



OFFICE OF THE ATTORNEY GENERAL  
AND DEPARTMENT OF JUSTICE



THE DANISH  
INSTITUTE FOR  
HUMAN RIGHTS



# A REVIEW OF THE LEGAL FRAMEWORK GOVERNING HUMAN RIGHTS AND PUBLIC PROCUREMENT IN KENYA

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# 1. EXECUTIVE SUMMARY AND RECOMMENDATIONS

Embedding human rights protections in public procurement is a practical way that Kenya can realise its human rights obligations and implement the sustainable development goals (See Section 4). Practical measures to support businesses from specific groups and include requirements to encourage all suppliers to respect human rights can foster increased responsible business conduct and ensure that taxpayer's money does not fund human rights abuses in Kenya's value chains.

The public procurement framework is underpinned by the Kenya Constitution and articulated through legislation and regulations (See Annex A), which require and allow for certain human rights measures in public procurement activities (See Section 5). The framework also articulates the role and responsibilities of bodies, including the Public Procurement Regulatory Authority (PPRA) and the National Treasury (See Annex B).

There is considerable focus on supporting enterprises owned by women, youth, persons with disabilities and other disadvantaged groups through preferences and reservations under the Access to Government Procurement Opportunities (AGPO) scheme which is laid out in legislation, notably the Public Procurement and Asset Disposal Act (PPDA), 2015. Procuring entities are required to prepare a procurement plan which should detail the application of preference and reservations schemes for enterprises owned by women, youth, persons with disabilities and other disadvantaged groups. These plans should be submitted to the National Treasury and the part related to the application of preference and reservations schemes should be submitted to the Public Procurement Regulatory Authority (PPRA). Procuring entities are mandated to publish and publicise approved procurement plans as an invitation to treat on their websites. In addition, the National Treasury shall publish and publicise the procurement plans as invitation to treat on the state tender portal. There is no information available online on these plans.

Procuring entities are required to report on how they are implementing preferences and reservations to the PPRA (for central procurement) and the County Executive (for county level procurement), as stated in the PPDA and the 2022 Amendment. The PPRA is required, every six months, to submit a report with disaggregated data, including that of procuring entities, to indicate compliance on this issue to the Parliamentary committee responsible for realization of opportunities for youth, women and PWDs. The PPRA AGPO Report for the Period Jan-June 2021 states that only 184 procuring entities submitted reports on contracts awarded to enterprises owned by youth, women and PWDs, of which, 160 were from National Government and 24 from the County Governments. The Public Procurement Information Portal lists 651 procuring entities, which indicates that less than 30% of procuring entities submitted reports covering the period January-June 2021. From the 184 reports received the PPRA identified that 20.25% of procurements were reserved, which is under the required 30%. The PPRA AGPO Report for the Period Jan-June 2021 further states that, of the 20.25% of reserved procurements, the Women category received the



highest share of contracts (53.38% by number and 50.95% by value), followed by the youth category (39.00% by number and 41.86% by value), while the PWD category received the fewest (7.63% by number and 7.19% by value), with some procuring entities reporting 0 contracts awarded to the PWD category.

The National Treasury is mandated to operationalise a preference and reservations secretariat to be responsible for the implementation of the preferences and reservations. The National Treasury established the AGPO Secretariat, but there is information available online on the operations of this Secretariat.

There are several protections available to address human rights abuses within the state's value chains. Legislation states that all bidders must meet the eligibility criteria, which includes not to be guilty of any serious violation of fair employment laws and practices, all bidders must sign and submit a signed copy of the Code of Ethics as part of their bid documentation, suppliers can be debarred on human rights grounds, and the PPRA right of the PPRA to inspect, assess and review suppliers, including accessing documents and physical locations (see Section 5 for more information).

The PPRA has developed 23 standard tender documents (STDs) which articulate how procurements should operate (See Annex C). The STDs require that suppliers agree to a Code of Ethics to be eligible to tender, which includes certain human rights protections. The STDs also prevent debarred enterprises from bidding for tenders, which can include enterprises which have not complied with Kenyan human rights and labour laws (as of September 2022, the PPRA website lists 6 debarred enterprises, although there is no information on the grounds for debarment). Most of the STDs allow for human rights and sustainability issues to be integrated into tender requirements and evaluation and award criteria, but do not require this. Certain STDs contain further human rights protections (see Section 5), but it is not consistent across all STDs.

There is guidance and training available to public procurement practitioners, but the guidance available does not articulate how to activate the human rights protections that are required or are allowed for in practice (See Annex D). The PPRA's Strategic Plan 2019-2023 commits the PPRA to develop guidelines on sustainable procurement, which could help public procurement practitioners integrate human rights into public procurement further. The Kenya Institute of Supplies Management (KISM) has developed training for public procurement practitioners, including on the STDs, but there is no information online on how their trainings address sustainability and/ or human rights. The Public Procurement and Asset Disposal (Amendment) Act 2022 extends the PPRA functions to require them to develop, promote and support the training and capacity development of persons involved in procurement and asset disposal.

The legal framework grants the PPRA functions to investigate and act on complaints and create a central repository or database. The Code of Ethics provides further details how complaints should be handled. The PPRA has developed a Complaints Framework and a Process on Complaints, Investigations and Enforcement. However, there is no information available online on how this framework operates in practice, and

no information on a complaints central repository or database/ general information on complaints and sanctions. The Code of Ethics also details that the PPRA should publish quarterly a list of persons sanctioned for violations of the Code of Ethics, but there is no information this available online.

The available research on impacts has a specific focus on empowering women and the preference and reservation schemes (see Section 6). More extensive research and stakeholder consultation would be required to assess impact of all available measures to protect human rights (as detailed in Section 5).

## RECOMMENDATIONS:

1. The National Treasury and procuring entities should continue to advance measures to publish procurement plans as invitations to treat on their websites in an accessible form and in a timely manner in line with Section 13 of the Public Procurement and Asset Disposal Amendment Act 2022;
2. The National Treasury and Public Procurement Regulatory Authority (PPRA) should consider engaging with procuring entities to identify what barriers exist on developing and publishing plans and submitting reports, including how plans address the application of preference and reservations schemes, and build capacity of procuring entities to address identified barriers;
3. The PPRA should publish an annual overview of how procurement plans address the application of preference and reservations schemes for enterprises owned by women, youth, persons with disabilities and other disadvantaged groups. Such an overview could include which sectors the reserved procurements are in, the number and sizes of reserved procurements, and how the plans intend to operationalise reservations. The National Treasury should consider how to support the PPRA to this end;
4. The National Treasury should prioritise conducting an impact assessment on the implementation of the AGPO programme and its effectiveness in realising the rights of the groups it is directed towards (women, persons with disabilities, and youth). Consideration should be given to including recommendations to strengthen the AGPO programme. The assessment should be published and publicised upon finalisation, including through the AGPO online portal. The PPRA should support to this end;
5. The National Treasury should continue with measures to establish and operationalise the AGPO Secretariat, and publish and publicise information on the structure and planned activities of the AGPO Secretariat, including through the AGPO online portal;
6. The PPRA and the National Treasury should develop practical guidance for public procurement practitioners on human rights and public procurement (either stand-alone or under broader sustainability guidance). The PPRA and the National Treasury should review existing public procurement manuals to ensure they adequately incorporate human rights and sustainability (for example, the Public



Procurement and Disposal General Manual Debarment Manual, Compliance Monitoring Manual, Complaints and Investigations Manual);

7. The PPRA, National Treasury, and Kenya Institute for Suppliers Management (KISM) should consider building capacity and training on sustainability and human rights in public procurement for public procurement practitioners;
8. The PPRA should review standard tender documents to ensure consistency on measures to address risks of negative impacts on sustainability, human rights, and the environment and support practitioners implement them in practice and entrenching access to information;
9. The National Treasury, PPRA, procuring entities, and the AGPO Secretariat should consider developing guidance for, and enhancing the capacity of, suppliers on how to conduct human rights due diligence and demonstrate this in their tenders;
10. The PPRA should prioritise the roll out of a complaints management system, publish and publicise information on its public procurement information portal on how the Complaints Framework and a Process on Complaints, Investigations and Enforcement operates, a quarterly a list of entities sanctioned for violations of the Code of Ethics, and continue to regularly update the list of debarred entities and include information on the grounds of their debarment, and publish and publicise information.

## 2. BACKGROUND

This is a review of the legal framework governing human rights and public procurement in Kenya. It has been prepared in the context of the implementation of the National Action Plan on Business and Human Rights (NAP), which contains a policy action stating that the Government will:

“ strengthen leverage in using public procurement to promote human rights. This will involve the review of existing public procurement policies, laws and standards and their impacts with due regard to the state’s human rights obligations including the participation of women, persons with disability and other vulnerable groups<sup>1</sup>

The review identifies laws, regulations, standard tender documents, and guidance relevant to public procurement, human rights (with a focus on gender equality), and responsible business conduct in Kenya. Further research and stakeholder consultation would be required to review the full impact of these on the human rights of Kenyans and those working in the supply chains.

Public procurement is the process by which public authorities source goods, services and works from the private sector. Public procurement is a substantial component of the overall economy and gives states a significant opportunity to influence global value chains. In Kenya, the public sector is the largest buyer accounting for an estimated 26% of the gross domestic product.<sup>2</sup> In real terms, Kenyan public authorities purchase goods and service worth 33 billion Kenyan shilling (\$26.5 billion USD) from businesses every year.

In recent years, public procurement has increasingly been recognised as a means for states to fulfil their human rights obligations and to realise sustainable development. Including requirements within public procurements that suppliers respect human rights can help prevent human rights abuses from occurring within value chains. Public buying is a mechanism through which states can encourage and influence sustainable business practice by the private sector.<sup>3</sup>

In addition to preventing human rights abuses from occurring within value chains, public procurement systems and exercises can also promote the rights of vulnerable and at-risks groups by favouring them, or businesses which support them, in public procurement exercises. Hence public procurement that integrates the goal of promoting equitable distribution of contracting opportunities has the potential to

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1 [Republic of Kenya, National Action Plan on Business and Human Rights, 2020-2025](#), page 18

2 [World Bank, Blog, How large is public procurement? February 5 2020](#)

3 See the [UN Guiding Principles on Business and Human Rights](#), also see [Danish Institute for Human Rights, Driving change through public procurement, A Toolkit on human rights for policy makers and public buyers](#)



foster economic and social inclusion, accelerate local businesses, including small and medium enterprises (SMEs), as well as create employment. Equally, inefficient public procurement can be a risk to the procuring entity, environment, end-user individuals or groups and could also result in loss of public resources (and tax-payers' money) through corruption, substandard performance that does not yield value for money in terms of quality and cost works and services.

In Kenya, certain laws and regulations have been introduced to utilise public procurement to protect human rights, including measures on preferential contracts, protection and advancement of special groups, and sanctions against contractors based on labour, anti-corruption and related practices. These are highlighted in the chapters below.

## 3. HUMAN RIGHTS FRAMEWORKS

To understand how to use public procurement to promote human rights it is necessary to understand how pre-existing human rights and public procurement frameworks fit together and interact. Section 4 explores human rights frameworks relevant to public procurement and Section 5 explores the public procurement relevant to human rights.

- 3.1 HUMAN RIGHTS LEGAL FRAMEWORK
- 3.2 SUSTAINABLE DEVELOPMENT AGENDA
- 3.3 RESPONSIBLE BUSINESS CONDUCT FRAMEWORK

### 3.1 HUMAN RIGHTS LEGAL FRAMEWORK

States have a legal obligation to protect human rights when they purchase goods, which includes the human rights of individuals in the value chains of businesses supplying goods and services to the state, who are in its territory/ jurisdiction, as articulated in the UN Guiding Principles on Business and Human Rights.<sup>4</sup> In addition, the state should support suppliers in meeting the business responsibility to respect human rights. Introducing requirements within public procurement that suppliers respect human rights is increasingly being recognised as a means of meeting these obligations.<sup>5</sup>

The Constitution of Kenya 2010 under the bill of rights obliges the state to promote, protect, and fulfil the rights of every person. Furthermore, Articles 2(5) and (6) of the Constitution provide that the general rules of international law, and any treaty or convention ratified by Kenya form part of the laws of Kenya. Therefore, regional, and international treaties and agreements that Kenya has signed are a part of the domestic legal framework, including those related to human rights.

A distinctive feature of the Constitution of Kenya is found in Article 20 whereby all persons, not just the state and state entities are bound to observe human rights. Within the meaning of the Constitution, persons include a “company, association or other body of persons whether incorporated or unincorporated” (Article 260). The courts have interpreted this as imposing direct human rights obligations on businesses, which has

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4 See Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, Annex, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) (by John Ruggie) [hereinafter [UN Guiding Principles](#)], Commentary to Guiding Principle 6, and in Commentary to Guiding Principle 2 in relation to extraterritorial jurisdiction.

5 See [G-7 Leaders' Declaration, Schloss Elmau, Germany \(June 8, 2015\)](#); [OECD, OECD Guidelines for Multinational Enterprises \(2011\)](#); [OECD, Responsible business conduct in government procurement practices, June 2017](#); [OECD, Ministerial Communiqué on Responsible Business Conduct, \(June 26, 2014\)](#); [OECD, Public Procurement For Sustainable And Inclusive Growth: Enabling Reform Through Evidence And Peer Reviews \(2012\)](#); [ILO, Agenda of the 105th Session of the International Labour Conference, \(April 22, 2016\)](#).



potentially given victims of business-related human rights abuses an extensive range of options for remedy while also requiring that businesses (including suppliers to the state) support the state's commitments regarding human rights.<sup>6</sup>

Drawing from Kenya's Bill of rights are numerous laws, policies and regulations that seek to guide the implementation of all rights including through the creation of institutions that give oversight to the process and those that adjudicate in the event of potential or actual breach. Some of the provisions the Constitution of Kenya that aim at the realisation of human rights obligations include those that relate to arrest and fair trial, fair administrative action, representation and voting, access to education, health, protection of the environment, non-discrimination and affirmative action for individuals and groups, access to information, consumer protection, and fair labour standards, among others. Moreover, other notable rights such as rights relating to the promotion of gender equality are articulated in the Constitution and other laws.

### **3.1.1. Equality and non-discrimination**

This section outlines how both international human rights law and the Constitution of Kenya articulate the right to equality and non-discrimination. This section also outlines select ongoing policy initiatives and means of implementation.

