



EMERGENCY PUBLIC PROCUREMENT IN KENYA

THE CASE OF THE HEALTH
SECTOR PROCURING FOR COVID-19

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List of Abbreviations

AGPO	Access to Government Procurement Opportunities
EACC	Ethic and Anti-Corruption Commission
KEBS	Kenya Bureau of Standards
KEMSA	Kenya Medical Supplies Agency
MDAs	Ministries, Departments, and Agencies
MOH	Ministry of Health
OECD	The Organisation for Economic Co-operation and Development
OGP	Open Government Partnership
OPP	Open Procurement Partnership
PPE	Personal and Protective Equipment
PPL	Public Procurement Laws
PPOA	Public Procurement Oversight Authority
PPRA	Public Procurement Regulatory Authority
WHO	World Health Organisation

1. BACKGROUND

The main function of a government is to provide its citizens with essential services such as health, education, infrastructure and defence. These services are realised through Public Procurement¹. Public Procurement refers to the process of purchasing goods and services by public entities so as to meet essential public needs of the citizenry². The process seeks to establish the availability of the right materials, at the right time, with good quality and quantities, and at good prices. So as to be effective and efficient in the use of public resources, the process requires guidelines that provide for performance standards that can continuously be monitored and evaluated³. To this end, the Kenyan Public Procurement System has gone through many transformative changes from a system with no regulations to one embedded within the rule of law, and committing to major global goals/reforms.

1.1. National Reforms in the Public Procurement System

In Kenya, the Public Procurement System was a system with no regulations in the 1960s. However, the system started to evolve in the 1970s, 1980s and 1990s through regulations in Treasury Circulars. It further evolved to an orderly legally regulated procurement system in March, 2001 under the Exchequer and Audit (Public Procurement) Regulations. This was followed by a parliament approved Public Procurement and Disposal Act in 2005 as a result of an overall Public Finance Reform agenda. In 2007, the Act came into force and established the Public Procurement Oversight Authority (PPOA) as regulatory body for development and oversight of the Kenyan Public Procurement System⁴.

The promulgation of the Constitution of Kenya, 2010 gave prominence to national values and the principles of governance. Subsequently, Article 227 of the constitution requires public procurement systems to be fair, equitable, transparent, competitive and cost effective⁵. It also required parliament to pass relevant procurement legislation to which the Public Procurement and Asset Disposal Act, 2015 was passed. The Act changed the mandate of the Public Procurement Oversight Authority (PPOA), to largely assume a regulatory function, which then transited to Public Procurement Regulatory Authority (PPRA). The Act also establishes the PPRA functions to include, among other functions: to monitor, assess and review the Public Procurement and Asset Disposal System so as to ensure they respect national values⁶ and guiding principles of public procurement and asset disposal as under Section 3 of the Act.

Furthermore, the Constitution and Public Procurement Laws (PPL) also provide for supplementary measures of oversight by the Ethic and Anti-Corruption Commission (EACC); the Office of the Auditor General (OAG); various procuring entities of Government Ministries, Departments, and Agencies (MDAs) at both National and County level; as well as the relevant parliamentary committees to reinforce the implementation of the provisions under Article 227.

¹ Nyambariga, 2016, *Corruption in Public Procurement*

² Kiawa, 2012, *Accountability in Public Procurement*

³ Nyambariga, 2016, *Corruption in Public Procurement*

⁴ Ochieng and Muehle, 2012, *Reforms in Procurement System*

⁵ Adili 145, *Public Procurement in Kenya*

⁶ PPRA History

1.2. Global Goals and Reforms in Public Procurement

The constitutional reforms in Kenya have enshrined citizen engagement and transparency in policy making. The commitments to these, and other national values and principles of governance, have been demonstrated through the participation in Open Government Partnership (OGP)⁷. One of the commitments the country has made is in the area of open contracting. The principles of open contracting seek to transform how public contracting is undertaken by engaging stakeholders across government, private sector and civil society to drive systemic reforms⁸. Subsequently, through the Kenya Open Data Initiative, Kenya was the first Sub-Saharan African country to make government data open in June, 2011⁹. In addition, Kenya has made documented commitments including the OGP National Action Plans and the Elgeyo Marakwet County subnational OGP action plan as well as launched its first sub-national contracting portal in Makueni County.

