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# Policy Brief

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*Improving public policy making for economic growth and poverty reduction*

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

Persistent controversies in Kenya's public procurement and the resultant negative impact on efficient public service delivery can be explained, in part, by weak enforcement of existing legislation.<sup>1</sup> They could also be attributed to the absence of a coherent policy framework. Such a policy would complement and broaden the scope of continuing legislative reforms to make government procurement more predictable and less problematic. It would also support and contribute to national growth and development strategies.

The Economic Recovery Strategy (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 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 when the Public Procurement and Disposal Act was enacted.

Whereas the reforms already achieved are important in ensuring that government spending leads to the attainment of broad social goals, they do not provide sufficient links between the country's overall macroeconomic policy and public procurement, which constitutes a large and ever-growing share of total government spending. Where such links exist, the government's procurement 'muscle' should be able to: 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.

A coherent policy framework would help to outline the objectives of government procurement and the channels through which public purchasing could promote fairness, transparency, accountability and value for money. It would also contribute to stability in the macroeconomic environment, efficiency in infrastructure and service delivery, increased productivity in all sectors, faster industrialization and deeper regional integration.

### Government Procurement in Kenya

Procurement is the acquisition of goods and services (i.e. purchasing) and hiring of contractors and consultants to carry out works and services. Procurement also embraces clearing out of 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 and usage. 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.

Public procurement is 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 support for employment of citizens and income creation through preference for local suppliers; promotion of indigenous small, medium and micro enterprises; and, enhancement of regional integration through improvement of cross-border trade.

In developing countries and economies in transition, public procurement serves a greater role than it does in developed countries. This is largely because in developing countries, governments are the major buyers or in some cases the only buyers of goods and services. They can therefore 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

*"A fundamental requirement for any procurement policy is that it should be in line with the Government's overall macroeconomic strategy...Furthermore, it should form part of the strategy for rebuilding and restructuring...the policy should extend the principles of affirmative action into the area of economic development"*<sup>2</sup>

*This policy brief is based on a KIPPR study on Public Sector Procurement in Kenya. The study aims to contribute to the current initiatives towards development of a coherent policy framework for government procurement.*

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the form of competition; that is, whether competition is restricted to price or includes non-price variables such as technical progress, delivery and product characteristics. Governments can also influence firm prices and profits directly, for example by specifying profit rates in non-competitive contracts or indirectly by encouraging open competition for contracts.

It is common to categorise government procurement into contestable and non-contestable government procurement. Contestable government procurement (CGP) refers to public procurement that is subject to competitive bidding.

In 1998, the value of the world's total contestable government procurement (CGP) market was estimated at US\$ 2,083 billion, equivalent to 7.1 percent of the world's Gross Domestic Product (GDP) or 30.1 percent of the world's merchandise and commercial services exports. The proportion of central government procurement in developing countries is higher and ranges between 9 and 13 percent of GDP.

Kenya's contestable government procurement (CGP) has grown rather irregularly in value terms over the period between 1992 and 2004. Between 1992 and 1997, for instance, procurement in central government increased yearly 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. In 2003 and 2004, CGP grew by 27 percent before decreasing by 8 percent, respectively.

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## Kenya's Public Procurement Framework

Kenya's public procurement often raises allegations of unscrupulousness in public financial management both in central and local governments. The most recurring allegations include 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; poor implementation of donor-funded projects due to procurement-related inefficiencies; 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 interference of the executive arm of government in awarding of contracts.

Prior to 1998, many public procurement problems could be explained by absence of a uniform or transparent procurement system covering the entire public sector. Since political independence in 1963, central government procurement decisions were guided only by a Supplies Manual written in 1978, and circulars issued by the Treasury from time to time. Regulation was undertaken through various laws, including: general commercial laws (e.g. Sale of Goods Act-Cap 31, Law of Contracts-Cap 23, Government Contracts Act-Cap 25, etc); laws governing state corporations; labour, tax, customs and banking laws, among a myriad of other statutes containing aspects of procurement; and 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. The regulations provided for structured organizations to undertake procurement, and provided basic rules for guiding procuring entities, including handling of appeals and complaints. Contrary to expectations, these regulations have not eliminated public procurement controversies.

In 2005, Kenya enacted the Public Procurement and Disposal of Public Assets Act, which replaced the 2001 Procurement Regulations. The Act provides for a Public Procurement Oversight Authority (PPOA) and a Public Procurement Complaints Review and Appeals Board (PPCRAB). Even though the Act came into force in January 2006, certain elements of its implementation (such as the operationalisation of PPOA) are uncertain. Moreover, key reforms in government procurement remain outstanding.

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 this focus is well justified, it does not effectively cover some five critical areas that earlier legislative and institutional reforms overlooked. These are elaborated upon subsequently.

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### 1. Electronic procurement

Adoption of electronic (e-) procurement has clear advantages over the current manual and paper-based method of procuring and supply chain management. Efforts to roll out the Integrated Financial Management Information System (IFMIS) have stagnated because of, among other reasons, lack of commitment to deploy resources needed to complete the exercise.



