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Kenya

Public Procurement

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This country-specific Q&A provides an overview of public procurement laws and regulations applicable in Kenya.

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Kenya: Public Procurement

*"Complex contracts" refers to contracts including: where the needs of the contracting authority cannot be met without adaptation of readily available solutions; contracts involving design or innovative solutions; where prior negotiation is required before a contract can be awarded due to particular circumstances related to the nature, the complexity or the legal or financial make-up of a contract or because of risks attaching to these circumstances; and where technical specifications cannot be determined with sufficient precision with reference to established technical standards, references or specifications.

1. Please summarise briefly any relationship between the public procurement / government contracting laws in your jurisdiction and those of any supra-national body (such as WTO GPA, EU, UNCITRAL).

In Kenya, Article 227 of the Constitution mandates public procurement to be fair, equitable, transparent, competitive, and cost-effective. Additional constitutional provisions crucial for public procurement include adherence to national values (Article 10), equality and freedom from discrimination (Article 27), affirmative action programs (Article 55), values and principles of public service (Article 232), and Chapter 6 on Leadership and Integrity. These supplementary provisions emphasize the broader ethical, inclusive, and accountable framework within which public procurement processes should operate in the country.

Article 201 (d) of the Constitution further provides for the principles of administration of public finance and mandates public bodies to utilize public money in a prudent and responsible way. This includes the need to promote the integrity and fairness of the procedures put in place so as to enhance transparency and accountability of the said procedures. This provision is further enshrined in Section 2 of the Public Finance Management Act, 2012 which underscores the fiscal responsibility principles in administration of public finances.

To achieve the above objectives, Parliament enacted the Public Procurement and Asset Disposal Act of 2015 ("PPADA, 2015"), which governs procurement in The Act provides policy interventions to address perennial concerns of mis-procurement, delayed payments, project delays, inflated costs and cost overruns, in order to

achieve value for money. In addition, there are detailed procedures outlined in the Public Procurement and Asset Disposal Regulations, 2020 (PPADR). From the foregoing, it is evidence that the laws primarily focus on ensuring transparency, fairness, and competition in the procurement process.

The PPADA provides for Classified Procurement Methods and procedures for procurements carried out by the national security organs. The PPADA also allows a procuring entity to use Specially Permitted Procurement Procedures in specific cases such as when use of other methods is impractical or uneconomical, if permitted by the National Treasury.

According to Section 4 of the PPADA, 2015, public procurement and disposal of assets under bilateral or multilateral agreements between the Government of Kenya and any other foreign government or multilateral agency are not procurements or asset disposals to which the PPADA applies, unless the Regulations or the International Agreement or rules prescribe otherwise. This allows for implementation of such Agreements without conflict with the Kenyan legislation.

There also exists the Public Officers Ethics Act, 2003 which advances the ethics of public officers by providing for a Code of Conduct and Ethics for public officers and requiring financial declarations from certain public officers. It details how public officers should carry out their duties, with efficiency, honesty, professionalism and integrity, avoiding conflicts of interest, and with political neutrality.

In addition, there is the Public Audit Act, 2015, which empowers the Auditor General to undertake audit activities in state organs and public entities to confirm whether public money has been applied This includes

auditing public procurements in public entities.

Kenya is part of the UNCITRAL's Model Law on Public Procurement which serves as a global reference for procurement regulations. However, the level of alignment between Kenya's laws and those of supra-national bodies depends on the specific legal provisions and reforms undertaken by the Kenyan government.

The relationship between Kenya's public procurement laws and UNCITRAL's Model Law on Public Procurement lies in the potential influence of international best practices on Kenya's regulatory framework. UNCITRAL provides a model that countries, including Kenya, may consider when developing or reforming their procurement laws. This model offers a set of guidelines and principles aimed at promoting efficiency, fairness, and transparency in public procurement processes. Kenya is also a member of the World Trade Organization

2. What types of public procurement / government contracts are regulated in your jurisdiction and what procurement regimes apply to these types of procurements? In addition to any central government procurement regime please address the following: regulated utilities procurement regime (e.g. water, gas, electricity, coal, oil, postal services, telecoms, ports, airports), military procurements, non-central government (local, state or prefectures) and any other relevant regime. Please provide the titles of the statutes/regulations that regulate such procurements.