Achieving equality and non-discrimination requires a state to take actions to reduce or eliminate conditions that cause or help perpetuate discrimination. Public procurement presents an opportunity to promote equality and non-discrimination because governments engage at all levels of procurement processes and are therefore uniquely placed to guarantee equality and non-discrimination on women, youth and people with disabilities through contracting for goods and services.<sup>7</sup>

The right to equality and non-discrimination is articulated in Article 2 of the Universal Declaration of Human Rights and a range of human rights conventions that Kenya has ratified, including International Covenant on Civil and Political Rights, Article 26, International Covenant of Economic, Social and Cultural Rights, Article 2(2). In addition, Kenya has ratified the International Convention on Elimination of all forms of Racial Discrimination, the Convention on Elimination of all Forms of Discrimination against Women, and the Convention on the Rights of Persons with Disabilities, which articulate the obligations of the state to address discrimination on the ground of race, gender, and disability. The ILO core conventions cover various aspects of equality and non-discrimination in the context of work including decent work conditions, reduction of inequality, quality education and gender equality.

The UN Guiding Principles on Business and Human Rights acknowledge that businesses have responsibilities in ensuring respect for human rights. The UN Global Compact and UN Women have established the Women's Empowerment Principles (WEPs) that offer guidance to the corporates to promote gender equality and women's empowerment in the workplace, marketplace and community through

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<sup>6</sup> See [Amy Kagendo Mate v Prime Bank Limited Credit Reference Bureau & another](#) [2013] eKLR, para 23  
<sup>7</sup> [Open Contracting Partnership Research Report, Towards Gender Balance in Public Procurement: Understanding the Barriers and Solutions to include women-led Businesses](#)

seven principles.<sup>8</sup> Currently 51 Kenyan Corporates have signed up to implement the principles.<sup>9</sup>

In Kenya, the principles of equality and non-discrimination are established as national values and principles of governance under Article 10 of the Constitution and articulated further in other subsidiary legislations, policies and regulations. National Values and Principles are core in not just the implementation of the Constitution but in all matters of governance in the public and private spheres in life.

Article 10: National values and principles of governance

1. The national values and principles of governance in the Article bind all State Organs, State officers, public officers, and all persons whenever any of them
  - (a) applies or interprets this Constitution;
  - (b) enacts, applies, or interprets any law; or
  - (c) makes or implements public policy decisions.

Article 27: Equality and freedom from discrimination

1. Every person is equal before the law and has the right to equal protection and equal benefit of the law
2. Equality includes the full and equal enjoyment of all rights and fundamental freedoms.
3. Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.
4. The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language, or birth
5. A person shall not discriminate directly or indirectly against another person of any of the grounds specified or contemplated in clause (4).
6. To give full effect to the realization of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination. [emphasis added]
7. Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.
8. In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.

An important element in achieving equality lies in achieving gender equality and addressing discrimination based on gender (including discrimination against women).

Efforts to implement Article 27(6 & 8) has increased the space for more women in the public and political platforms through the preserved elective legislative seats in the National Assembly and the two-thirds gender rule which is yet to be fully realised.

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8 [Women's Empowerment Principles, About page](#)

9 [Women's Empowerment Principles, Signatories](#)



Other additional gains for women from the 2010 Constitution, relevant in this context, include equality in leadership with 33% as the minimum requirement of either gender; equality in employment; prohibition of all discriminatory customary; requirement for both public and private entities to comply with the inclusion principles and gender among others.

Other measures that target the promotion of women's economic empowerment and other vulnerable groups in this context is the introduction of empowerment funds that are aimed at enabling women, youth and persons with disability to access finances to promote enterprises at the grassroots level and enhance their livelihoods and economic growth. These funds include:

Women Enterprise Fund (WEF) that targets women; The Youth Enterprise Development Fund (YEDF) for young women and men; The Uwezo Fund (Kiswahili word for Ability) the fund provides seed money for special interest groups; The National Government Affirmative Action Fund to redress past disadvantages among certain groups such as youth, women, elderly, needy children, persons with disabilities among others. The fund is administrated by the 47 specially elected women representatives. There is also a policy requiring all public entities to preserve 30% of all their procurement budget for enterprises owned by youth, women, PWDs and other special groups.

For purposes of coordination, implementation and compliance with the programmes, policies and legislations promoting gender equality and freedoms, there are institutions established by government for the purpose. First, there is the State Department for Gender under the Ministry of public service, Gender, Social Protection, Senior Citizens Affairs & Special Programmes whose mandate is to institutionalise gender mainstreaming in ministries, departments and agencies as well as in the devolved county level and private sector; promote the development and review of gender policies and legislations; promote research, collection and analysis, storage and dissemination of sex disaggregated data to inform programming; coordinate programmes for reduction of SGBV; oversee the implementation of socio-economic empowerment for the benefit of women and youth; and set standards to build the capacity of National and County level actors, monitor compliance and report on progress. Secondly, there is the Kenya National Human Rights and Equality Commission, which has a mandate laid out in Article 59 of the Constitution to, inter alia, promote gender equality and equity generally and to coordinate and facilitate gender mainstreaming in national development and to promote the protection, and observance of human rights in public and private institutions. Thirdly, there is the National Gender and Equality Commission with a mandate laid out in Section 8 of the National Gender and Equality Act 2011 to promote gender equality and freedom from all forms of discrimination in Kenya especially for special interest groups through ensuring compliance with policies, laws and practice.

Public Procurement provides a strong means of addressing non-discrimination and equality in Kenya, as articulated in the PPDA (see Annex A for more information). This can be seen in standard tender documents (see Annex C – Standard Tender Documents) and preferences and reservations schemes (see the Access to

Government Procurement Opportunities (AGPO) programme detailed in Section 4.2 below). It can also be seen in the range of protections to address human rights abuses within value chains and remedy mechanisms which are explored in detail in Section 5 on Public Procurement and Human Rights.

### 3.2 SUSTAINABLE DEVELOPMENT AGENDA

In 2015, the UN General Assembly unanimously adopted the 2030 Agenda for Sustainable Development (the 2030 Agenda) as “a plan of action for people, planet and prosperity”. The potential of public procurement as a driver for human rights is highlighted in SDG 12. Target 12.7 calls on all states to “[p]romote public procurement practices that are sustainable, in accordance with national policies and priorities”. This provides an opportunity for states not only to procure from suppliers which deliver the cheapest product quickest but also to prioritise procurement from suppliers which respect the three dimensions of sustainable public procurement; economic, social and environmental.

Implementing sustainable public procurement and Target 12.7 is also a means of realizing other SDGs, as procurements can be designed to favour suppliers which have taken steps to promote equality for women (in line with SDG 5 on gender equality), persons with disability and other vulnerable groups within their operations or within their sub-suppliers operations, for example, and/ or favour suppliers owned, controlled, or with a large number of workers/ management from vulnerable groups.



To better implement the SDGs, Kenya has a long-term development blueprint Vision 2030 usually implemented through five-year Medium-Term Plans (MTPs). The country is currently finalising the preparation of its fourth MTP 2022-2026 (which was originally scheduled to commence in December 2022) and preparing a report on the gains and achievements of the third MTP 2018-2022.<sup>10</sup>

The third MTP 2018-22 identifies gender equality, empowerment of women, youth, and persons living with disability and other vulnerable groups as well as full realisation of human rights as a priority. The third MTP sought to increase the Women Enterprise Fund loan disbursement from a cumulative Ksh.10.4 billion to Ksh.25.7 billion targeting 2,157,653 beneficiaries by 2022. In addition, the number of women trained on entrepreneurship skills will be increased from 956,493 to 1,632,806. The third MTP projects to increase the number of Access to Government Procurement Opportunities

<sup>10</sup> [Republic of Kenya, State Department for Planning \(2018\) Third Medium Term Plan 2018 – 2022 for Vision 2030](#)

(AGPO) registered enterprises to 210,000 to ensure full access to 30 per cent of government procurement opportunities. The third MTP identifies implementation of the Procurement Guarantee for PWDs under the AGPO programme and sensitise a total of 170,000 youth on AGPO and entrepreneurship skills to increase uptake of procurement opportunities to youth and support enterprises. UN Women<sup>11</sup> observe that Kenya has seen a gradual increase in proportion of its public procurement spend going to women-owned businesses and other disadvantaged groups. More specifically, tenders reserved and awarded to women under the AGPO programme increased from Ksh 7.4 billion in 2015/16 to Ksh 15.5 billion in 2018/19 (see Section 6 on impacts). However, the PPRA only receives a limited number of reports on reservations from procuring entities (see Section 5.1 on Preferences and Reservations). Implementation of the third MTP comes to end by June 2022 and Kenya is currently developing a fourth MTP 2023-27. The Cabinet Secretary stated on 2 February 2022 that this fourth MTP will incorporate strategic programmes and projects aimed at addressing climate change, gender equality and plight of the vulnerable groups in the society.<sup>12</sup>

The latest SDGs Progress Report<sup>13</sup> for Kenya that was published in 2019 makes no direct reference to SDG target 12.7. The only policy action by the Government of Kenya that relate to SDG 12.7 is the Procurement Preferences and Reservation directive of the public procurement and Asset Disposal Act, 2015 that makes it mandatory for public entities to reserve not less than 30% of their procurement budget to the disadvantaged groups. In addition, the SDGs Kenya Forum<sup>14</sup> - which is a platform of the Civil Society, private sector organizations and international NGOs with operations in Kenya and membership platform on the SDGs – does not feature SDGs target 12.7 in their periodic voluntary progress review of the SDGs implementation.

### **3.3 RESPONSIBLE BUSINESS CONDUCT FRAMEWORK**

The responsible business conduct framework articulates how businesses which supply the state with goods and services should operate. Article 20 of the Kenyan Constitution provides the normative framework for business obligations vis a vis human rights. However, statutes that govern the creation and ongoing operations of business enterprises such as the Companies Act, 2015, Micro and Small Enterprises Act, 2012, Investment Promotion Act, Revised 2009, and the Capital Markets Act – Amended 2019 have little or no implications for human rights. Nonetheless the country's labour and environmental protection laws which recognise the impact of business on human rights for individuals and communities, places mandatory obligations on businesses to act responsibly.

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11 [UN Women and Open Contracting Partnership. Empowering Women Through Public Procurement and Enabling Inclusive Growth. Published in 2021.](#)

12 [Statement By Cabinet Secretary, The National Treasury And Planning Hon. \(Amb.\) Ukur Yatani During Launch Of Fourth Medium Term Plan 2023-2027 Preparatory Process At Kenyatta International Convention Centre On 2nd February, 2022](#)

13 [The National Treasury and Planning, Department for Planning Projects and Programmes Department; SDGs Progress Report, 2019.](#)

14 [The SDGs Kenya Forum is an inclusive membership platform on the 2030 agenda for Sustainable Development Goals \(SDGs\) that provides space for structured and coordinated Civil Society Organizations \(CSOs\) engagement with \(national and subnational\) governments, citizens, the private sector, media, academia and development partners.](#)

In 2021 Kenya promulgated a national action plan on business and human rights (NAP)<sup>15</sup> detailing steps that the country will take to implement the United Nations Guiding Principles on Business and Human Rights that were adopted in 2011 by the UN Human Rights Council. The objectives of the NAP are:

1. To guide the State in fulfilling its duty to protect individuals and communities from business-related human rights abuses consistent with its domestic and international obligations.
2. To guide businesses on the measures they should undertake to meet their responsibility to respect human rights in their operations.
3. To promote human rights due diligence by businesses as a concrete measure of preventing adverse impacts on people.
4. To offer a roadmap of strengthening access to State-based judicial and non-judicial remedies for victims of business-related harm.

The above objectives will be achieved by undertaking the following NAP policy actions:

1. Enhance existing policy, legal, regulatory, and administrative framework for ensuring respect of human rights by business through legal review and development of specific guidance for business
2. Enhance understanding of the obligation of business to respect human rights
3. Enhance access to justice for victims of business-related human rights abuses
4. Establish a NAP implementation and monitoring mechanism that will also act as a platform for dialogue on business and human rights issues in the country

Included in the NAP Policy Action of enhancing the legal and regulatory framework is the commitment by the State to “strengthen leverage in using public procurement to promote human rights”.<sup>16</sup> Specific activities envisaged in this regard involve an analysis of existing public procurement policies, laws and standards and their impacts with due regard to the state’s human rights obligations including women’s rights.”<sup>17</sup>

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<sup>15</sup> [Kenya National Action Plan on Business and Human Rights 2020-2025](#)

<sup>16</sup> [Ibid.](#), Page 18

<sup>17</sup> [Ibid.](#), Page 18



## 4. PUBLIC PROCUREMENT AND HUMAN RIGHTS

Article 227 of the Kenyan Constitution mandates that a framework shall be developed which may provide for:

- Categories of preference in the allocation of contracts;
- The protection or advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination; and
- Sanctions against contractors that have not performed according to professionally regulated procedures, contractual agreements or legislation.

This section contains a summary of public procurement and human rights framework in Kenya. More detailed information can be found in Annexes A-D. This section is structured as follows:

- 4.1 PREFERENCES AND RESERVATIONS
- 4.2 PROTECTIONS TO ADDRESS HUMAN RIGHTS ABUSES WITHIN VALUE CHAINS
- 4.3 REMEDY
- 4.4 GUIDANCE AND TRAINING

### 4.1 PREFERENCES AND RESERVATIONS

The Kenyan legal framework, through the Public Procurement and Asset Disposal Act (PPDA) 2015, states that all procurement and asset disposal planning shall reserve a minimum of thirty per cent of the budgetary allocations for enterprises owned by women, youth, persons with disabilities and other disadvantaged groups.

The Access to Government Procurement Opportunities (AGPO) programme allows enterprises owned by women, the youth and persons with disabilities to register and access the 30% of Government procurement opportunities that are mandated in law as reserved for these categories. Registration requires at least 70% membership of youth, women or persons with disabilities and leadership of 100% youth, women and persons with disability, respectively. However, it is unclear from information available online how this registration requirement is verified. UN Women have noted that tenders reserved and awarded to women under AGPO increased from Ksh7.4 billion in 2015/16 to Ksh15.5 billion in 2018/19. However, there is no information publicly available online on how favouring suppliers representing certain groups of society can impact on the rights of individuals within these groups (see Section 6 on Impacts).

The PPDA requires that procuring entities prepare a procurement plan, which should detail the application of preference and reservations schemes for enterprises owned by women, youth, persons with disabilities and other disadvantaged groups as part of the annual budget preparation process (Section 54). These plans should be submitted to the National Treasury and the part related to the application of preference and reservations schemes should be submitted to the Public Procurement Regulatory

Authority (PPRA) (Sections 44 and 158). The Public Procurement and Asset Disposal (Amendment) Act, 2022, states that procuring entities should publish and publicise approved procurement plans as an invitation to treat on their websites. In addition, the National Treasury shall publish and publicise the procurement plans as invitation to treat on the state tender portal (Section 13). There is no information available online on these plans.