Despite all the measures, some in the aforementioned, put in place to enhance management and oversight of public procurement, the Auditor General's audit reports frequently mention cases of non-compliance with the procurement laws and procedures. In addition to that, several issues around public procurement have also been reported by the media with those being accused facing no major repercussions. One of the identified issues is the abuse of the emergency procurement process. This analysis seeks to facilitate the public discourse on emergency public procurement so as to strengthen public procurement reforms, and to ensure that entangled taxpayer's money within the public procurement system is safeguarded.

2. EMERGENCY PUBLIC PROCUREMENT PRACTICES

An 'emergency' can be described as a sudden unforeseen event. It can result in injury, loss of life or critical damage to property or infrastructure. Emergency situations can include:

1. natural or manmade disasters including earthquakes, tsunamis and flooding;
2. failures of critical infrastructure or equipment: like failure of critical hospital infrastructure;
3. critical health or environmental emergencies such like a pandemic or a food safety incident;
4. political emergencies including wars, coups, and civil insurrections; critical security emergencies such as a terrorist attack; and
5. unanticipated events that make it impossible for an agency to perform a statutory or critical function in the necessary timeframe for example the destruction of critical election supplies immediately prior to an election would be an emergency for the Electoral Commission¹⁰.

In a genuine emergency, countries become exposed to multiple risks and it therefore becomes of vital importance that authorities make appropriate use of the available public resources to mitigate, contain and recover from the adverse effects of such events¹¹. The government will need to be flexible in how they procure goods and services that are required for their response¹². Preference is given to accelerated procurement procedures to ensure that public entity operations are efficient during times

⁷ OGP, 2020, *The OGP story in Kenya*

⁸ OPP, *What is open contracting?*

⁹ OGP, 2020, *The OGP story in Kenya*

¹⁰ *Guide to Emergency Procurement*

¹¹ TI, 2020, *Public Procurement During Emergency*

¹² Ibid.

that demand enhanced flexibility, responsiveness and accountability¹³. Thus, the public procurement process in times of emergency/crisis is mainly characterised by: deviation from the standard procedures; deadline reductions and other procedural simplifications; and modification of contracts and negotiations¹⁴. As such, emergency procurements procedures raise the risk of waste, fraud and corruption resulting from human error, lack of coordination and the sheer amount of funds that are transferred in a short period of time¹⁵.

Emergency/Crisis situations have been founded to provide ripe ground for corruption through reduced financial controls, soaring funding levels and frequent staff change. Additionally, the pressure to act and to be seen to be acting by the media militates against cooperation among individual agencies. As a result, many purchases occur in an uncoordinated, hurried manner that only amplifies the potential for fraud. In such cases, corruption often falls under the forms of misuse of legitimate derogations from the rules, or hidden violations of procurement rules— where it appears that normal procedures have been followed¹⁶. To put this in perspective, this analysis highlights the procurement by the health sector for COVID-19 in Kenya.

3. HEALTH PROCURING FOR COVID-19 IN KENYA

In 2020, the world experienced the outbreak of the novel coronavirus (COVID-19) that was eventually declared a pandemic by the World Health Organization (WHO) on March 11th, 2020. As a result, public procurement became a critical component of any government’s response to the threat to life the pandemic posed¹⁷. In Kenya, the first confirmed case was announced on 13th March, 2020 in Kajiado County, and this prompted the implementation of the country’s response strategy which included evoking emergency public procurement. This was aimed at meeting the unanticipated demand of goods and services as a result of the pandemic. Particularly in the Health Sector, among the items facing increasing demand included face masks, protective gloves, ventilators, beds, medicines, intensive care material, COVID-19 tests, lab supplies and hospital infrastructure. In order to better understand the context, we observe how health sector procurement in Kenya is undertaken.