All contracts with state organs and public entities are deemed to be public procurements and are subject to the PPAD Act, unless expressly exempted under Section 4 (2) of the Contracts that are covered may include; procurement of goods, works or services, including asset disposal.

Under Section 4 (2), contracts that are exempt from the application of the Act include those relating to the provision of services where an individual works as if he or she were an employee of the public. The PPAD Act does not apply to the transfer of assets being disposed off between public entities for no financial consideration or the acquisition of services provided by the government or government department.

In addition to the above, specific sectors or agencies may have their own regulations or guidelines tailored to their

unique procurement needs.

The other types include:

- a) **Open Tendering:** This is the default method where all interested and qualified bidders may submit their bids.
- b) **Restricted Tendering:** This involves inviting selected suppliers or contractors to submit bids.
- c) **Request for Proposals (RFP):** Used for more complex projects where the procuring entity needs detailed technical and financial proposals.
- d) **Direct Procurement:** In certain circumstances, entities may directly procure goods, works, or services without However, this is subject to specific conditions outlined in the law.
- e) **Pre-Qualification Suppliers:** In certain circumstances, before allowing suppliers to participate in certain tenders, procuring entities may prequalify suppliers based on their capabilities, experience, and financial standing.
- f) **Framework Agreements:** These are long-term agreements with suppliers or contractors to provide goods, works, or services as and when needed. For instance, Sections 2 and 114 of the PPADA defines framework agreements and applicable. The above provisions provide circumstances under which a procuring entity may enter into a framework agreement, the maximum term of the framework agreements (three years), evaluation of bids carried out under the framework agreement and reporting requirements. Further, Regulations 103 to 105 of the PPADR provides for detailed rules including thresholds, indexing of prices and the process of making call-off orders.
- g) Regulated Utilities Procurement in the following sectors:

Water: Water Act 2016. Electricity: Energy Act 2019

Telecoms: Kenya Information and Communications Act 2012. Ports: Kenya Ports Authority Act (Cap 391).

Airports: Kenya Airports Authority Act (Cap 395). Postal Services: Postal Corporation Act (Cap 534).
- h) Military Procurements:

The defence sector's procurement falls under the Ministry of Defence, and specific regulations may not be publicly disclosed due to security considerations.
- i) Procurement by the county governments which is governed by:

The Constitution of Kenya, 2010

The Public Procurement and Asset Disposal Act, 2015 (PPADA)

The Public Procurement and Asset Disposal Regulations, 2020 (PPADR) The Public Finance Management Act, 2012

Ethics and Anti-Corruption Commission Act, 2011
Leadership and Integrity Act, 2012

3. Are there specified financial thresholds at which public procurement regulation applies in your jurisdiction? Does the financial threshold differ depending on the nature of procurement (i.e. for goods, works or services) and/or the sector (public, utilities, military)? Please provide all relevant current thresholds in your jurisdiction. Please also explain briefly any rules on the valuation of a contract opportunity.

Section 45 of the Public Procurement and Asset Disposal Act (PPADA) stipulates that all procurement processes must align with the approved budget and adhere to the specified threshold outlined in the Second Schedule of the Public Procurement and Asset Disposal Regulations (PPADR). The threshold set out in the Second Schedule of the PPADR establishes the permissible levels of expenditure for each procurement method, setting both maximum and minimum limits.

In addition, exclusive preference to citizen contractors is governed by Regulation 163, which outlines financial thresholds. For works, construction materials, and other materials produced in Kenya, the threshold is set at 1 billion shillings, while procurements related to goods and services have a threshold of 500 million shillings. These parameters ensure financial accountability and regulate the use of the procurement methods.

The financial threshold matrix stipulated under the PPDA and the PPADR is applied in determining the available procurement methods for all public procurement. The Schedule goes further to specify the officers that need to be involved subject to the difference in thresholds.

4. Are procurement procedures below the value of the financial thresholds specified above subject to any regulation in your jurisdiction? If so, please summarise the position.