The PPDA requires that procuring entities prepare a report with disaggregated data on procurements awards where preferences and reservations were applied for the PPRA every six months which provides disaggregated data on the number of youth, women and persons with a disability whose services have been procured (Sections 158). Similarly, counties are required to submit quarterly progress reports on the implementation of their annual procurement plans to the County Executive committee member for finance (Regulation 40 of the PPDA Regulations).

The PPRA is granted functions under the PPDA to monitor and evaluate the implementation of the preference and reservations schemes (Section 9) and is required, every six months, to submit a report with disaggregated data, including that of procuring entities, to indicate compliance on this issue to the Parliamentary committee responsible for realization of opportunities for youth, women and PWDs (Section 157). The PPRA published a circular in 2021 highlighting the obligations of procurement entities to report and providing templates for reporting. The PPRA AGPO Report for the Period Jan-June 2021 (the latest available report as of May 2022) states that "During the reporting period, only 184 procuring entities submitted reports on contracts awarded to enterprises owned by youth, women and PWDs; of which, 160 were from National Government and 24 from the County Governments." The Public Procurement Information Portal lists 651 procuring entities, which indicates that less than 30% of procuring entities submitted reports. From the 184 reports received the PPRA identified that 20.25% of procurements were reserved, which is under the required 30%. The PPRA AGPO Report for the Period Jan-June 2021 further states that the Women category received the highest share of contracts (53.38% by number and 50.95% by value) followed by youth category (39.00% by number and 41.86% by value) while the PWD category received the fewest (7.63% by number and 7.19% by value), with some procuring entities reporting 0 contracts awarded to the PWD category.

The PPDA mandates that the Cabinet Secretary shall, in consideration of economic and social development factors, prescribe preferences and or reservations in public procurement and asset disposal (Section 157). The PPDA further states that preferences and reservations shall— (a) be non-discriminatory in respect of the targeted groups; (b) allow competition amongst the eligible persons; and (c) be monitored and evaluated by the Authority (Section 157). The PPDA further states that for the purpose of protecting and ensuring the advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination, reservations, preferences and shall apply to— (a) candidates such as disadvantaged groups; (b) micro, small and medium enterprises; (c) works, services and goods, or any combination thereof; (d) identified regions; and (e) such other categories as may be prescribed (Section 157). Consequently, preferences and reservations could be proscribed to include a category for suppliers which respect human rights.

The PPDA mandates that the National Treasury operationalise a preference and reservations secretariat to be responsible for the implementation of the preferences and reservations (Section 157). The Secretariat shall be responsible for —

- (a) registration, prequalification and certification of the persons, categories of persons or groups;
- (b) training and capacity building of the above target groups;
- (c) providing technical and advisory assistance to procuring entities in the implementation of the preferences and reservations; and
- (d) monitoring and evaluating the implementation of the preferences and reservations under this Act.

The PPDA further mandates that the National Treasury to provide adequate staff and resources for the operations of the secretariat (Section 157). The National Treasury established the AGPO Secretariat, but there is information available online on the operations of this Secretariat.

In April 2021 the PPRA published 23 Standard Tender Documents (STDs), which were updated in April 2022 and are available on the PPRA website.<sup>18</sup> 18 of the STDs allow for reservations of tenders for specific groups. 2 STDs do not allow for reservations and 3 STDs make no reference to this subject. Of the 18 STDs which make provisions for reservations, 9 STDs state that “No tender shall be reserved to more than one group”. See Annex C on how these STDs address human rights generally.

#### **4.2 PROTECTIONS TO ADDRESS HUMAN RIGHTS ABUSES WITHIN VALUE CHAINS**

Kenya has a number of legislative measures in place to protect against human rights abuses in its value chains, including:

- All bidders must meet the eligibility criteria, which includes not to be guilty of any serious violation of fair employment laws and practices (PPDA, Section 55);
- Debarment of suppliers, which can be done on human rights grounds (PPDA, Section 41);
- The right of the PPRA to inspect, assess and review suppliers, including accessing documents and physical locations (PPDA, Section 43).

As of September 2022, the PPRA website lists 6 debarred enterprises in Kenya, although there is no information on the grounds for debarment.

The Code of Ethics for Persons Participating in Public Procurement and Asset Disposal Activities in Kenya contains several human rights elements. All bidders must sign and submit a signed copy of the Code of Ethics as part of their bid documentation (Section 8). It requires that suppliers:

- Comply with the Constitution, the Act and its attendant regulations, this Code of Ethics, rules and practices relating to ethics and integrity, and other laws related to

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<sup>18</sup> [Public Procurement Regulatory Authority, Standard Tender Documents](#)

taxation, labour, health and safety standards as well as environmental protection (Section 3).

- Cooperate and assist in conducting of due diligence, where a procuring entity conducts on-site evaluations and inspections of the person's facilities or project site, including those of their subcontractors and Joint Venture partners to review their compliance to this Code during execution of the Contract (Section 15).

The Kenya legal framework does not explicitly mandate that human rights considerations are included in public procurement. However, the legal framework does not prevent human rights considerations being included across the procurement cycle. Indeed, the inclusion of human rights considerations are a means to realise the Guiding Principles of public procurement outlined in the Public Procurement and Asset Disposal Act, 2015, including “national values and principles”, “equality and freedom from discrimination”, and “promotion of local industry, sustainable development and protection of the environment” (Section 3).<sup>19</sup> The inclusion of human rights considerations are also a means of fully implementing the risk management approach articulated in section 9.6 of the Public Procurement and Disposal General Manual, First Edition, March 2009.

In April 2021 the PPRA published 23 standard tender documents (STDs), which were updated in April 2022 and are available on the PPRA website.<sup>20</sup> Procuring entities are mandated to use these STDs although they can be “customized to the needs of the Procuring Entity”.<sup>21</sup> These STDs vary in scope and format, with some covering broad areas and others specific to certain sectors (e.g. health sector goods), with other STDs related to framework agreements, pre-qualification, and evaluation reports. As such, the content in these STDs related to human rights and sustainability varies considerably:

- 22 of the STDs state that debarred individuals and businesses should be prevented from bidding for tenders. The majority require that a tenderer submits a self-declaration form to declare they are not debarred.
- 19 of the STDs require that suppliers abide by the Code of Ethics, with the majority requiring suppliers to sign a specific form to this effect.
- 18 of the STDs explicitly allow for tender requirements based on sustainability (which includes human rights) to be included (Document 12: Standard Tender Document for Procurement of Design and Build (Turnkey) Contracts contains a section on preparing the 'Procuring Entity's Requirements' goes into detail on this subject).
- Of the 19 STDs that reference award criteria, 15 are based on the award criteria of lowest/ best evaluated tender. When assessing the lowest/ best evaluated tender, 11 STDs specify that “the criteria to determine the Lowest Evaluated Tender that would be considered for contract award; that is the tenderer that meets the

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<sup>19</sup> Also see Article 10 of the Constitution on National Values and Principles of Governance

<sup>20</sup> [Public Procurement Regulatory Authority, Standard Tender Documents](#)

<sup>21</sup> The Instructions to Tenderers and the General Conditions of Contract can only be modified via requirements in the Tender Data Sheets and in Special Conditions of Contract.



qualification criteria and whose tender has been determined to be: a) Substantially responsive to the bidding document, and b) The lowest evaluated cost. As such, should sustainability or human rights requirements be included within the tender documents, then these can form grounds for evaluation. 4 STDs explicitly provide for special additional criteria to be considered in the evaluation, including sustainability.

- 18 STDs contain general conditions of contract (GCC). 5 STDs contain clauses human rights clauses in their GCC, including for example, Labor Laws, Prohibition of Forced or Compulsory Labor, Prohibition of Harmful Child Labor Workers' Organizations, and Non-Discrimination and Equal Opportunity.
- All of the 18 STDs which contain a GCC include clauses that allow the procuring entity and/ or representatives to conduct on-site inspections and/ or audits of suppliers and sub-contactors.
- None of the 18 STDs which contain a GCC explicitly list human rights abuses as a ground for suspension or termination of a contract. However, clauses for suspension and/ or termination for breach of contract are broadly constructed and should allow for termination where local human rights laws have been broken. Furthermore, the GCCs contain clauses allowing the procuring entity to termination for convenience.
- 3 STDs include a clauses on progress reports which requires suppliers to include information with their report on safety statistics. Only STD requires the supplier notify in relation to certain human rights abuses.

The STDs provide instructions and templates to use. They do not provide guidance, for example on which tenders should include sustainability requirements, or information on what such sustainability requirements should cover.

### **4.3 REMEDY**

There are a number of provisions in the legal framework to allow for complaints of human rights abuses in Kenyan supply chains. The PPDA, grants the PPRA functions to:

- Investigate and act on complaints received on procurement and asset disposal proceedings from procuring entities, tenderers, contractors or the general public that are not subject of administrative review (Section 9).
- Create a central repository or database that includes: complaints made on procuring entities, records of those prohibited from participating in tenders or those debarred, market prices of goods, services and works, benchmarked prices, State organs and public entities that are non-compliant with procurement laws, statistics related to public procurement and asset disposal, price comparisons for goods, services and works and any information related to procurement that may be necessary for the public (Section 9).

In addition, the Code of Ethics provides that:

- Any person may report a violation of 'this Code to the Authority or other law enforcement agencies and the complainant may in addition report the breach to the relevant professional body (Section 26).

- Upon receipt of the report, the Authority shall register, carry out investigations into the complaint, and take appropriate action including referring the matter to the relevant authorities (Section 26).
- The PPRA shall— (a) exercise oversight in the enforcement of this Code, including taking remedial measures in case of breach of the Code; (b) on its own motion or upon receipt of complaint, inquire into the allegation of the violation of the Code of Ethics and take appropriate action including instituting debarment proceedings as provided under the Act and Regulations; (c) establish a complaints management system for reporting and receiving of complaints on alleged violations of the Constitution, relevant laws, Regulations and the Code of Ethics (Section 23).

The PPRA should publish quarterly a list of persons sanctioned for violations of the Code of Ethics (Section 28). The PPRA has developed a Complaints Framework and a Process on Complaints, Investigations and Enforcement. However, there is no information available online on how this framework operates in practice, and no information on a complaints central repository or database/ general information on complaints and sanctions (e.g. number, nature, resolutions). There is also no information online on the quarterly list of persons sanctioned for violations of the Code of Ethics.

#### **4.4 GUIDANCE AND TRAINING**

Guidance and training are available for staff working on public procurement.

The Public Procurement and Disposal General Manual, First Edition, March 2009, prohibits discrimination except in the case of preference programmes, stating that “Any form of discrimination discourages participation in public procurement and undermines any efforts to achieve value for money through open competition.” The manual notes that the “PPOA [now the PPRA] may issue guidelines for the application of the preference schemes by Procuring Entities in the evaluation of bids in accordance with the Procurement Act and Regulations.”

The Public Procurement and Disposal General Manual states that “Bidders as well as contractors shall at all times abide by their obligations under the Public Procurement and Disposal Act 2005 and the Public Procurement and Disposal Regulations 2006, this Manual, procurement contracts, and other instruments applicable to their conduct and activities related to procurement [emphasis added].” This could include responsible business conduct instruments detailed in Section 4.3.

The manual provides detail on how public procurement can be used “to promote sound principles of environmental protection in public procurement in Kenya.” The manual states that “[e]nvironmental protection can be enhanced by incorporating environmental protection factors in the evaluation process and liaising with the relevant environmental regulatory bodies. Examples of environmental protection factors that may be considered in the tender design and evaluation of bids, provided these factors are directly indicated in the bidding documentation, may include but not be limited to:

- i. Carbon foot print;
- ii. Level of forest degradation;

- iii. Emission or spillage of toxic chemicals;
- iv. The level of non bio-degradable waste;
- v. Threat to levels of biodiversity; and
- vi. Levels or radioactive materials.

Particularly in the specifications, these designs should be considered.” There is no equivalent section in the manual relating to human rights or the social element of sustainable public procurement.

The Public Procurement and Asset Disposal (Amendment) Act, 2022, adds an addition paragraph to the PPRA functions to develop, promote and support the training and capacity development of persons involved in procurement and asset disposal (Section 3). The PPRA’s Strategic Plan 2019-2023 commits the PPRA to collaborate with stakeholders in the development of guidelines on sustainable procurement, disseminate guidelines and sensitise stakeholders on sustainable procurement. Information on the development of sustainable procurement guidance is not available online.

The Kenya Institute of Supplies Management (KISM) is a national body for professionals in the practice of procurement and supply chain management in Kenya. KISM provides practical training on the standard tender documents (see Annex C below) to staff involved in procurement activities in public sector organizations. This training is also open to the private sector, NGOs, and SACCO staff.<sup>22</sup> KISM hosts classes for the Chartered Institute of Procurement & Supply program, which contains content on sustainable public procurement. KISM provides practical training on the standard tender documents (see Annex C below) to staff involved in procurement activities in public sector organizations. This training is also open to the private sector, NGOs, and SACCO staff.<sup>23</sup>

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<sup>22</sup> [Kenya Institute of Suppliers Management, CPD Programs: Upcoming](#)

<sup>23</sup> [Ibid](#)

## 5. IMPACT OF CURRENT MEASURES

There is limited information available on the impacts of the existing measures to integrate human rights into public procurement in Kenya. This in addition to the limited number of reports the PPRA has received on how procuring entities are implementing the AGPO scheme. The information on impacts which is available online has been published or commissioned by UN Women and has a specific focus on empowering women and the preference and reservation schemes.

In 2021, UN Women published [Empowering Women through public procurement & enabling inclusive growth](#)<sup>24</sup> which states that:

“Despite some challenges with the implementation of the affirmative procurement policy Kenya has seen a gradual increase in the proportion of its public procurement spend going to women-owned businesses and other disadvantaged groups. According to the Kenya Economic survey 2020, tenders reserved and awarded to women under AGPO increased from 7.4 billion KSh (approximately US\$ 66.9 million) in 2015/16 to 15.5 billion KSh (approximately US\$ 140.2 million) in 2018/19. According to preliminary figures, women entrepreneurs are expected to win 17,564 tenders worth KSh 17.3 billion (approximately US\$ 156.5 million), accounting for 52.7 per cent of the total value of the tenders awarded for this programme in 2019/20. Additionally, the number of tenders awarded to women increased by 100 per cent from 2015 to 2019/20 (from 8,795 to 17,564).”