3.1. Health Sector Procurement in Kenya

The health sector in Kenya is a complicated web of vertical health programs with parallel logistics systems that manage health commodities. To improve efficiency within the health sector the government decided to transform its central and regional medical supply stores into a parastatal organisation that would apply private sector management techniques to supply the public health systems with the commodities it requires¹⁸. Subsequently, the Kenya Medical Supplies Agency (KEMSA) was established as a state corporate organization through a legal notice No. 17 of 2000, Cap 466 of the Laws of Kenya in 2000 and was operational in 2005. An Act of parliament in 2013,

¹³ OECD Tool: *Guideline for Accelerated Procurement*

¹⁴ Schultz and Søreide, 2008, *Corruption in emergency procurement*

¹⁵ OECD Tool: *Guideline for Accelerated Procurement*

¹⁶ Schultz and Søreide, 2008, *Corruption in emergency procurement*

¹⁷ OGP, 2020, Public Procurement during Coronavirus

¹⁸ Aronovich and Kinzett, 2001, *Kenya: Health Commodity Supply Chains*

further transformed KEMSA from being an *Agency* to an *Authority* with the mandate to procure, warehouse and distribute medical commodities to public health facilities¹⁹.

As the country went on to embrace a devolved system of governance, the health function was devolved to the Counties. Similarly, KEMSA realigned itself with the devolved system to ensure effectiveness in the access of medical commodities by public health facilities. Therefore, county health facilities order and pay for their medical commodities on a demand driven supply system. Meanwhile, KEMSA stands responsible for ensuring that its stocks are in line with market demands and that the necessary transport system is in place to ensure timely dispatch of all commodities ordered by the county health facilities²⁰.

3.2. The COVID-19 Health Sector Procurement

With the announcement of the first confirmed case of COVID-19 in the country, the government and its relevant entities seemed to spring into action in a quick response to the pandemic. This included the formation of various sector specific committees and technical working groups so as to ensure concerted efforts from the process of resource mobilisation all through to procurement for the provision of essential goods and services to the citizens. Nonetheless, there lacked an intergovernmental guiding framework to coordinate the actions of the National Government, County Governments and other relevant public entities.²¹

Whereas the financing component of the response (especially for the health sector) seemed to be fruitful, the purchasing component did not go on without various shortcomings. When addressing the fundamental questions of what to buy; from where to buy; and how to buy, the health sector failed to apply the best practices and guiding principles of public procurement²². Though the factors contributing to such shortfalls are yet to be determined given the on-going investigations, NTA has assessed this particular procurement with reference to Schultz and Søreide, 2008²³.

The problems faced may be mainly attributed to the fact that the pandemic created a significant rise in the demand for certain medical commodities thus providing an opportunity for malpractice. This is because the resultant price soars, making it harder to detect improper costs. Other contributing factors may also have included: deviation from standard procedures by evoking emergency public procurement which allowed for discretion, and reduced financial controls; pressure to spend quickly given the accelerated nature of the procurement being done; as well as a lack of experience in purchasing given that COVID-19 was a new disease. Moreover, the kind of technology of the commodities demanded (such like ICU equipment) may have also been a contributing factor given that complex and advanced technological commodities make it easier to conceal corruption²⁴.

With some of the factors contributing to mismanagement present, corrupt practices and rent seeking were bound to be observed. This is because in an emergency public procurement the problem does not lie within the breach of legal provision but with the breach of national values and guiding

¹⁹ KEMSA historical background

²⁰ KEMSA business model

²¹ Gitau, LSK, 2020. *LSK Discourse on Procurement*

²² Ibid.

²³ Schultz and Søreide, 2008, *Corruption in emergency procurement*

²⁴ Ibid.

principles. As such, the Auditor General through a special audit on the utilisation of the COVID-19 funds has determined that Kenya has lost KSh. 2.3B by way of a procurement scandal in KEMSA. The observable forms of such unscrupulous practices often fall under one of the following two categories: misuse of legitimate derogations from the rules; and hidden violations of procurement rules. On the one hand, the Ministry of Health (MOH) through KEMSA seem to have misused legitimate derogations with allegations of exaggerating the emergency, and misusing discretionary power and lax requirements. On the other hand, the ministry has also been accused of violating procurement and best practices in regards to shortlisting and prequalification, misuse of confidential information as well as the concerns of beneficial ownership²⁵.

Furthermore, given the accelerated nature of the procurement to ensure a quick response, the government did not seem to take into consideration various COVID-19 policy recommendations including the OGP's A Guide to Open Government and the Coronavirus: Public Procurement; the World Bank 2020 Kenya Economic Update which provided policy options during the COVID-19 pandemic; and the OECD COVID-19 Competition and Emergency Procurement brief.