Yes, procurement procedures below the financial

thresholds specified in Kenya are still subject to regulation. The Public Procurement and Asset Disposal Act applies to all procurement processes, regardless of the value. However, for lower-value procurements, simplified procedures are often employed to streamline the process. Regulation 92 of the regulations outlines the conditions under which a procuring entity may utilize the low-value procurement method as per Section 107(b) of the These conditions include meeting cost thresholds, absence of benefits in time or cost from other procurement methods, not avoiding competition, and approval by the head of the procurement function after a market survey, endorsed by the accounting officer.

Furthermore, Section 93 specifies that if the accounting officer deems low-value procurement necessary, this function may be delegated solely to the head of the procurement function. The delegated function involves procuring goods, works, or services from a reputable outlet or provider through direct shopping, credit cards, or direct funds transfer.

5. For the procurement of complex contracts*, how are contracts publicised? What publication, journal or other method of publicity is used for these purposes?

Project procurement and management typically require the Procuring Entity to possess advanced technical expertise in project design and implementation, considerable human, financial and material resources, advanced contracting and negotiation skills, strong knowledge of dealings with international For all these reasons, it was agreed that a project procurement manual would be a valuable tool for procuring entities, leading to the formulation and implementation of the Manual for Procurement and Management of Projects. The manual offers an opportunity to standardize and streamline procurement procedures for complex projects.

Section 96 of the PPAD Act requires the accounting officer of a procuring entity to take such steps as are reasonable to bring the invitation to tender to the attention of those who may wish to submit tenders. There are exceptions to this requirement to advertise where the procurement method is the restricted tender, direct procurement, request for quotations, low-value procurement and force accounts.

Publication:

Section 96 further requires a procuring entity to advertise in the dedicated government tenders' portals at www.tenders.go.ke, on its own website, and via a notice

in at least two daily newspapers of nationwide circulation. The procuring entity should also post advertisements at any conspicuous place reserved for this purpose in the premises of the procuring entity.

The above requirement is similarly anchored in Section 37 (1) of the Public Private Partnership Act.

6. For the procurement of complex contracts, where there is an initial selection stage before invitation to tender documents are issued, what are typical grounds for the selection of bidders? If there are differences in methodology between different regulated sectors (for example between how a utility might undertake a regulated procurement procedure and how a government department might do so), please summarise those differences.

For procurement of complex contracts, the initial selection stage before invitation to tender the typical grounds for the selection of bidders is quality and competence based. This is informed by the fact that complex contracts require skilled expertise and in order to limit the responses to only limited bidders, the procurement entity, with justification, will invite select bidders to submit their proposals/bids as opposed to subjecting the tender to being open to all interested suppliers.

Section 92 of the PPADA lists 12 procurement methods that may be utilised by a public entity, while Section 114 (1) lists a further five methods that may be used as specially permitted procurement. These methods are applied in public procurement and the determining factor for selecting one method over the other is primarily based on the threshold matrix that is focused on the expenditure involved.

The PPP Act has two procurement procedures: (i) solicited proposals through a two-stage tendering process under Section 37, and (ii) privately initiated investment proposals under Section 61 of the PPP Act.

7. Does your jurisdiction mandate that certain bidders are excluded from tendering procedures (e.g. those with convictions for bribery)? If so, what are those grounds of mandatory exclusion? Are there any notable features of how this operates in your jurisdiction e.g. central registers

of excluded suppliers? Does your jurisdiction specify discretionary grounds of exclusion? If so, what are those grounds of discretionary exclusion?

Under section 55 of the PPADA to be eligible to bid for a procurement contract or an asset being disposed of, a person must meet specific criteria, including having the legal capacity for such contracts, not being insolvent, meeting professional requirements (if applicable), not being precluded by the procuring entity, not being debarred from participating in procurement proceedings, fulfilling tax obligations, having no convictions for corrupt practices, and not being guilty of serious violations of fair employment laws and practices. Failure to satisfy these criteria renders a bidder ineligible to bid.

In addition to the above criteria, another factor that automatically excludes a bidder from a tender process is conflict of interest on account of familial relations and private business operations.