In 2017 UN Women commissioned an assessment of access to government public procurement opportunities for women, youth and persons with disabilities<sup>25</sup> “to assess the effectiveness of the AGPO as entrenched under the Preference and Reservations Scheme in the Public Procurement and Disposal Act 2015”. The Executive summary details a range of challenges and some suggested solutions, including:

- “there was general lack of awareness of the AGPO opportunities due to lack of sensitization from both the AGPO secretariat and the procuring entities;”
- “Women’s challenges facing those with AGPO certificates were: (a) in filling standards tender documents; (b) certification, technical and financial challenges; (c) delay in payment for goods and services delivered; (d) corruption; (e) short timelines to respond to tender; and (f) stiff tendering requirements.”
- “The challenges facing those without AGPO certificates were: 1. Lack of awareness of AGPO initiative; 2. Lack of information of how to register a business and for an AGPO certificate; 3. Perception of corruption in government and 4. Fear of suffering loss due to delayed payments.”
- “The long term objective of AGPO is to reduce poverty especially among the marginalized women, youth and PWDs. From the study, it is clear that this objective

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24 [UN Women, Empowering Women through public procurement & enabling inclusive growth, 2021](#)

25 [UN Women, Kenya: Assessment Of Access To Government Public Procurement Opportunities For Women, Youth And Persons With Disabilities, 2017, conducted By Prof. Tabitha Kiriti Nganga](#)



may be achieved if only the uptake of the initiative was much higher than it is now. ... However, due to the small sample size, we are not able to confidently conclude that the long term objective of AGPO of reducing poverty especially among the marginalized women, youth and PWDs is on track. Nevertheless by doing business with government, the target groups seems to be benefiting in terms of increased profit margins, increasing the number of employees, increasing the amount of stock, payment of fees, provision of basic needs and purchase of property which essentially leads to economic empowerment.”

- “From the key informants point of view, the procuring entities face various challenges such as: (i) Lack of funds for capacity building for both the target group and the procurement officers, (ii) Lack of capacity to make returns to The National Treasury and the Public Procurement Regulatory Authority as required by law, (iii) Delayed payments due to funds reallocation to other uses, (iv) Poor flow of information between procurement and finance departments, (v) Corruption, (vi) Lack of coordination between Treasury and the Public Procurement Regulatory Authority, (vii) Strict Regulations Leading to Challenges For the Target Group, (viii) Lack of capacity to use Integrated Financial Management Information Systems (IFMIS) and (ix) Lack of Proper Signage leading to Poor Accessibility.”

The available research on impacts has a specific focus on empowering women and the preference and reservation schemes. Further research and stakeholder consultation would be required to review the full impact of all available measures to protect human rights (as detailed in Section 5) on the human rights of Kenyans and those working in Kenyan state supply chains.

# ANNEX A – PUBLIC PROCUREMENT LEGAL FRAMEWORK

The public procurement framework in Kenya consists of provisions in the constitution, specific statutes relating to public procurement, and their respective regulations as highlighted under this section. There are also public bodies and agencies that make up the institutional framework responsible for overseeing public procurement processes in Kenya which are also highlighted under this section.

## A.1. CONSTITUTIONAL UNDERPINNING OF THE PUBLIC PROCUREMENT LEGAL FRAMEWORK

The significance of public procurement in Kenya is captured by its inclusion in the 2010 Constitution where it is covered in Chapter 12 on Public Finance. Article 227 specifically addresses public procurement in the following manner.

227. Procurement of public goods and services

(1) 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.

(2) An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following—

- categories of preference in the allocation of contracts;
- the protection or advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination;
- sanctions against contractors that have not performed according to professionally regulated procedures, contractual agreements or legislation; and
- sanctions against persons who have defaulted on their tax obligations or have been guilty of corrupt practices or serious violations of fair employment laws and practices.

Article 227(1) captures both social and economic objectives of procurement. Article 227(2) adds to the preceding principle-based expectations by mandating parliament to enact a rule-based regulatory framework. Some of the particulars for inclusion in the law include preferential contracts, protection, and advancement of special, and sanctions against contractors. While the Constitutional provision to and articulates principles of public procurement, it is not the operational law.

The Constitution was predated by statutory law, the Public Procurement and Disposal Act, 2005 and the regulations thereunder, the Public Procurement Regulations 2006. The Act and Regulations were enacted as part of broader economic reforms introduced by the government in 2002. Preceding this, public procurement was governed through

circulars from the national treasury.<sup>26</sup> The 2005 Act has since been revised to align with the 2010 Constitution thus the current statute is the Public Procurement and Disposal Act, No. 33 of 2015 [Revised, 2016] and more recently, the Public Procurement and Asset Disposal Regulations 2020. These are explored below alongside several other statutes with address public procurement.

## **A.2. LAWS GOVERNING PUBLIC PROCUREMENT**

This section highlights provisions of the following key laws which anchor public procurement in Kenya and specific provisions of these which are relevant to human rights:

1. Public Finance Management Act (PFMA), 2012<sup>27</sup>
2. The Public Procurement and Asset Disposal Act, 2015, The Public Procurement and Asset Disposal Regulations 2020, and The Public Procurement and Asset Disposal (Amendment) Act 2022<sup>28</sup>
3. Supplies Practitioners Management Act, 2007<sup>29</sup>  
Public Private Partnerships Act 2013<sup>30</sup>
4. Mining Act 2016; Mining (Award of Mineral Rights By Tender) Regulations 2017<sup>31</sup>
5. Executive Order No. 2 of 2018 – Procurement of Public Goods, Works and Services By Public Entities<sup>32</sup>

### **1. Public Finance Management Act (PFMA), 2012**

The PFMA provides for the effective management of public finances by national and county governments. Under Section 30, all procurement of goods and services required for the purposes of the national government or a national government entity is to be carried out in accordance with Article 227 of the Constitution and the relevant legislation on procurement and disposal of assets. Section 121 is similarly worded with regards to public procurement by the county governments and their entities. Moreover, all procurement must be budgeted for and managed within the timelines established under the Act.

### **2. Public Procurement and Asset Disposal Act, 2015 and Public Procurement and Asset Disposal Regulations 2020**

The Public Procurement and Asset Disposal Act, 2015, came into force on 7 January 2016 with the objective of giving effect to Article 227 of the Constitution which provides for a system that is fair, equitable, transparent, competitive and cost-effective, to provide for procurement by the county governments and to make provisions for e-procurement.

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<sup>26</sup> [Public Procurement Regulatory Authority, About Us](#)

<sup>27</sup> [Public Finance Management Act \(PFMA\), 2012](#)

<sup>28</sup> [The Public Procurement and Asset Disposal Act, 2015, The Public Procurement and Asset Disposal Regulations 2020,](#)

<sup>29</sup> [Supplies Practitioners Management Act, 2007](#)

<sup>30</sup> [Public Private Partnerships Act 2013](#)

<sup>31</sup> [Mining Act 2016](#) and [Mining \(Award of Mineral Rights By Tender\) Regulations 2017](#)

<sup>32</sup> [Executive Order No. 2 of 2018 – Procurement of Public Goods, Works and Services By Public Entities](#)

The Act applies to all public entities including state organs, departments, state corporations, county governments, companies owned by public entities and bodies in which the national or county government has a controlling interest EXCEPT:

- Procurement and disposal of assets under Public Private Partnership Act, 2013; and
- Procurement and disposal of assets under bilateral or multilateral agreements between the Government of Kenya and any other foreign government, agency, entity or multilateral agency unless otherwise prescribed in the Regulations.

The Public Procurement and Asset Disposal Regulations, 2020 were gazetted in April 2020 by the National Treasury Cabinet Secretary through the Legal Notice Number 69 of PPDA and came into effect on 2 July 2020. The Regulations developed pursuant to Section 180 of the PPDA, 2015 operationalise the entire Act and therefore provide public procurement officials and other interested stakeholders with useful guidance in their day-to-day work. Like the Act, the Regulations apply to both national and county level procurement.

The Public Procurement and Asset Disposal (Amendment) Act, 2022 was gazetted in July 2022 and amends specific sections of the Public Procurement and Asset Disposal Act, 2015. A number of these amendments related to human rights in public procurement, including how procurement plans are published.

The following elements of the PPDA and associated regulations are relevant to public procurement and human rights:

- A. Procurement plans;
- B. Special categories under the PPDA;
- C. County level procurement;
- D. Other important highlights from the Regulations;
- E. Code of Ethics for Persons Participating in Public Procurement and Disposal;
- F. Access to Government Procurement Opportunities (AGPO).
- G. Guiding Principles of Public Procurement in Kenya

#### **A. Procurement plans**

According to Section 53(2) of the PPDA, an accounting officer shall prepare an annual procurement plan which is realistic in a format set out in the Regulations within the approved budget prior to commencement of each financial year as part of the annual budget preparation process. Section 53(6) of the PPDA states that all procurement and asset disposal planning shall reserve a minimum of thirty per cent of the budgetary allocations for enterprises owned by women, youth, persons with disabilities and other disadvantaged groups (explored in greater detail below in section B. Special categories under the PPDA).

Section 44(2)(c) of the PPDA states that the accounting officer shall ensure procurement plans are prepared in conformity with the medium term fiscal framework and fiscal policy objectives and ... submit them to the National Treasury. Section 44(2) (i) of the PPDA also states that the accounting officer submit to the Authority the part in its procurement plan demonstrating application of preference and reservations



schemes in relation to the procurement budget within sixty days after commencement of the financial year.

Section 158 of the PPDA state that:

- (1) The procuring entities shall integrate preferences and reservations in their procurement plans.
- (2) The procuring entity shall submit to the Authority the part in its procurement plan demonstrating application of preference and reservation schemes in relation to procurement budget within sixty days after commencement of the financial year.
- (3) All procurement awards by procuring entities where a preference or reservation scheme was applied shall be reported with disaggregated data to the Authority on a quarterly basis.

The Public Procurement and Asset Disposal (Amendment) Act, 2022, further requires that:

- (12) Upon submission of the procurement plans to the National Treasury pursuant to section 44(2)(c) of this Act, the accounting officer of a procuring entity shall publish and publicize its approved procurement plan as invitation to treat on its website.
- (13) On receipt of the procurement plans submitted by the procuring entities, the National Treasury shall publish and publicize the procurement plans as invitation to treat on the state tender portal.

Regulation 40 of the PPDA Regulations states that:

- (5) A procuring entity of a county government shall indicate in its procurement plan a minimum twenty percent (20%) budgetary allocation for preferences and reservations for resident tenderers of the county, pursuant to section 33(2)(g) of the Act.
- (6) An accounting officer of a procuring entity shall prepare a quarterly report on the implementation of the annual procurement plan and submit it to the Cabinet Secretary or county executive committee member for finance or responsible for the procuring entity or the governing body, as the case may be.

## **B. Special categories under the PPDA**

The Constitution in Article 27(3) recognises that both men and women have the right to equal opportunities in all aspects of life including in the economic sphere and (6) authorises the use of affirmative action to address past disadvantages. Moreover, Part 3 of the Bill of Rights provides for the specific application of rights to some categories of persons – Persons With Disabilities - PWDs (Article 55), youth (Article 54), and minorities and marginalised groups (Article 56) - with a view to ensure greater certainty to the realization of their rights. Access to economic opportunities is one such measure. As previously mentioned, Article 227 (2) authorises the use of preferences and seeks to protect and promote economic advancement of previously disadvantaged groups through their participation in public procurement.

The PPDA, Section 157, provides that the Cabinet Secretary shall, in consideration of economic and social development factors, prescribe preferences and or reservations in

public procurement and asset disposal. Section 157 further states that the preferences and reservations shall be non-discriminatory in respect of the targeted groups; allow competition amongst the eligible persons; and be monitored and evaluated by the Authority. The PPDA elaborates that for the purpose of protecting and ensuring the advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination, reservations, preferences and shall apply to:

- (a) candidates such as disadvantaged groups;
- (b) micro, small and medium enterprises;
- (c) works, services and goods, or any combination thereof;
- (d) identified regions; and
- (e) such other categories as may be prescribed.

In addition, the PPDA, Section 157(10) explicitly states that every procuring entity shall ensure that at least thirty percent of its procurement value in every financial year is allocated to the youth, women and persons with disability. This is supplemented by Section 53(6) of the PPDA states that all procurement and asset disposal planning shall reserve a minimum of thirty per cent of the budgetary allocations for enterprises owned by women, youth, persons with disabilities and other disadvantaged groups (explored in greater detail below in section B. Special categories under the PPDA).

i. Definition of categories and other important terms

The Act defines who or what entity shall be deemed to fall into this category which guidance is central in ascertaining who is entitled to benefit.

**Disadvantaged groups** - Section 2 of the Act defines disadvantaged groups as “persons denied by mainstream society access to resources and tools that are useful for their survival in a way that disadvantages them or individuals who have been subjected to prejudice or cultural bias because of their identities as members of groups or categories of persons without regard to their individual qualities, and includes enterprises in which a majority of the members of shareholders are youth, women, persons with disability or categories as shall be prescribed”.

Definition of each specific category is as follows.

**Person with disability** – a person with disability who has attained the age of 18 years and includes a company or association or body of persons corporate or unincorporated in which at least 70% of the shareholders, members or persons and a majority of the directors are persons with disability.

**Woman** – a person of the female gender who has attained the age of eighteen years and includes a company, association, or body of persons, corporate or unincorporated in which at least 70% of the shareholders, members or persons and a majority of its directors are of the female gender.

**Youth** – a person who has attained the age of eighteen years and has not attained the age of thirty-five and includes a company, association or body of persons, corporate

or unincorporated in which at least 70% of the shareholders are persons who have attained the age of eighteen years and have not attained the age of thirty-five years.

Small and medium enterprises are also set to benefit from the scheme and in this regard and the Regulations defines what is considered a “**small enterprise**” for this purpose as “a business undertaking with an initial staff establishment of not less than eleven and not more than fifty employees and annual turnover or investment not exceeding five million shillings” – Regulation 2.

**Preference** is defined as “the right or opportunity to select a tenderer from an identified group that is considered more desirable than the other.”

**Reservations** “means exclusive preference to procure goods, works, and services set aside to a defined target group of tenderers within a specified threshold or region.”

- ii. Specific actions aimed at promoting participation of special categories in public procurement

#### **Reservation of budgetary allocation**

The PPDA mandates procurement entities to “reserve a minimum of thirty percent of the budgetary allocation for enterprises owned by women, youth, persons with disabilities and other disadvantaged groups (Section 53)” and Regulation 149. In achieving this aim, procuring entities shall submit to the Authority, their procurement plan with integrated preferences and reservations including the requisite budgetary allocations, and each quarter all awards where the preferences and reservations have been applied - Section 158. It is the responsibility of the accounting officer of each procurement entity to reserve not less than 30 percent of its budget for procurement from disadvantaged groups – Section 157(5), Regulation 149.

