. Careful selection of procurement teams with a major focus on integrity, including signing of an 'integrity pact' by every member of the team involved in any aspect of the procurement process, should be adopted.

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<sup>47</sup> Dabla-Norris et al (2011) as quoted by World Bank (2014)

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