8. Please describe a typical procurement procedure for a complex contract. Please summarise the rules that are applicable in such procedures. Please include a timeline that includes the key stages of the process, including an estimation for the total length of the procedure.

Section 2 of the PPADA, complex contracts mean contracts that include procurement where the terms and conditions of an agreement are different from standard commercial terms and conditions, and includes contracts for infrastructural works performed under international agreements containing international terms and conditions;

Pursuant to Section 5.2 of the Manual for Procurement and Management of Projects, prequalification may be carried out as a stage in open tendering or it may be a separate preliminary step before the main tender procedure begins. Prequalification for projects should not be confused with the annual registration process of suppliers and contractors for use under the RFQ procedure. The first step should always be to investigate whether another PE has recently carried out a similar prequalification exercise, in which case it may be sensible to use the data they have obtained. Failing that, the PE should carry out a prequalification ensuring that the criteria used to select suppliers or contractors are stringent enough to weed out those who are not suitable

without disqualifying so many that competition would be inadequate.

In *Miscellaneous Civil Application 140 of 2019, Republic v Public Procurement Administrative Review Board; Accounting Officer, Kenya Rural Roads Authority & 2 others (Interested Parties) Ex Parte Roben Aberdare (K) Ltd [2019] eKLR* – Mandatory requirements in a bid document must be complied with. Deviations from mandatory bid requirements should not be permissible.

Section 91 of the PPADA, pre-qualification must be undertaken for complex and specialized goods, works and Further, pursuant to Section 99 of the PPADA, a procuring entity may engage in procurement by means of two-stage tendering when, due to complexity and inadequate knowledge on its part or advancements in technology, it is not feasible for the procuring entity to formulate detailed specifications for the goods or works or non-consultancy services in order to obtain the most satisfactory solution to its procurement needs.

In addition to the above, as provided for under Section 102 of the PPADA, an accounting officer of a procuring entity may use restricted tendering because of the complex or specialised nature of the goods, works or services in which tendering is restricted to prequalified tenderers resulting from the procedure under Section 94 of the PPADA.

It is this stage that the provisions of Section 151 of the PPADA are invoked. They provide for the management of complex contracts. First and foremost, for every complex and specialized procurement contract, the accounting officer of a procuring entity is mandated to appoint a contract implementation team which consists of members from the procurement function, and the requisitioner, the relevant technical department and a consultant where applicable.

A reading of Regulation 137 of the PPADR reveals that the contract must have a commencement date, and the contract implementation must be as per the project implementation plan agreed upon by the contractor and the procuring entity. The implementation plan must consist of:

- i. the list of activities planned to be carried out;
- ii. the deadline for each activity;
- iii. monthly cash planning forecast; and
- iv. any other information as required by a procuring entity;

9. If different from the approach for a complex

contract, please describe how a relatively low value contract would be procured. (For these purposes, please assume the contract in question exceeds the relevant threshold for application of the procurement regime by less than 50%)

This procurement method is governed by sections 107-108 of the PPAD The public entity may procure low-value items which are not procured on a regular or frequent basis and are not covered in a framework agreement subject to the maximum thresholds prescribed in the regulations. Section 92 of the regulations provides that, under section 107(b) of the Act, a procuring entity can employ the low-value procurement method if the estimated cost aligns with the specified threshold, there are no tangible benefits from other methods, the procedure avoids competition, and it's approved by the head of procurement and the accounting officer. Delegation of this method is restricted to the head of the procurement function.

As stipulated under Section 108 of the PPADA, the procedure and conditions for the use of low-value procurement method by different classes of public entities or different classes of goods, works or services being procured shall be as prescribed in the regulations as follows;

- i. Pursuant to Regulation 27 of the PPADR, low value procurements as per the threshold matrix under the Second Schedule shall not require an evaluation committee as stipulated under Section 46(8) of the PPADA;
- ii. Pursuant to Regulation 93 of the PPADR, the accounting officer, when deeming low-value procurement necessary, can only delegate this function to the head of the procurement The delegated function involves procuring goods, works, or services through direct shopping, credit cards, or direct funds transfer to a reputable outlet or provider.