#### **Responsibility for preferences and reservations**

The PPDA mandates that the National Treasury operationalise a preference and reservations secretariat to be responsible for the implementation of the preferences and reservations. This secretariat shall be responsible for:

- A. registration, prequalification and certification of the persons, categories of persons or groups as provided for in under Part XII;
- B. training and capacity building of the above target groups;
- C. providing technical and advisory assistance to procuring entities in the implementation of the preferences and reservations under this Act; and
- D. monitoring and evaluating the implementation of the preferences and reservations under this Act.

The PPRA further mandates the National Treasury to provide adequate staff and resources for the operations of the secretariat. The National Treasury established the AGPO Secretariat, but there is information available online on the operations of this Secretariat.

**Registration requirement**

As a prerequisite to participate in public procurement, SMEs, women, youth and PWDs wishing to access public procurement under this scheme must first register with and obtain a certificate of registration from the National Treasury (Regulations 145(2)(b), (3) and 146(1)). An enterprise registered by the National Treasury as a target group benefitting from the preference and reservation scheme shall be entitled to such benefits for a period of two years, which may be renewed biennially for up to a maximum period of ten years – Regulation 156. Furthermore women, youth and PWDs registered by the National Treasury need not apply to be listed as suppliers by specific procuring agencies (Regulation 69(5)) as they register directly with the National Treasury which is responsible for compiling a list of all registered suppliers and publishing the same on the state portal Regulations 145(3) and 146(2).

**Advertisement or call to tender**

The accounting officer of a procuring entity shall where necessary, ensure that the applicable preferences and reservations of the tender are clearly indicated in the bid documents, (Section 5(e)(vi) and are clearly set out in the invitation to tender (Section 74(1)(g)). Furthermore Regulation 157 provides that “an advertisement relating to an open tender under a preference and reservations scheme shall state that such tender is open to small and micro enterprises and to disadvantaged groups registered with the National Treasury or regions, as appropriate.”

**Monitoring compliance**

The Public Procurement Regulatory Authority (Section 9(1)(e)), National Treasury (Section 157(17)(d), and Parliament (Section 157(14)) are to monitor compliance on application of preferences and reservations. Regulation 160 also applies to monitoring by the Authority and National Treasury.

Each quarter, the Accounting Officers of the procuring entities shall prepare for the Authority a report with disaggregated data on procurements awards where preferences and reservations were applied (Section 158(3)). And every six months they shall provide disaggregated data on the number of youth, women and PWDs whose services have been procured (Section 157(13)(b)). On its part, the Authority shall, every six months, submit a report with disaggregated data, including that of procuring entities, to indicate compliance on this issue to the Parliamentary committee responsible for realization of opportunities for youth, women and PWDs (Section 157(14)).

**Exemption from tender security**

SMEs, women, youth and PWDs tenderers shall not be required to provide tender securities for procurements that are reserved for these categories. However, they shall be required to fill the Tender-securing Declaration Form in this regard. Section 61(5) PPDA and Regulations 46 and 155.

**Request for a review**

Section 157 of the PPDA provides that a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review. Section 33 of the Public Procurement and Asset Disposal (Amendment) Act 2022 provides

costs for such reviews do not apply to tenders reserved for women, youth, persons with disabilities and other disadvantaged groups”.

#### **Unbundling of tenders – Regulation 154**

1. A procuring entity may for the purpose of ensuring maximum participation of citizen contractors, disadvantaged groups, small, micro and medium enterprises in public procurement, unbundle a category of goods, works and services in practicable quantities.
2. For greater certainty, a procuring entity in unbundling procurements in paragraph (1) may lot goods, works or services in quantities that are affordable to specific target groups participating in public procurement proceedings.

#### **Limitations**

All tenderers must meet the eligibility criteria established in Section 55 which among others requires the person, to have complied with tax obligations (55(1)(f), not to have been convicted of corruption or fraud (55(1)(g) and, not to be guilty of any serious violation of fair employment laws and practices(55(1)(g). From the wording of the Act, a judicial finding is required. Additionally, the Public Procurement Administrative Review Board may debar a person from participating in procurement on similar and other grounds (Section 38). It is the tenderers responsibility to furnish the procuring entity with information to establish that the set criteria are met; giving false information shall result in ineligibility to participate (Section 55 (4&5)).

A person shall be entitled to only one preference at the time – the most advantageous, Section 156 and Regulation 153.

iii. Additional support

In addition, there are several initiatives that aim promoting the participation certain categories of persons or entities in the economic sphere. See 1.1.

#### **C. County level procurement**

The PPDA applies to both levels of government, county and national: all public procurement in Kenya is subject to and undertaken in accordance with the provisions under the Act.

County treasuries oversee county procurement and therefore, for the implementation of the PPDA. This includes the administration of the preferences and reservations for special categories (Section 33 (1, 2(f)). In addition, 20% of county procurement shall be reserved for the county (Section 33(2,g)), Regulation 40(5) and Section 157(4)(d) and Regulation 151 which identify counties as regions where preferences and reservations shall apply.

Section 33(2) of the PPDA states that the County Treasury shall establish a procurement function which shall:

(f) promote preference and reservations schemes for small and micro enterprises and other disadvantaged groups, citizen contractors, women, youth, persons with



disabilities, minorities and marginalized groups in public procurement at the county;  
(g) promote preference and reservation schemes for residents of the county to ensure a minimum of twenty percent in public procurement at the county;

Regulation 40 of the PPDA Regulations states that:

(5) A procuring entity of a county government shall indicate in its procurement plan a minimum twenty percent (20%) budgetary allocation for preferences and reservations for resident tenderers of the county, pursuant to section 33(2)(g) of the Act.

(6) An accounting officer of a procuring entity shall prepare a quarterly report on the implementation of the annual procurement plan and submit it to the Cabinet Secretary or county executive committee member for finance or responsible for the procuring entity or the governing body, as the case may be.

#### **D. Other important highlights from the Regulations**

- i. Inspections, Assessments and Reviews relating to contracts, procurement and asset disposal proceedings are detailed in section 43 of the PPDA. It allows the PPRA to inspect, assess, review or audit at any reasonable time, the records and accounts of the procuring entity and contractor relating to the procurement or disposal proceeding or contract and the procuring entity and contractor or tenderer shall cooperate with and assist whoever does such an inspection. Where contraventions are discovered in the course of an inspection, the PPRA may direct the procuring entity to take such actions as are necessary to rectify the contravention.

The Public Procurement and Asset Disposal (Amendment) Act 2022 further states that when conducting investigations, inspections, assessments and reviews relating to contracts, procurement and asset disposal proceedings, anyone authorized by the Authority may enter any premises of a procuring entity, at a reasonable time and inspect the premises to make any inquiries that may be necessary for the collection of information.

The PPRA could conduct inspections, assessments and reviews in the case of alleged or actual human rights abuses.

- ii. Procurements undertaken pursuant to bilateral/ multilateral agreements are commonly referred to as 'government-to-government' procurements and they are exempt from the provisions of the Act whereby any procurement procurements and disposal of assets under bilateral or multilateral agreements between the Government of Kenya and any other foreign government, agency, entity or multilateral agency are not procurements or asset disposals (G2G Exemption).<sup>33</sup>

G2G exemptions have been used to facilitate notable public projects. An example is the Standard Gauge Railway project which was financed through a concessional loan from the Republic of China and whereby there was no competitive bidding for the feasibility study or for the construction which has raised questions as to whether the country got value for money.

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<sup>33</sup> Public Procurement and Asset Disposal Act 2015, sec.4 (2) (f).

Public Procurement and Asset Disposal Regulations 2020, regulation 5 stipulates the requirements for a procurement to qualify for the government-to-government exemption under the Act:<sup>34</sup> where a government-to-government procurement is financed through a negotiated loan, the Public Procurement and Asset Disposal will apply unless the agreement specifies the procurement and asset disposal procedures to be followed:

- Procurement professionals from the respective procuring entity must be involved during the negotiations of the bilateral/multilateral agreement for the purposes of ensuring that the public procurement and asset disposal interests of Kenya are considered;
  - Local content requirements – unless an exemption is issued by the National Treasury, the tender documents for a government to government procurement must contain requirements that the tenderer must include a plan for technology transfer to locals, plan to reserve 50% employment opportunities for Kenyans and 40% of inputs must be sourced locally.
- iii. Debarment proceedings - a tenderer who is found to have breached the provisions of the PPDA (including having been convicted of corruption or fraud or being found guilty serious violation of labour laws) of may be blacklisted and debarred from participating in procurements for not less than 3 years. The New Regulations further introduces procedures for the hearing and determination of debarment proceedings by the Public Procurement Regulatory Board. A tenderer who is the subject of the proceedings can now contest the accusations and will be allowed to respond and submit evidence in its defence.<sup>35</sup> When an entity is debarred, any successor entity of that entity is also debarred. Debarment extends to directors and partners if the debarred person is a company or a partnership. Debarment decision will not relieve the debarred person of its obligations under any contract entered into with a procuring entity before the debarment.
- iv. E-procurement- the New Regulations provide guidance and elaborate procedures for the establishment and use of e-procurement systems and a central online portal to be developed by the Public Procurement Regulatory Authority. If successfully implemented, e-procurement systems could potentially save costs, eliminate paperwork and improve transparency and efficiency in procurement processes otherwise e-procurement could facilitate, or be a source of, discrimination and exclusion.
- v. Preferences and Reservations- Preferences and reservations are to be applied by procuring entities where preference is given to supplies wholly mined and produced in Kenya, supplies partially mined or produced in Kenya or assembled in Kenya and firms with 51% Kenyan shareholding.<sup>36</sup> The New Regulation provide that the tender documents must specify that the successful bidder will:<sup>37</sup>

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34 Public Procurement and Asset Disposal Regulations 2020, regulation 5.

35 Ibid, regulation 22.

36 Public Procurement and Asset Disposal Act 2015, sec. 155.

37 Public Procurement and Asset Disposal Regulations 2020, regulation 143.

- Transfer technology, skills and knowledge through training, mentoring and participation of Kenyan citizens;
- Reserve at least 75% employment opportunities for Kenyan citizens for works, consultancy services and non-consultancy services, of which not less than 20% shall be reserved for Kenyan professionals at management level;
- Include in its tender a local content plan specifying the positions reserved for employment of local citizens, capacity building and competence development programs for local citizen, the timeframes within which to provide employment opportunities, demonstrable efforts for accelerated capacity building of Kenyan citizens, succession planning and management and a plan demonstrating linkages with local industries which ensures at least 40% inputs are sourced from locally manufactured articles, materials and supplies partially mined, produced or assembled in Kenya.

In circumstances where an international tender does not meet the above requirements, specific approval from the National Treasury shall be required.

#### **E. The Code of Ethics for Persons Participating in Public Procurement and Asset Disposal Activities**

Gazetted in May 2019, the Code of Ethics for Persons Participating in Public Procurement and Asset Disposal Activities (Code of Ethics) in conformity to Section 181 of the Act and sets the minimum standard of behaviour and aims to foster good business conduct for all persons participating in public procurement and disposal activities (Section 1). All bidders are required to sign and submit a signed copy of the Code as part of their bid documentation (Section 5). Failure to do so results in automatic disqualification (Section 14). By signing the Code, signatories commit to comply with the Constitution, the PPDA and its regulations, to observe the laws on matters, ethics and integrity, taxation, labour, health safety and environmental protection (Section 6).

The Code of Ethics requires that a person cooperates and assists in conducting of due diligence, where a procuring entity conducts on-site evaluations and inspections of the person's facilities or project site, including those of their subcontractors and Joint Venture partners to review their compliance to the Code of Ethics during execution of the Contract (Section 22).

The Code of Ethics states that the PPRA shall exercise oversight in the enforcement of this Code, including taking remedial measures in case of breach of the Code. The PPRA shall on its own motion or upon receipt of complaint, inquire into the allegation of the violation of the Code of Ethics and take appropriate action including instituting debarment proceedings as provided under the Act and Regulations. The Code of Ethics mandates the PPRA to establish a complaints management system for reporting and receiving of complaints on alleged violations of the Constitution, relevant laws, Regulations and the Code of Ethics (Section 23).

The Code of Ethics states that any person may report a violation of the Code of Ethics to the PPRA or other law enforcement agencies and the complainant may in addition report the breach to the relevant professional body (Section 25).

The Code of Ethics also requires that upon receipt of a report, the PPRA register, carry out investigations into the complaint, and take appropriate action including referring the matter to the relevant authorities or report to the relevant professional body for action where appropriate. The PPRA should communicate preliminary findings to the complainant within 60 days of the complaint being filed and communicate feedback to the complainant on conclusion of the investigation (Section 26). The PPRA should also publish quarterly a list of persons sanctioned for violations of the Code of Ethics (Section 28).

## **F. Access to Government Procurement Opportunities (AGPO)**

This is a programme which comes from Public Procurement and Asset Disposal Act and the Public Procurement and Disposal (Preference and Reservations) Regulations, 2011.

The programme launched in October 2013 with the aim to enable enterprises owned by women, the youth and persons with disabilities access the 30% of Government procurement opportunities that are mandated in law as preserved for these categories.<sup>38</sup> It achieves this aim by verifying and registering business enterprises that fit within the given definition which a prerequisite for accessing the preserved opportunities, which requires that an enterprise:

1. is registered with the relevant government body;
2. and has at least seventy percent membership of youth, women or persons with disabilities and the leadership shall be one hundred percent youth, women and persons with disability, respectively.

Registration can be done at the any of the 53 Huduma Centres, the one-stop shop for government services. In addition, one can also access available public tenders from the AGPO website.

## **G. Guiding Principles of Public Procurement in Kenya**

The Public Procurement and Asset Disposal Act, 2015, defines the overarching principles guiding public procurement in Kenya:

“3. Guiding principles

Public procurement and asset disposal by State organs and public entities shall be guided by the following values and principles of the Constitution and relevant legislation—

- (a) the national values and principles provided for under Article 10;
- (b) the equality and freedom from discrimination provided for under Article 27;
- (c) affirmative action programmes provided for under Articles 55 and 56;
- (d) principles of integrity under the Leadership and Integrity Act, 2012 (No. 19 of 2012);
- (e) the principles of public finance under Article 201;
- (f) the values and principles of public service as provided for under Article 232;

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38 [The National Treasury, Access to Government Procurement Opportunities](#)

- (g) principles governing the procurement profession, international norms;
- (h) maximisation of value for money;
- (i) promotion of local industry, sustainable development and protection of the environment; and
- (j) promotion of citizen contractors.”