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## 2. Standardization of procurement systems

Implementation of joint and standardized procurement, especially for common user items across ministries, local authorities and state corporations as been slow. Furthermore, government suppliers such as Government Printer, Kenya Medical Supplies Agency, etc have only been utilised sparsely.

## 3. Deepen public-private partnerships

There is lack of public-private partnerships (PPPs) in procurement essentially due to 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. Green procurement and community procurement initiative

Green procurement involves building environmental sustainability considerations into the supplies management chain of activities. Community procurement, an emerging concept in public procurement developed by the World Bank, involves public procurement through grassroots committees. Community procurement can generate win-win synergies when combined with Kenya's decentralized funds, such as the Constituency Development Fund (CDF), and therefore the need for clear policy guidance.

## 5. Integration of regional procurement markets

Besides promoting economic co-operation, 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 information technology (IT) public procurement support system (within EAC), will remain void as long as the country has no coherent, integrated and comprehensive domestic policy detailing what public procurement is expected to achieve and how.

A broad policy framework addressing these five concerns will help sustain the gains from past public procurement reforms and ensure that the envisaged initiatives succeed.

## Conclusions

Reform initiatives in Kenya have centered on making the government procurement process more efficient, essentially by blocking the legal and procedural loopholes believed to be avenues for waste and rent-seeking behaviour in the system. Consequently, much

effort has been devoted in bringing together existing procurement regulations and directives into a single document, the Public Procurement and Disposal of Assets Act, 2005, and to making this document clearly understood, easily accessible by all its users and properly enforceable. These efforts are valid and justified especially considering the general legislative and regulatory weakness that has characterized procurement in Kenya's public sector over the last four decades.

However, 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, there is need to develop a broad and coherent procurement policy framework to ensure that government procurement contributes meaningfully 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 macroeconomic tool. Many countries have successfully exploited the immense government purchasing power to promote small, micro and medium enterprises in the manufacturing, services and construction sectors. Others, notably in Europe, Latin America and South East Asia have integrated 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).

Secondly, there is need to make the procurement process more comprehensive through adoption of an integrated management framework, which aims to forge close and effective interaction between planning, programming and budgeting; requirements generation; and management of the entire supply chain.

Planning, programming and budgeting would entail integration of government acquisition with planning, programming and the national budgeting processes. While ensuring that procurement projects submitted to it for approval are within allocated departmental ceilings, the Ministry of Finance should also certify that the projects are 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 procurement have in the past generated costly inefficiencies in Kenya's public sector procurement.

Thirdly, a comprehensive procurement process must 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. This requires institutionalization of monitoring & evaluation (M&E) mechanisms and adoption of clear strategies for periodic auditing of government acquisition.

It should be noted that 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 public procurement and auditing of its performance can form a sound basis for continuing reform and hopefully preempt crises in the acquisition system. Apart from this, establishing an M&E strategy ensures that the goals and objectives of government procurement are effectively met. Since it requires creating of clear measures of success, such as 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 under-performance. In this regard, complaints brought before a public procurement dispute resolution agency, such as Kenya's Public Procurement and Complaints Review and Appeals Board (PPCRAB) are critical barometric indicators of the success or failure of public procurement policies, practices and procedures.

Ultimately, the effectiveness of public procurement in Kenya will be determined by numerous other factors, among them domestic social and economic policies, regional and international trade agreements entered into, and the regulatory framework 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) who have specific preferences on where and how aid money should be spent. For these reasons, formulating a coherent public procurement policy for Kenya will also require:

1. A carefully selected mix of related policies to 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;

2. Harnessing of procurement power to promote economic recovery, wealth and employment creation, and social goals while enforcing compliance with established public procurement rules; and
3. A balance of 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.

## Policy Recommendations

Four broad recommendations are suggested:

1. Outstanding government procurement reforms should be implemented as interconnected rather than disjointed elements of a wholesome public policy reform discipline. Also, the pace of these reforms should be accelerated.
2. The Central Bureau of Statistics should begin collecting, processing and disseminating quantitative data on Kenya's public procurement across ministries, departments and sectors. Such data would provide a useful basis for further analyses of the challenges facing government procurement and therefore for more detailed recommendations of how these challenges may be overcome.
3. There is need to begin broad stakeholder consultations with a view to preparing a coherent Public Procurement Policy Framework Paper with specific policy targets of government purchasing, clear strategies towards the attainment of these targets, and methods to be used periodically in evaluating progress.
4. There is also need to include procurement planning as a core activity under the Public Expenditure Review (PER), Medium-Term Expenditure Framework (MTEF) and budget preparation cycles. Procurement planning, 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.

### Notes:

1. The term *legislation* is used throughout this brief to refer to bills passed by Parliament, which later become state laws. It also refers to other general *legal* rules. The term *policy*, on the other hand, is used in reference to 'a plan or course of action ... of a government ... intended to influence and determine decisions, actions, and other matters.'
2. Green Paper on public sector procurement reform in South Africa: An initiative of the Ministry of Finance and the Ministry of Public Works, April 1997.

## About KIPPRA Policy Briefs

KIPPRA Policy Briefs are aimed at a wide dissemination of the Institute's policy research findings. The findings are expected to stimulate discussion and also build capacity in the public policy making process in Kenya.

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