Procurements under this method require support with the original Kenya Revenue Authority Electronic Tax Receipt (KRA ETR Receipt), and the goods obtained are officially recorded by the stores officer after confirmation by the user department, in accordance with the relevant sections of the Act.

10. What is seen as current best practice in terms of the processes to be adopted over and above ensuring compliance with the relevant regime,

taking into account the nature of the procurement concerned?

Current best practices in public procurement extend beyond mere compliance with the relevant regime and are tailored to the nature of the procurement. In November 2020, the Government published a National Public Procurement and Asset Disposal Policy which contains principles that guide the public procurement processes. They include:

- a. Good governance;
- b. Integrity;
- c. Equality and Equity;
- d. Professionalism;
- e. Transparency and Accountability;
- f. Compliance and conformity;
- g. Maximization of value for money;
- h. Efficiency and Effectiveness;
- i. Recognition of International Trade Treaties and Interests; and
- j. Sustainable Procurement.

These best practices are not exhaustive and may evolve based on emerging trends and regulatory changes. Procuring entities are encouraged to stay informed about international best practices, adapt to technological advancements, and continually improve their procurement processes to achieve efficiency, fairness, and value for money.

11. Please explain any rules which are specifically applicable to the evaluation of bids.

The starting point would be Section 46 of the PPADA, which provides for the establishment of an evaluation committee. In that regard, an Accounting Officer is mandated to ensure that an ad hoc evaluation committee is established in accordance with the PPAD Act and the PPAD Regulations made thereunder and from within the members of staff, with the relevant expertise.

In establishing the ad hoc evaluation committee, the procuring entity that is a State Department or a County Department, must do so in consultation with the Cabinet Secretary or the County Executive Committee member responsible for that entity, as the case may be. However, where technical expertise is required from outside the organisation, such expertise may be obtained from other procuring entities or procured to join the committee, on recommendation, in writing, by the head of the procurement function, and the committee shall be appointed by the accounting officer, in writing.

Section 78 of the PPADA provides for the opening of tenders, in which the accounting officer of a procuring entity is mandated to appoint a tender opening committee specifically for the procurement. It is important to note that any bid withdrawn in writing shall not be eligible for evaluation or consideration in the tender process.

At this stage, the opened tenders must be evaluated in accordance with Section 80 of the Hereunder, the evaluation committee appointed by the accounting officer pursuant to Section 46 of the PPADA must evaluate and compare the responsive tenders other than tenders rejected. The evaluation and comparison must be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of the PPADA and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered.

The evaluation committee must then prepare an evaluation report containing a summary of the evaluation and comparison of tenders and then submit the report to the person responsible for procurement for his or her review and It is important to note that pursuant to Section 80(6) of the PPADA, the evaluation must be carried out within a maximum period of thirty days, and the evaluation report must be signed by each member of evaluation committee. The person responsible for procurement must, upon receipt of the evaluation report prepared, submit such report to the accounting officer for approval.

12. Does your jurisdiction have specific rules for the treatment of bids assessed to be "abnormally low" for the purposes of a particular procurement (i.e. a low priced bid, significantly lower than any other bid or a bid whose pricing raises questions of sustainability/viability over the contract term)? If so, is there a definition of what "abnormally low" means and please can you provide a short summary of the specific rules?

There is no definition of "abnormally low" however, the guidelines for handling bids that may be considered as abnormally low for the capabilities required to perform the tender are outlined in the Standard Tender Documents. All public procuring entities must use these guidelines when preparing their tender documents, as mandated by section 70 (2) of the PPADA.

Section 70 (5) (b) of the PPADA specifies that

disqualification based on quoting above or below a certain percentage of engineer's estimates is not in the Standard Tender Document for Works, Clause 37.2 addresses the identification of potentially abnormally low tenders. If such tenders are identified, the procuring entity is required to seek written clarifications from the tenderer, including detailed price analyses.

Following the evaluation of these analyses, if the procuring entity determines that the tenderer hasn't demonstrated the capability to perform the contract at the offered tender price, the tender should be rejected.