The Public Procurement and Asset Disposal Regulations, 2020 Arrangement of Regulations, 2020, provides that:

“value for money” means the undertaking by a procuring entity that results in a benefit accruing to that procuring entity defined in terms of cost, price, quality, quantity, timeliness and risk transfer;

### **3. Supplies Practitioners Management Act, 2007**

This is a law auxiliary to procurement in general. The Supplies Practitioners Management Act makes provision for the training, registration, and licensing of supplies practitioners to regulate their practice and for the establishment of the Kenya Institute of Supply Management (KISM). It enables the KISM to fully pursue its mandate of capacity building and professionalizing procurement and supply chain management practice in Kenya through:<sup>39</sup>

- Putting in place the proper governance structures established in the Act. The institute has been governed by an interim Council since commencement of the Act in October 2007 in line with transitional provisions in the second schedule of the Act. The regulations will facilitate installation and operation of the Council.
- Putting in place the Registration and Disciplinary Committees established in the Act. In the absence of regulations, the interim Council continues to register members under transitional provisions in the second schedule of the Act. The regulations define a framework for registration and allows installation of the Registration and Disciplinary Committees which will respectively take over the functions for registration and enforcement of codes of ethics and professional conduct.
- Putting in place the Examinations Board established in the Act. The institute has partnered with KASNEB to develop and launch a National Professional Examination for the procurement and supply chain management profession in Kenya. The regulations will allow proper establishment of the examinations board and position it to take over administration of the said examinations from KASNEB.

As the professional association on matters procurement and supply management, KISM supports the implementation of the PPDA through the development of professional training of procurement personnel as well as in nominating from among its membership persons to serve in the Public Procurement Authority (1 persons)<sup>40</sup> as well as on the Public Procurement Administrative Review Board (3 persons)<sup>41</sup>. More importantly, KISM promotes research in the profession of procurement to be used in promoting continuous learning and policy development. It has a Council which is its

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<sup>39</sup> Supplies Practitioners Management Act 2007, sec.5.

<sup>40</sup> Section 10(1)(b)iii

<sup>41</sup> Section 29(2)(c)

governing body and the membership include Ministry responsible for Finance, the Director General of Public Procurement Regulatory Authority among other members.

#### **4. The Public Private Partnership Act, 2021**

The Act which came to effect on December 23, 2021, repeals the **Public Private Partnership (PPP) Act 2013** and among other objects gives effect to Article 227 of the Constitution on procurement relating to public private partnerships and provide for the participation of county governments in public private partnerships. In general, the 2021 PPP Act provides for the participation of the private sector in the financing, construction, development, operation or maintenance of infrastructure or development projects through public private partnerships.

The 2021 PPP Act expressly states in Section 4(2) that the provisions of PPDA shall not apply to PPP initiatives. Section 6 of the Act establishes a PPP Committee that shall be responsible to among others formulating policies on PPPs, overseeing the implementation of PPP contracts and approving feasibility studies. Section 15 of the 2021 Act creates a Directorate to be known as the Directorate of PPP headed by Director General and shall be the leading institution in the implementation of PPP projects under the Act.

Section 32 requires contracting authority under the direction of the Directorate to undertake feasibility study of the PPP project to be implemented. According to section 32 (2), feasibility study must among others take into consideration the social, economic and environmental impact of the project and land requirement for the project. The Directorate has the role to evaluate the feasibility study and recommend approval or non-approval by the PPP Committee.

Section 41 requires due diligence to be undertaken for privately initiated proposals to ensure that the party has not been debarred, has not engaged in corrupt practices, not insolvent, is tax compliant and not been convicted for criminal offence within a given period.

Finally, section 78 of the 2021 PPP Act introduces local content requirements as well as requirements that Kenyan goods and services meeting minimum standards are given priority and that skilled and qualified Kenyan citizens are employed where possible. This is an important policy objective to enhance local participation and access to business opportunities.

#### **5. Mining Act 2016; Mining (Award of Mineral Rights By Tender) Regulations 2017**

The Mining Act 2016 addresses public procurement with respect to mineral rights. Section 14 gives the Cabinet Secretary in charge of mining powers to declare areas reserved for tendering. As a result, there are specific regulations developed under the Act for the purpose of awarding mineral rights by tender. In this case of reserved areas for tendering, the regulations empowers the Mining Cabinet Secretary to decide the method for tendering on such places in consultation with Public Procurement Regulatory Authority with Mineral Rights Board being the procuring entity.

Moreover, Section 13 of the Mining Act gives the Cabinet Secretary in charge of mining ministry powers to declare areas to be exclusively reserved for small-scale and



artisanal mining operations. This is an affirmative action for small scale entities and vulnerable individuals and groups interested in mining to have equal access and be protected from the large scale and highly equipped mining companies.

## **6. Executive Order No. 2 of 2018 – Procurement of Public Goods, Works and Services by Public Entities**

THAT effective the 1st of July 2018, all Public Procuring Entities shall maintain and continuously update and publicise (through the websites of the Public Procuring Entity, e-Citizen, Public Procurement Regulatory Authority platforms, public notice boards and/or official government publications):

A. Complete information of all tenders awarded, including but not limited to:

- i. Full Particulars of the awarded Bidder (Supplier, Contractor or Consultant);
- ii. Specification of goods and services, scope and schedule of works and contract value;
- iii. Technical and financial capacity of the awarded bidder (Supplier, Contractor or Consultant) and summary of reasons for the award;
- iv. Award Date and Contract Period;
- v. Current market price of the specific goods, works or service, as well as price guidelines as published by the Public Procurement Regulatory Authority with regard to that specific item (where applicable);
- vi. Variations in regard to specification of goods and services, scope of work and contract price during the pendency of the contract (where applicable); and
- vii. The names of the members of the Evaluation Committee and Inspection and Acceptance Committee of the Procuring Entity with respect to each award.

C. In furtherance of I (A)(i) above, the list of awarded suppliers/contracts/consultants shall include the following information:

- Name of Supplier
- Registration details (ID/Registration/ Incorporation)
- PIN Number
- List of Directors, Shareholders and Beneficial Owners (in case of a company)
- Name of Proprietor (for Sole Proprietor and Business name)
- Names of Partners (for Partnerships)
- Business Contacts Information Number) (telephone and email address)
- Postal address
- Physical address
- Tax Compliance Status
- Business Permit/License Number
- County of Operation

E. The Procuring Entities shall consolidate and publish the information above on the 15th day of every subsequent month, outlining the tender and supplier data for the previous month;

## ANNEX B – RELEVANT AUTHORITIES AND BODIES

This section describes the institutions that provide guidance, oversight and work on public procurement matters:

1. The National Treasury
2. Public Procurement Regulatory Authority (PPRA)
3. Public Procurement Administrative Review Board (PPARB)
4. County Treasury
5. Kenya Institute of Supplies Management (KISM)

### **1. The National Treasury**

It is established under section 11 of the Public Finance Management Act, 2012 and it is responsible for public procurement and asset disposal policy formulation for entities in Kenya. It may also prescribe an institutional framework to provide for the procurement, administration and management of common user items for the national government.<sup>42</sup> The function of public procurement is within the ambit of the National Treasury where it is one of the five departments under the Directorate of Budget, Fiscal and Economic Affairs.

As detailed in the Special categories under the PPDA section above, the National Treasury is responsible for operationalising a preference and reservations secretariat to be responsible for the implementation of the preferences and reservations. The PPDA further mandates the National Treasury to provide adequate staff and resources for the operations of the secretariat. The National Treasury established the AGPO Secretariat, but there is information available online on the operations of this Secretariat. As a prerequisite to participate in public procurement, SMEs, women, youth and PWDs wishing to access public procurement under this scheme must first register with and obtain a certificate of registration from the National Treasury. The PPRA, National Treasury, and Parliament are to monitor compliance on application of preferences and reservations.

Section 44 of the PPDA states the accounting officers at procurement entities shall ensure procurement plans are prepared in conformity with the medium term fiscal framework and fiscal policy objectives and ... submit them to the National Treasury. These plans should detail how the procuring entity will apply preference and reservation schemes. The Public Procurement and Asset Disposal (Amendment) Act, 2022, state that on receipt of the procurement plans submitted by the procuring entities, the National Treasury shall publish and publicise the procurement plans as invitation to treat on the state tender portal

### **2. Public Procurement Regulatory Authority (PPRA)**

In January 2016, the Public Procurement and Asset Disposal Act, 2015 (the Act) was enacted. This substantially changed the mandate of the Public Procurement Oversight

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<sup>42</sup> Public Procurement and Asset Disposal Act, sec.7.

Authority (PPOA) as it largely assumed the regulatory function which then transitioned to Public Procurement Regulatory Authority (PPRA). The Act establishes the Public Procurement Regulatory Authority with the following functions under Section 9:

- (a) monitor, assess and review the public procurement and asset disposal system to ensure that they respect the national values and other provisions of the Constitution, including Article 227 and make recommendations for improvements;
- (b) monitor the public procurement system and report on the overall functioning of it and present to the Cabinet Secretary and the county executive member for finance in each county, such other reports and recommendations for improvements;
- (c) enforce any standards developed;
- (d) monitor classified procurement information, including that of specific items of security organs and make recommendations to the Cabinet Secretary;
- (e) monitor the implementation of the preference and reservation schemes by procuring entities;
- (f) prepare, issue and publicise standard public procurement and asset disposal documents and formats to be used by public entities and other stakeholders;
- (g) provide advice and technical support upon request;
- (h) investigate and act on complaints received on procurement and asset disposal proceedings from procuring entities, tenderers, contractors or the general public that are not subject of administrative review;
- (i) research on the public procurement and asset disposal system and any developments arising from the same;
- (j) advise the Cabinet Secretary on the setting of standards including international public procurement and asset disposal standards;
- (k) develop and manage the State portal on procurement and asset disposal and ensure that it is available and easily accessible;
- (l) monitor and evaluate the preference and reservations provided for under this Act and provide quarterly public reports;
- m) Create a central repository or database that includes-
  - i. Complaints made on procuring entities;
  - ii. Record of those prohibited from participating in tenders or those debarred;
  - iii. Market prices of goods, services and works;
  - iv. Benchmarked prices;
  - v. State organs and public entities that are non-compliant with procurement laws;
  - vi. Statistics related to public procurement and asset disposal;
  - vii. Price comparisons for goods, services and works; and
  - viii. Any information related to procurement that may be necessary for the public
- (n) inform the Cabinet Secretary, Parliament, the relevant County Executive member for finance, the relevant County Assembly or Auditor-General on issues of noncompliance with procurement laws once the relevant State organ or public entity ignores the written directives of the Authority, including material breaches of the measures;
- (o) report to Parliament and the relevant county assembly;
- (p) develop a code of ethics to guide procuring entities and winning bidders when undertaking public procurement and disposal with State organs and public entities;
- (q) cooperate with state and non-state actors with a view to obtaining recommendations on how public procurement and disposal can be improved;
- (r) ensure the procurement entities implement the preference and reservations and

provide data to the Authority disaggregated to indicate the number of disadvantaged groups that have benefitted.

The Public Procurement and Asset Disposal (Amendment) Act, 2022, adds an additional paragraph to the PPRA functions:

(ra) develop, promote and support the training and capacity development of persons involved in procurement and asset disposal

Section 44(2)(i) of the PPDA states that the accounting officer submit to the PPRA the part in its procurement plan demonstrating application of preference and reservations schemes in relation to the procurement budget within sixty days after commencement of the financial year.

The PPRA is required, every six months, to submit a report with disaggregated data, including that of procuring entities, to indicate compliance on this issue to the Parliamentary committee responsible for realization of opportunities for youth, women and PWDs (Section 157(14)).

**The PPRA AGPO Report for the Period Jan-June 2021<sup>43</sup>** (the latest available report as of May 2022) states:

#### "1. Reporting Status of Procuring Entities

During the reporting period, only 184 procuring entities submitted reports on contracts awarded to enterprises owned by youth, women and PWDs; of which, 160 were from National Government and 24 from the County Governments. The National Government procuring entities comprised of 20 Ministries and State Departments; 92 State Corporations, 39 Universities, Colleges, Polytechnics and Technical Training Institutions and 9 Constitutional Commissions and Independent Offices. The 24 County Governments procuring entities comprised of 15 County Executives and 9 County Assemblies.

This reporting half recorded a 4.7% decline in the number of procuring entities that submitted reports to the Authority on contracts awarded to the target groups; from 193 in the previous half-year (July-December, 2020). Majority of the procuring entities have persistently failed to submit reports to the Authority as required by the Act.

#### 2. Reservation of Procurement Spend for the Disadvantaged Groups

The 184 procuring entities from National Government (160) and County Governments (24) that reported, cumulatively planned to spend Kes. 122,504,457,647.82 on procurement of goods, works and services. Of this amount, Kes. 24,805,596,973.86 was reserved for procurement of goods, works and services from firms owned by youth, women and PWDs. This represents an average reservation of 20.25% of the cumulative planned annual procurement spend. This implies that a majority of the procuring entities at both levels of Government reserved less than the required minimum of 30%.

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<sup>43</sup> [PPRA AGPO Report for the Period Jan-June 2021](#)

Similarly, National Government and County Governments made average percentage reservations of 17.94% and 31.54% respectively. On average, none of the categories of procuring entities reserved at least the required minimum of 30%, except sparingly for the County Governments.

### 3. Contracts Awarded to the Disadvantaged Groups (youth, women and PWDs)

In terms of number and value of contracts awarded to the disadvantaged groups, the procuring entities that reported awarded a total of 19,617 contracts worth Kes. 15,419,842,307.67. This is disaggregated into 17,992 contracts of Kes. 12,350,781,213.99 by National Government entities and 1,625 contracts of Kes. 3,069,061,093.68 by County Governments entities.

When disaggregated, the Women category received the highest share of 10,471 (53.38%) contracts followed by youth category at 7,650 (39.00%) contracts while PWDs received the least at 1,496 (7.63%) contracts. In terms of value of the contracts, the women category received the highest share of 50.95% followed by youth at 41.86% and the PWDs received the least share of 7.19%. The summary is presented in the table below.

**TABLE E1 - SUMMARY OF NUMBER AND VALUE OF CONTRACTS AWARDED BY ALL ENTITIES THAT REPORTED**

Category	No. of Contract Awards	Percent	Value of Contract Awards	Percent
<b>Women</b>	10,471	53.38%	7,856,988,681.60	50.95%
<b>Youth</b>	7,650	39.00%	6,454,313,101.18	41.86%
<b>PWDs</b>	1,496	7.63%	1,108,540,524.89	7.19%
<b>Total</b>	19,617	100%	15,419,842,307.67	100.00%

In summary, we noted that PWDs were awarded the least number of contracts across all the categories of procuring entities that reported with some entities awarding nil contracts to this target group. We further noted that a number of public entities did not reserve at least the required minimum of 30% of their procurement spends to the target groups. Additional observation was on low levels of absorption of the amounts reserved for the disadvantaged groups. Most procuring entities also reported that their levels of absorption of the reserved procurement spend were affected by prevailing COVID-19 pandemic. Finally, majority of procuring entities have still failed to submit reports to the Authority on contracts awarded to the target groups as prescribed."