Further in the Standard Tender Document for Small Works, Clause 2 addresses the identification of potentially abnormally low tenders. If such tenders are identified, the procuring entity is required to seek written clarifications from the tenderer, including detailed price analyses.

13. Please describe any rights that unsuccessful bidders have that enable them to receive the reasons for their score and (where applicable in your jurisdiction) the reasons for the score of the winning bidder. Are regulated procuring bodies required to provide these reasons for their award decision before awarding the contract in question?

Unsuccessful bidders have rights to receive feedback on the reasons for their scores and, where applicable, the reasons for the score of the winning bidder. Section 87 (3) of the PPADA requires that when a person submitting the successful tender is notified, the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof.

It is mandatory that unsuccessful bidders are informed of the reasons as to why their bids were. These reasons should be supplied to the unsuccessful bidders prior to the signing of the Contract.

Unsuccessful bidders have the right to challenge (apply for a review of) the procurement process and the award before the Public Procurement Administrative Board. Such an application has to be made within 14 days of notification of the award.

Other than the Review Board, there is an alternative right that unsuccessful bidders may. This is the request for debrief. A debriefing clause is included in standard tender documents issued by the PPRA. An unsuccessful bidder

may make a written request to the procuring entity for a debriefing on specific issues and stipulates the timelines and manner of the debriefings.

The days spent on the debriefing form part of the 14-day window to appeal to the PPARB. The procuring entity cannot reverse its decision after issuance of the award letters even if the debriefing uncovers a material error. The reversal of the award can only be done by the Public Procurement Regulatory Authority or Public Procurement Administrative Review Board.

14. What remedies are available to unsuccessful bidders in your jurisdiction? In what circumstances (if any) might an awarded contract be terminated due to a court's determination that procurement irregularity has occurred?

A request for review, as defined in accordance with section 171(1) of the PPADA, constitutes an application presented to the PPARB by a candidate or tenderer asserting actual or potential loss or damage due to an alleged breach of duty by a procuring entity under the provisions of both the PPADA and PPADR. This administrative review must be pursued within 14 days following the notification of the award or the occurrence of the purported breach at any stage of a procurement process.

The involved parties in a request for review encompass the applicant, the accounting officer of the procuring entity, the tenderer notified as successful, and such other individuals as the PPARB may, at its discretion, designate.

The PPARB, vested with expansive powers as delineated in section 173 of the PPADA, possesses the authority to prescribe remedies, including annulling the decision of the accounting officer, terminating ongoing procurement proceedings, or mandating financial reparations.

In the event that the applicant is dissatisfied with the decision of the PPARB, section 175(3) of the PPADA confers upon the aggrieved party the entitlement to seek judicial review at the High Court within a period of 14 days from the date of the PPARB decision. Failure to initiate such judicial review within the stipulated timeframe renders the PPARB decision final and binding.

Further appellate recourse is provided, allowing an individual dissatisfied with the High Court's decision a window of seven days to appeal to the Court of Appeal pursuant to section 175(4) of the PPADA.

In addition to the aforementioned, individuals may solicit the initiation of an investigation into procurement or disposal proceedings or contracts by the PPRA to ascertain potential breaches of the If the Director General of the PPRA, following investigation, identifies a breach, corrective measures such as termination of procurement proceedings or debarment may be prescribed under sections 38 and 41 of the PPADA.

Should an individual be aggrieved by the directives of the PPRA, recourse is available through filing a request for judicial review to the High Court within 14 days subsequent to the issuance of the orders.

15. Are public procurement law challenges common in your jurisdiction? Is there a perception that bidders that make challenges against public bodies suffer reputational harm / harm to their prospects in future procurement competitions? If so, please provide brief comment. Assuming a full hearing is necessary (but there are no appeals), how much would a typical procurement claim cost: (i) for the defendant and (ii) for the claimant?

Challenges to public procurement decisions are common in Disputes may arise due to alleged breaches of procurement laws or unfair treatment during the bidding process. Aggrieved bidders do not shy from challenging the procurement process or outcome on account of fear of reputational harm or harm of their prospects in future procurement processes.

Regarding the cost of a typical procurement claim assuming a full hearing, costs can vary widely based on factors such as the value of the tender, the complexity of the issue in dispute and the volume of documents. Legal costs for both the defendant (public body) and the claimant (challenging bidder) can be substantial especially because the outcome of the PPARB is appealable to the High Court and so it that of the High Court to the Court of Appeal.

Other than the costs for legal representation, there are administrative costs attendant to the proceedings, Regulation 222 of the regulations provides that, the filing of a judicial review application under section 175(2) of the act shall be accompanied by a refundable security fee valued at 3% of the Applicant's tender sum subject to a maximum of Ten million shillings.

16. Typically, assuming a dispute concerns a complex contract, how long would it take for a procurement dispute to be resolved in your jurisdiction (assuming neither party is willing to settle its case). Please summarise the key stages and typical duration for each stage.

The first step would be a request for review made to the PPARB within 14 days of the notification of The Review Board is mandated to complete its review within 21 days of receiving the request for review.

If any party is aggrieved by the decision of the Board may seek judicial review by the High Court within 14 days from the date of the decisions of the The High Court is also time bound. It has to determine the judicial review application within 45 days of the application being made. Where the High Court fails to determine the judicial review application within the prescribed timeline it shall be devoid of jurisdiction. This was the determination in **Civil Appeal No. E039 of 2021 – Aprim Consultants v. Parliamentary Service Commission & Another.**

Where there is a party aggrieved by the decision of the High Court, they have 7 days within which to appeal to the Court of Which similarly has 45 days to render its judgment. The Court of Appeal has ratified this position regarding its jurisdiction being time-bound in **Civil Appeal (Application) E008 of 2022) – Risk Africa Innovatis Limited v Smartmatic International Holdings B.V.A & 3 others.**

17. What rights/remedies are given to bidders that are based outside your jurisdiction? Are foreign bidders' rights/remedies the same as those afforded to bidders based within your jurisdiction? To what extent are those rights dependent on whether the host state of the bidder is a member of a particular international organisation (i.e. GPA or EU)?

The rights/remedies given to bidders that are based outside Kenya are similar to those accorded to local entities.

Since Kenya has ratified the UNCITRAL law, it is imperative to note that Article 64 and Article 67 of the UNCITRAL Model Law on Public Procurement govern the right to challenge and appeal, as well as the right to apply for review before an independent body. Furthermore, Article 68 outlines the rights of participants in challenge proceedings, encompassing suppliers, contractors,

governmental authorities, and the procuring entity. Any supplier or contractor involved in the relevant procurement proceedings, as well as a concerned governmental authority, is afforded the right to participate in challenge proceedings under Articles 66 and 67 of this Law. Failure of a duly notified supplier or contractor to engage in such proceedings results in a subsequent bar from challenging decisions or actions outlined in the application under Articles 66 and 67. The procuring entity, too, maintains the right to participate in challenge proceedings under Article 67.

Participants proceedings challenging the procurement process enjoy several rights, including being present, represented, and accompanied during hearings, the right to be heard, present evidence, request public hearings, and seek access to the record of the challenge proceedings, all subject to the provisions of Article 69 of this Law.

18. Where an overseas-based bidder has a subsidiary in your territory, what are the applicable rules which determine whether a bid from that bidder would be given guaranteed access to bid for the contract? Would such a subsidiary be afforded the same rights and remedies as a nationally owned company bidding in your jurisdiction?

Regulation 148 of the PPRA outlines provisions for foreign contractors seeking preference and reservation benefits in joint ventures or subcontracting arrangements with Kenyan-registered firms, where Kenyan citizens hold the majority shares. A written agreement is required to evidence such arrangements.

In the case of a citizen contractor engaging in contractual arrangements with a foreign contractor under paragraph (1), a ten percent (10%) margin of preference in the evaluated tender price is applicable. The citizen contractor in this context, as per paragraph (2), must demonstrate technical capability and competence for performance.

Additionally, the joint venture formed under these provisions must nominate a representative with the authority to conduct all business on behalf of all members during the tendering process and, if successful, during contract execution.