The PPRA has developed a **Strategic Plan 2019-2023**.<sup>44</sup> This strategic plan contains a PESTEL analysis with the following relevant elements:

<sup>44</sup> [Public Procurement Regulatory Agency, Strategic Plan 2019-2023](#)

Factor	Aspect	Effect/ implication	Mitigation measure
<b>3. Social</b>	<ul style="list-style-type: none"> <li>• Social cultural practices</li> <li>• Corruption and economic crimes</li> </ul>	<ul style="list-style-type: none"> <li>• Low uptake of preference and reservation scheme</li> <li>• Unequal economic opportunities</li> <li>• Loss of public funds</li> <li>• Negative national/ corporate image</li> <li>• Loss of confidence in the public procurement system</li> </ul>	<ul style="list-style-type: none"> <li>• Sensitization/ community engagement</li> <li>• Monitoring compliance of PEs with the preference and reservations schemes</li> <li>• Collaboration with relevant agencies involved in the fight against corruption</li> <li>• Review internal control systems</li> <li>• Sensitization of stakeholders</li> </ul>

The strategic plan also contains the following relevant strategic objectives and strategies:

Theme	Objective	Strategy
1. Compliance and Enforcement of Standards	To strengthen performance & compliance monitoring of the public procurement and asset disposal system	ii. Strengthen compliance monitoring
	To enhance enforcement of the public procurement and asset disposal standards	iii. Improve efficiency in complaints management
		iv. Enhance efficiency of the debarment process
3. Legal & Regulatory Framework	To strengthen the public procurement and asset disposal policy, legal & regulatory framework	iii. Strengthen capacity building for persons involved in public procurement
4. Capacity Building and Technical Support	To equip persons involved in public procurement with requisite knowledge and skills on public procurement and asset disposal	i. Strengthen capacity building for persons involved in public procurement
6. Institutional Capacity	To strengthen institutional capacity	iii. Enhance good governance & risk management practices.



The strategic plan includes measures to “Promote adoption of sustainable procurement and asset disposal”:

- i. Collaborate with stakeholders in the development of guidelines on sustainable procurement
- ii. Disseminate guidelines and sensitize stakeholders on sustainable procurement

In addition, the strategic plan includes key performance indicators to measure increased awareness on sustainable procurement. There are also a range of measures related to the debarment and complaints.

The PPRA has published a range of guidance and instruments relevant to public procurement and human rights, which are explored in greater detail in Annex D – Guidance and Training.

The PPRA has developed a **Complaints Management Framework**.<sup>45</sup>

## **2.1 Complaints**

2.1.1 A complaint refers to information received which indicates or alleges that there is a breach of the Act, Regulations or directives of Authority.

2.1.2 Types of Complaints: Complaints may be specific or non-specific, written or oral and may come from a number of sources, such as individuals, mail, electronically, news media, private and other public institutions.

## **2.2 Specific Complaints**

2.2.1 A complaint is termed specific when the information is definite and indicates a breach on a procurement and asset disposal process.

## **2.3 Non-specific Complaints**

2.3.1 If the information is indefinite, general in nature, grounded in rumour or conjecture, or alleges activity which does not constitute a violation of the Act, the complaint is non-specific.

2.3.2 Investigations will not be conducted on non-specific complaint. However, a Procuring Entity with a high number of complaints relating to the same subject matter over a period of time shall be acted upon.

## **2.4 Confidentiality of Complaints**

2.4.1 If the complainant requests confidentiality, the complainant will be identified as a confidential source. The complainant's name will only appear in the original written

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<sup>45</sup> [Public Procurement Regulatory Authority, Complaints Management Framework](#)

complaint or an original memorandum relating to an oral complaint which is to be kept in the Report Centre. If it is not possible to pursue a matter or refer it to another agency without identifying the person who reported the issue, a complainant will be asked to indicate whether he or she consents to the identity being disclosed to another agency when the information is being provided.

## **2.5 Complaint Filing**

2.5.1 The Complaint Report Centre shall accept all complaints irrespective of their sources and allocate a unique identification number for each complaint.

2.5.2 Report Centre shall screen and determine whether or not the complaint relates to Public Procurement and Asset Disposal law. The report centre shall acknowledge receipt.

2.5.3 The Complaint Report Centre shall classify a complaint according to the stages of the procurement process.

2.5.4 If the complaint does not fall within the confines of the Public Procurement and Asset Disposal law, the complainant shall be advised accordingly.

## **2.6 Complaint Processing**

2.5.5 Upon receipt of a report or complaint the Report Centre shall register/log the information in the database or the system that is in use.

2.5.6 Once a complaint has been registered, it shall be received by the Director General for action. The complaint shall be presented to the Technical Directorate for determination as to whether to investigate or to act upon the complaint.

2.5.7 The Technical Directorate shall forward the complaint to the Manager- CIE for action either as a complaint or as an investigation.

2.5.8 The Manager shall assign the complaint to a CIE officer.

2.5.9 The CIE officer shall analyse the complaint, engage the procuring entity for a response and/or documents and provide feedback to the complaint and the PE.

2.5.10 The procedure is illustrated in the flowchart below.

The PPRA has developed a **Process on Complaints, Investigations and Enforcement**,<sup>46</sup> which details the following steps:

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<sup>46</sup> [Public Procurement Regulatory Authority, Process documentation - Complaints, Investigations and Enforcement](#)

STEPS/FLOWS/SEQUENCE			
Step	Event/Activity/Action	Time/No. of days	Strategy
1.	<b>Review of complaints from producing Entities</b> <ul style="list-style-type: none"> <li>Receives and register complaints</li> <li>Send acknowledgment letter to complainant</li> <li>Analyse complaint</li> <li>Respond to complainant</li> <li>Prepare report on complaints</li> </ul>	1 day 3 days 14 days 1 day Quarterly	Director General, General Manager-Technical Service, Manager, CIE CIE officer
2.	<b>Investigations</b> <ul style="list-style-type: none"> <li>DG Initiates the investigation</li> <li>Appoinment of investigators</li> <li>Conduct investigation</li> <li>Preapre draft report</li> <li>Incorporate PE's response on report</li> <li>Prepare final report, share with PE &amp; other agencies</li> <li>Prepare report on investigations</li> </ul>	1 day 1 day 30 days 7 days 14 days 1 day quarterly	Director General, General Manager-Technical Service, Manager, CIE CIE officer
3.	<b>Enforcement</b> <ul style="list-style-type: none"> <li>Identification of issue (s) that require follow-up</li> <li>Assignment of officer to engage the PE</li> <li>Preparation of report on implementation of directives</li> <li>Prepare report on enforcement issues</li> </ul>	Quarterly 1 day 7 days Quarterly	Director General, General Manager-Technical Service, Manager, CIE CIE officer

PPRA circular 01/2021 and reporting templates document<sup>47</sup> identify the mandatory reporting requirements for procuring entities and the frequency of submission of reports, including:

- A. Reports on General Procurement Transactions
- B. Report on Preferences and Reservation scheme
  - h. Report on all contract awards where Preferences and Reservation schemes are applied with disaggregated data
  - i. Six (6) Months report on Preferences and Reservation of contracts awarded to Youth, Women and Persons with Disability
  - j. Part of Annual Procurement Plan demonstrating application of the Preference and reservation schemes

<sup>47</sup> [Public Procurement Regulatory Authority, Circulars](#)

### **3. Public Procurement Administrative Review Board (PPARB)**

It is a central independent procurement appeals review board that is tasked ensure reasonable access to its services in all parts of the Republic.<sup>48</sup>

The board is tasked with:<sup>49</sup>

- a. reviewing, hearing and determining tendering and asset disposal disputes; and
- b. Performing any other function conferred to the Review Board by the Act, Regulations or any other written law.
- c. Developing rules and procedures to be gazetted by the Cabinet Secretary.

The Public Procurement Regulatory Authority provides secretariat and administrative services to the Review Board.

### **4. County Treasury**

PPDA recognises County Treasury as the organ responsible for implementation of public procurement and asset disposal policy at the county level (Section 33 (1)). The County Treasury among other roles is responsible for promoting preference and reservations schemes for small and micro-enterprises and other disadvantaged groups, citizen contractors, women, youth, PWDs, minorities and marginalised groups in public procurement at the county. It also maintains linkages with the National Treasury and Public Procurement Regulatory Authority and prepare and submit procurement plans and reports. The County Treasury has the authority to prescribe an institutional framework to provide for procurement, administration and management of common user items for the county government.

### **5. Kenya Institute of Supplies Management (KISM)**

KISM is a national body for professionals in the practice of procurement and supply chain management in Kenya. The Institute draws its mandate from the "Supplies Practitioners Management Act No.17 of 2007." This Act provides the legal framework within which the Institute is established and operates as a corporate body promoting learning, development of best practices, and application of the same to the practice of procurement and supply chain management.<sup>50</sup>

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48 Public Procurement and Asset Disposal Act, sec 27.

49 Ibid, sec 28.

50 [Kenya Institute of Supplies Management website](#)

## ANNEX C – STANDARD TENDER DOCUMENTS

In April 2021 the PPRA published 23 standard tender documents (STDs), which were updated in April 2022 and are available on the PPRA website.<sup>51</sup> Procuring entities are mandated to use these STDs although they can be “customized to the needs of the Procuring Entity”.<sup>52</sup> These STDs vary in scope and format, with some covering broad areas and others specific to certain sectors (e.g. health sector goods), with other STDs related to framework agreements, pre-qualification, and evaluation reports. As such, the content in these STDs related to human rights and sustainability varies considerably.

### **Debarment**

22 of the STDs state that debarred individuals and businesses should be prevented from bidding for tenders. The majority require that a tenderer submits a self-declaration form to declare they are not debarred.

### **Reservations**

18 of the STDs make provision for reservations of tenders for specific groups. 2 STDs do not allow for reservations and 3 STDs make no reference to this subject. Of the 18 STDs which make provisions for reservations, 9 STDs state that “No tender shall be reserved to more than one group”.

### **Code of Ethics**

19 of the STDs require that suppliers abide by the Code of Ethics, with the majority requiring suppliers to sign a specific form to this effect.

### **Requirements**

16 of the STDs state that “Requirements shall also include (if so required) the environmental, social, health and safety requirements to be satisfied by the Tenderer in executing the contract.” The other 7 STDs either do not contain information on requirements more broadly or on requirements related to sustainability and human rights.

In addition, Document 4: Standard Tender Document for Procurement of Goods states that “Technical Specifications shall be fully descriptive of the requirements in respect of, but not limited to, the following:

- Standards of materials and workmanship required for the production and manufacturing of the Goods.
- Any sustainable procurement technical requirements shall be clearly specified.”

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<sup>51</sup> [Public Procurement Regulatory Authority, Standard Tender Documents](#)

<sup>52</sup> The Instructions to Tenderers and the General Conditions of Contract can only be modified via requirements in the Tender Data Sheets and in Special Conditions of Contract.

Furthermore, Document 12: Standard Tender Document for Procurement of Design and Build (Turnkey) Contracts contains a section on preparing the 'Procuring Entity's Requirements' states that:

1.11 Any additional sustainable procurement technical requirements (beyond the ESHS requirements stated in the Environmental, Social, Health and Safety Requirements section below) shall be clearly specified. The sustainable procurement requirements may be specified to enable evaluation of such a requirement on a pass/fail basis and/ [or rated] criteria (point system), as appropriate.

1.12 Environmental, social, health and safety requirements; The Procuring Entity should use the services of a suitably qualified environmental, social, health and safety specialist/s to prepare this section, working with a procurement specialist/s. The Procuring Entity should attach or refer to the Procuring Entity's environmental, social, health and safety policies that will apply to the project.

#### 1.13 SUGGESTED CONTENT FOR AN ENVIRONMENTAL AND SOCIAL POLICY

1.13.1 The Works' policy goal, as a minimum, should be stated to integrate environmental protection, occupational and community health and safety, gender, equality, child protection, vulnerable people (including those with disabilities), gender-based violence, HIV/AIDS awareness and prevention and wide stakeholder engagement in the planning processes, programs, and activities of the parties involved in the execution of the Works. The policy should set the frame for monitoring, continuously improving processes and activities and for reporting on the compliance with the policy.

1.13.2 The policy should, as far as possible, be brief but specific and explicit, and measurable, to enable reporting of compliance with the policy in accordance with the Particular Conditions of the Contract Sub-Clause 4.21 and Appendix C to the General Conditions of Contract.

As a minimum, the policy is set out to the commitments to:

- i. apply good international industry practice to protect and conserve the natural environment and to minimize unavoidable impacts;
- ii. provide and maintain a healthy and safe work environment and safe systems of work;
- iii. protect the health and safety of local communities and users, with particular concern for those who are disabled, elderly, or otherwise vulnerable;
- iv. ensure that terms of employment and working conditions of all workers engaged in the Works meet the requirements of national labor laws of Kenya;
- v. be intolerant of, and enforce disciplinary measures for illegal activities. To be intolerant of, and enforce disciplinary measures for gender violence, child sacrifice, child defilement, and sexual harassment;
- vi. incorporate a gender perspective and provide an enabling environment where women and men have equal opportunity to participate in, and benefit from, planning and development of the Works;
- vii. work co-operatively, including with end users of the Works, relevant authorities,



- contractors and local communities;
- viii. engage with and listen to affected persons and organizations and be responsive to their concerns, with special regard for vulnerable, disabled, and elderly people;
- ix. provide an environment that fosters the exchange of information, views, and ideas that is free of any fear of retaliation;
- x. minimize the risk of HIV transmission and to mitigate the effects of HIV/AIDS associated with the execution of the Works;

1.13.3 The policy should be signed by the senior manager of the Procuring Entity. This is to signal the intent that it will be applied rigorously. When preparing the specifications have regard to the relevant General Conditions of Contract and Particular Conditions of Contract.

#### **Award criteria**

Of the 19 STDs that reference award criteria, 15 are based on the award criteria of lowest/ best evaluated tender. 2 STDs detail more complex award criteria, 1 is based on “substantially responsive and has been determined to be the highest tendered price, subject to the reserve price”,<sup>53</sup> and 1 is based on the lowest evaluated quotation.<sup>54</sup>

#### **Evaluation and qualification criteria**

When assessing the lowest/ best evaluated tender, 11 STDs specify that “the criteria to determine the Lowest Evaluated Tender that would be considered for contract award; that is the tenderer that meets the qualification criteria and whose tender has been determined to be:

- a. Substantially responsive to the bidding document, and
- b. The lowest evaluated cost.