Section 50 of the Public Procurement and Asset Disposal Act (PPADA) introduces the concept of consortium buying. This provision allows procuring entities with

shared interests to collaborate for joint procurement, facilitating the realization of economies of scale.

The bidder would have the rights and remedies provided under the PPADA.

19. In your jurisdiction is there a specialist court or tribunal with responsibility for dealing with public procurement issues? In what circumstances will it have jurisdiction over a public procurement claim?

The Public Procurement Administrative Review Board (PPARB) functions as a tribunal designated to address complaints brought forth by aggrieved candidates or tenderers pertaining to specific procurement or asset disposal. This recourse is sought when a candidate or tenderer believes that its rights may have been violated by a public entity during a procurement process. The establishment, functions, powers, and composition of the PPARB are comprehensively outlined in Sections 27 to 32 of the PPADA.

In the event of dissatisfaction with the decision rendered by the PPARB, an alternative avenue is available through the application for judicial review within fourteen days from the Review Board's decision, as stipulated in Section 175 of the PPADA.

It is important to note that while the usual course involves approaching the PPARB first, in exceptional circumstances where immediate recourse is imperative, one has the option to bypass the PPARB and directly approach the High Court.

Contractors facing debarment by the PPRA Board, in accordance with Section 41 of the PPADA, may also seek judicial review at the High Court.

For individuals wishing to challenge aspects of the procurement process beyond the tender award or those perceiving judicial review as too confined in scope (e.g., in cases of highly contested facts or challenges to the merits of the case), alternative legal actions can be initiated before the High Court.

Additionally, the Public Procurement Regulatory Authority (PPRA) is vested with the authority to investigate complaints related to procurement and asset disposal proceedings not within the purview of the PPARB or subject to judicial review, as specified in Section 9(h) of the PPADA.

20. Are post-award contract amendments/variations to publicly procured, regulated contracts subject to regulation in your jurisdiction? Are changes to the identity of the supplier (for example through the disposal of a business unit to a new owner or a sale of assets in an insolvency situation) permitted in your jurisdiction?

Within Kenya, post-award contract amendments or variations to publicly procured contracts are subject to stringent statutory regulation. Section 139 of the PPADA prescribes the parameters that have to be satisfied before a variation can be considered. The main aim of the provisions of section 139 is to discourage variation of publicly procured contracts post-award in a manner that increases the contract price because of the need to control the spending of public funds. In the event that variations are inevitable then the Act is in place to avoid variations being made too soon after the award has been made. To ensure this the Act proscribes any variation affecting the price upwards from being made within the first 12 months from date of signing the contract. Where the variations are made the Act limits the effect on the price to 25%. Any variation resulting in increment of the contract price by more than 25% must be tendered for separately.

21. How common are direct awards for complex contracts (contract awards without any prior publication or competition)? On what grounds might a procuring entity seek to make a direct award? On what grounds might such a decision be challenged?

Direct awards for complex contracts in Kenya are uncommon in the public procurement framework. The preference is typically for open and competitive procurement processes to ensure transparency, fairness, and efficient allocation of public resources. Direct awards, without prior publication or competition, are less common, especially for complex contracts.

Section 108 permits a procuring entity in Kenya to use direct procurement under specific conditions outlined in subsection (2). The key conditions include situations where goods, works, or services are only available from a particular supplier, there is urgency due to unforeseen events, or there is a need for compatibility or standardization. Direct procurement is not allowed to avoid competition. The section emphasizes fair acquisition prices and makes it an offense for a public officer to contravene the outlined conditions.

22. Have your public procurement rules been sufficiently flexible and/or been adapted to respond to other events impacting the global supply chain (e.g. the war in the Ukraine)?

There has been flexibility in the existing procurement rules to cope with international crisis such as the war in Ukraine and COVID-19 where the need arises. There is a proposed Bill of Parliament that seeks to effect significant amendments to the PPADA. This reflects the continuous nature of law reform, indicating an ongoing effort to enhance existing legislation and introduce improved laws. Albeit slow.

Engaging stakeholders within the public and private supply chains has been a development that is likely going to have a positive effect on the amendments being introduced to the refined legal framework.

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