No other criterion shall be added by the Procuring Entity.”

1 of these 11 STDs provides a table with information on how to score environmental and social impact requirements.

4 STDs provide for special additional criteria including sustainability. They state that “If specific sustainable procurement technical requirements have been specified in Section VII- Specification, either state that (i) those requirements will be evaluated on a pass/fail (compliance basis) or otherwise (ii) in addition to evaluating those requirements on a pass/fail (compliance basis), if applicable, specify the monetary adjustments to be applied to Tender Prices for comparison purposes on account of Tenders that exceed the specified minimum sustainable procurement technical requirements.”

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<sup>53</sup> [Document 8: Standard Tender Document for Disposals \(Goods, Vehicles and Vessels and Plant/ Equipment\)](#)

<sup>54</sup> [Document 21: Standard Quotation Document for Procurement of Request for Quotations for Small Contracts for Works, Goods and Non-consulting Services](#)

### **Declarations of harm by national authorities**

11 STDs state that item to be procured (varying on the focus on the STD) “with characteristics that have been declared by the relevant national environmental protection agency or by other competent authority as harmful to human beings and to the environment shall not be eligible for procurement”.

4 STDs state that “A Tenderer may be considered ineligible if he/she offers goods, works and production processes with characteristics that have been declared by the relevant national environmental protection agency or by other competent authority as harmful to human beings and to the environment shall not be eligible for procurement”.

### **Human rights clauses in the General Conditions of Contract**

18 STDs contain general conditions of contract (GCC). These vary depending on the nature and focus of the STD.

5 STDs contain clauses human rights clauses in their GCC. The most extensive of these are found in Document 1: Standard Tender Document for Procurement of Works (Building and Associated Civil Engineering Works) and Document 2: Standard Tender Document for Procurement of Works (Roads, Water Bridges etc.), which include clauses on:

- Rates of Wages and Conditions of Labor
- Labor Laws
  - The Contractor shall comply with all the relevant labor Laws applicable to the Contractor’s Personnel, including Laws relating to their employment, health, safety, welfare, immigration and emigration, and shall allow them all their legal rights.
  - The Contractor shall require his employees to obey all applicable Laws, including those concerning safety at work.
- Facilities for Staff and Labor
- Health and Safety
- Supply of Foodstuffs
- Supply of Water
- Festivals and Religious Customs
- Prohibition of Forced or Compulsory Labor
- Prohibition of Harmful Child Labor
- Employment Records of Workers
- Workers’ Organizations
- Non-Discrimination and Equal Opportunity

3 STDs contain clauses in their GCC which state that “The Service Provider shall conform to the sustainable procurement contractual provisions, if and as specified in the SCC.”

### **Site inspections and audits**

All of the 18 STDs which contain a GCC include a clauses to allow the procuring entity and/ or representatives to conduct on-site inspections and/ or audits of suppliers and sub-contactors.

### **Suspension and termination**

None of the 18 STDs which contain a GCC explicitly list human rights abuses as a ground for suspension or termination of a contract. However, clauses for suspension and/ or termination for breach of contract are broadly constructed and should allow for termination where local human rights laws have been broken. Furthermore, the GCCs contain clauses allowing the procuring entity to termination for convenience.

### **Progress reports and reporting specific incidents**

3 STDs include a clauses on progress reports which requires suppliers to include information with their report on “safety statistics, including details of any hazardous incidents and activities relating to environmental aspects and public relations”

Document 2: Standard Tender Document for Procurement of Works (Roads, Water Bridges etc.) is the only STD which requires notification in relation to human rights abuses, stating in the GCC that:

“The Contractor shall provide immediate notification to the Engineer of incidents in the following categories. Full details of such incidents shall be provided to the Engineer within the time frame agreed with the Engineer.

- a. confirmed or likely violation of any law or international agreement;
- b. any fatality or serious injury;
- c. significant adverse effects or damage to private property (e.g. vehicle accident, damage from fly rock, working beyond the boundary);
- d. major pollution of drinking water aquifer or damage or destruction of rare or endangered habitat (including protected areas) or species; or
- e. any allegation of sexual harassment or sexual misbehavior, child abuse, defilement, or other violations involving children.”

## ANNEX D – GUIDANCE AND TRAINING

The PPRA has published manuals and guidance which are available on its website.<sup>55</sup>

### **Public Procurement and Disposal General Manual, First Edition, March 2009<sup>56</sup>**

This manual provides overarching guidance to public procurers. Although this manual does not directly address human rights, the following sections are relevant when considering human rights in public procurement:

#### 2.5 APPLICABLE ETHICS IN PROCUREMENT

“Do not discriminate on the basis of race, gender, party affiliation, religion or ethnicity”

“(c) Equal Opportunity: Any form of discrimination discourages participation in public procurement and undermines any efforts to achieve value for money through open competition. Consequently, no Procuring Entity or Procurement Officer may discriminate against any potential bidders or bidders based upon gender, ethnicity, religious affiliation, physical disability, or party affiliation in any procurement proceeding, except specifically and only where such discrimination is a direct and unavoidable consequence of a preference program instituted by the PPOA. Procuring Entities shall endeavour in developing shortlists to reach out to a broad mix of bidders that reflect the diversity in the communities within which they operate.”

#### 2.6 PROMOTION OF TRANSPARENCY

“All Procuring Entities shall to the extent possible make transparent their procurement proceedings by making public their procurement announcements and making public the results of procurement proceedings. It falls on the procurement units to ensure that such practices are adhered to and implemented.”

#### 2.7 RESPONSIBILITY, AUTHORITY AND ACCOUNTABILITY

“(a) Conduct of Bidders and Contractors

Bidders as well as contractors shall at all times abide by their obligations under the Public Procurement and Disposal Act 2005 and the Public Procurement and Disposal Regulations 2006, this Manual, procurement contracts, and other instruments applicable to their conduct and activities related to procurement.”

#### 2.9 DEBARMENT OF BIDDERS AND CONTRACTORS

“The PPOA may debar a bidder or contractor from participating in procurement proceedings on the ground that the bidder or contractor: ...

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<sup>55</sup> [Public Procurement Regulatory Authority, Manuals](#)

<sup>56</sup> NB: The Public Procurement and Disposal General Manual guidance was written in 2009 and refers to the PPOA, which is now known as the PPRA.

(vi) Has breached the Code of Ethics issued by PPOA under Section 139 of the Act”

## 2.12 PREFERENCES AND RESERVATIONS

The PPOA may issue guidelines for the application of the preference schemes by Procuring Entities in the evaluation of bids in accordance with the Procurement Act and Regulations.

## 2.13 PROMOTING ENVIRONMENTAL PROTECTION THROUGH PUBLIC PROCUREMENT

This manual, consistent with the objectives of the Procurement Law and the Regulations, seeks to promote sound principles of environmental protection in public procurement in Kenya. Kenya has ratified the Kyoto Agreement. Measures to protect the environment should be introduced in the design of a procurement requirement wherever and whenever possible.

The improvement of the environment and the mitigation of any negative environmental impact, by procurement of goods that require fewer resources for production, involve reduced levels of emissions and toxins in their production and in their composition and result in less waste and pollution over their lifetime is a constant objective. For example, the achievement of cost savings by procuring energy efficient goods and technology can be done through careful procurement planning.

Environmental protection can be enhanced by incorporating environmental protection factors in the evaluation process and liaising with the relevant environmental regulatory bodies. Examples of environmental protection factors that may be considered in the tender design and evaluation of bids, provided these factors are directly indicated in the bidding documentation, may include but not be limited to:

- i. Carbon foot print;
- ii. Level of forest degradation;
- iii. Emission or spillage of toxic chemicals;
- iv. The level of non bio-degradable waste;
- v. Threat to levels of biodiversity; and
- vi. Levels or radioactive materials.

Particularly in the specifications, these designs should be considered. Consultations with the environmental regulatory authority will be necessary.

## 9.6 RISK MANAGEMENT AND MAINTENANCE OF RISKS REGISTER

Risk is the single word that determines every contract. Adequate steps for risk mitigation must be taken in all public procurement contracts. Where the tender document so requires, an unconditional performance security must be provided by the successful tenderer issued by a reputable bank or a PPOA approved insurance company based in Kenya or by cash. Where a tender is international the security must be partly payable in Kenya Shillings and be issued by local institutions. The value of

the two securities shall be in the same proportions of foreign and local currencies as requested in the form of foreign currency requirements.

Failure of the successful tenderer to lodge the required performance security shall constitute a breach of contract and sufficient grounds for the annulment of the award and forfeiture of the tender security and any other remedy under the contract. In the circumstance the procuring entity may award the contract to the next ranked tenderer. The greatest risks which must be mitigated in the management of procurement contracts are:

- a. The supplier delivering late or not delivering at all.
- b. The quality of the required goods, works or services being of inferior quality
- c. Being charged a higher cost than what the contract provided for.
- d. The risk of paying for work not done

A risks register should be maintained in which identified risks should be recorded and monitored. The common contract risks that should be watched are:

- i. Incomplete or incorrect specifications.
- ii. Poor communication.
- iii. Supplier lacking sufficient resources.
- iv. Production problems.
- v. Quality problems including technology.
- vi. Shipment details.
- vii. Underestimation of costs by supplier.
- viii. Inflation trends.
- ix. Unexpected events.

Any risks identified shall be isolated and addressed before it is too late.

### **User Guide to the Public Procurement and Disposal Act, 2005, and The Public Procurement and Disposal Regulations, 2006, Published December 2014**

This user guide, published in 2014, provides a summary of the different bodies involved in public procurement and provides a summary of how procurement is conducted. It is not primarily concerned with human rights and sustainability and does not contain content on these topics.

### **Sector specific manuals, 2009**

In 2009 the PPRA published a range of manuals related to the following sectors:

- ICT
- Insurance Sector
- Non-intellectual services sector
- Schools and colleges
- Works
- Health
- Projects

None of these manuals directly address sustainability or human rights.



**Kenya Institute of Supplies Management (KISM) training**

KISM provides practical training on the standard tender documents (see Annex C) to staff involved in procurement activities in public sector organizations. This training is also open to the private sector, NGOs, and SACCO staff.<sup>57</sup> There is no available information online detailing how sustainability and human rights are reflected in these trainings

KISM hosts classes for the Chartered Institute of Procurement & Supply program, which contains content on sustainable public procurement from an international perspective.

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<sup>57</sup> [Kenya Institute of Supplies Management, CPD Programs: Upcoming](#)

## ANNEX E – THE PROCUREMENT LIFECYCLE IN KENYA

Procurement lifecycle in Kenya	
<b>Initiation</b>	A procurement process is initiated by the Head of a particular Department in the entity through a requisition to the Head of the Procurement who will process it. The requisition should be accompanied by specifications, bills of quantities, reasonable dates of delivery, terms of reference, environmental and social impact assessment reports. Estimation of the value of goods and services should be realistic and based on information that is up to date. Section 73 & Regulation 71(2)
<b>Invitation to tender</b>	The invitation must have the name and address of the procuring entity, the tender number of the procurement, a description of the goods and services being procured and the time limit, the place to obtain, submit and open the tender documents, a declaration that a tender is open to only eligible tenderers and any other necessary information. By recorded delivery, tender documents will then be sent to eligible bidders. Section 74 (1-2).
<b>Preparation of tender documents</b>	A procuring entity may amend the tender documents at any time before the deadline for submitting tenders by issuing an addendum without materially altering the substance of the original tender. An amendment may be made on the procuring entity's own initiative or in response to an inquiry by a candidate or tenderer (Section 75 (1-5)).
<b>Submission and receipt of tenders</b>	The submission and receipt of tenders should be done before the deadline for acceptance by the procuring entity either in electronic or manual form, and be in writing, signed and in the case of manual submission, should be sealed in an envelope and bear the tender number assigned to the procurement (Section 77(1-7)).
<b>Opening and responsiveness of tenders</b>	Those submitting tenders or their representatives may attend the opening of tenders. An accounting officer of a procuring entity shall appoint a Tender Opening Committee of at least 3 people specifically for the procurement. The Tender Opening Committee shall assign an identification number to each tender and record the number of pages received. A responsive tender is one that has conformed to all the requirements expected and minor deviations or errors and oversights that could be corrected do not affect its eligibility. (Sections 78 &79)

<p><b>Evaluation</b></p>	<p>The Evaluation Committee appointed by the accounting officer evaluates and compares the responsive tenders within 30 days using the procedures and criteria set out in the tender documents and in the tender for professional services and also as per the provisions of the PPDA and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered. A procuring entity may request a clarification of a tender from tenderer to assist in the evaluation and comparison of tenders. Section 80 &amp;81</p> <p>The committee is required to write and submit to the Head of Procurement an evaluation report containing a summary of the process once they are done.</p> <p>After evaluation but before award, the evaluation committee <b>may conduct due diligence to confirm the qualification of the tenderer</b> who submitted the bid that's recommended for award of tender (Section 83 and Regulation 80). Due diligence is conducted based on Sections 55 and 86 of the Act.</p>
<p><b>Professional opinion recommendation</b></p>	<p>The Head of Procurement reviews the submitted evaluation report, makes comments and provides a signed professional opinion to the Accounting Officer which shall be taken into account while awarding the tender. The Head of Procurement will inform the decision of the award of contract to the successful tenderers. Section 84-86.</p>
<p><b>Notification of intention to enter into contract</b></p>	<p>The Accounting Officer of the Procuring Entity notifies in writing the successful bidder that their tender has been accepted who will also in writing signify the acceptance of the award within the specified time. Unsuccessful tenderers will also be notified in writing and be informed of the successful tenderer with reasons thereof. Section 87</p>
<p><b>Contract administration</b></p>	<p>This task involves ensuring that the right quality and quantity of goods, works and services are delivered and upon confirmation a certificate of acceptance is issued. Both the entity's accounting officer and procurement lead are responsible, and where the goods, works or services are of a technical nature and specifications were provided by subject matter experts, they are also involved in the confirmation process (Section 150). Complex and specialized contracts are overseen by a contract implementation team (Section 151).</p>

<b>Contract monitoring</b>	Where contract performance is over a long period, the procurement lead is responsible for preparing monthly progress reports which are submitted to the entity's accounting officer (Section 152).
<b>Contract close out</b>	Immediately upon completion the accounting officer shall close out a procurement and issue a certificate prepared by the procurement lead (Section 153). For complex and specialised contracts, the certificate of completion is prepared by the technical department (Section 154).





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