3.3. Outcomes of the COVID-19 Health Sector Procurement

Given the above observable characteristics of the health sector emergency procurement for COVID-19, we cite the following outcomes that which some have already been observed while others we have been logically deduced:

1. Lack of coordination between the entities involved in the health sector supply management (the Ministry of Health, KEMSA and Counties) resulted in some of the counties not fully utilising the funds awarded. Among such counties is Nairobi County which was most affected by the pandemic. This increases the risk of the pandemic to human life.
2. The failure to ensure effective coordination among different government entities meant that the fundamental questions of what, from whom and how to buy were not appropriately answered. Consequently, the country has come up unable to effectively meet the demands for the pandemic with shortages in PPEs, testing kits, and isolation and control infrastructure.
3. Given the allegations of mismanagement as well as the abandonment of best practices and guiding principles of public procurement, the quality and quantity of procured goods and services stands to be questioned. For instance, there have been cases where the standards of available PPEs have been questioned by the Kenya Bureau of Standard (KEBS).
4. Malpractice in the emergency procurement process usually results in exaggerated investments in certain products or services at the expense of other needs. This is because the complexity of technology affects the opportunity for corruption.²⁶ As such, the government may have given more preference to procure ICU equipment over PPEs for the potential rent gains increasing the risk of the pandemic to human life.
5. The response to the pandemic also called upon the consolidation of various public resources thus neglecting other health care programs which will limit the access by patients to essential health care human resource and essential medicines. There have even been cases where public health facilities have been shut down.²⁷

²⁵ Schultz and Søreide, 2008, *Corruption in emergency procurement*

²⁶ Ibid.

²⁷ Gitau, LSK, 2020. *LSK Discourse on Procurement*

6. Additionally, it has been reported that the health supply management agencies in their response to the pandemic are in breach of budget provisions (i.e. KEMSA has gone beyond its budget while various County Governments have not fully utilised their resources). This may bring constraints to the provision of other health services and programmes years from now as the exchequer will be at liberty to review the funds allocated to them.
7. Furthermore, the concerns of mismanagement have resulted in the Senate ad hoc Committee on COVID-19 requesting that the Auditor General undertake special audits on the utilization of the COVID-19 funds. Though the full report is yet to be publicly disseminated, we foresee that the observed violations in the principle of public procurement will make it difficult to: accurately confirm the completeness of financial transactions; ascertain the value for public money; as well as determine the completeness of projects.
8. It is worth noting that unprincipled practices create a market of best bribers. This is because higher profits and more contracts enable dishonest firms to augment further its market power through honest mechanisms like extensive marketing and reduced prices²⁸. We can therefore anticipate a prevalence of dishonest firms and exclusion of marginalised suppliers. This will retrograde the efforts of the Access to Government Procurement Opportunities (AGPO) Program.
9. Furthermore, the ultimate outcome of this market of best bribers will be higher prices. Exaggerated/Inflated prices will be the norm and all buyers, including both the government and private entities, end up paying more for products and services²⁹. This will be in violation of Section 3 of the Public Procurement and Asset Disposal Act, 2015.
10. Finally, the alluded mismanagement and malpractice of emergency procurement by the health sector will result in undermined trust in individual agencies involved³⁰. In this case, KEMSA and the Ministry of Health as a whole will from now on be associated with being involved in corrupt practices. This will most likely affect the grants awarded by our foreign relations for the improvement of our public health.

4. CONCLUSION AND RECOMMENDATIONS

As noted in the analysis above, emergency public procurement is accompanied with the risk of waste, fraud and corruption as the pressure to be seen to be acting first and fastest militates against effective control. Nevertheless, it is important to emphasize that the general public procurement principles and best practices be applied when procuring for crisis given the negative effects associated with emergency public procurement. For the case of Kenya, we note that formal procurement procedures and legislation are in place but are unclear or inadequate during the times of an emergency. This suggests that the main problem sits with our cultural and value system rather than the legal systems. It is on this basis that NTA makes the following recommendations that are aligned with the principles of open contracting:

1. The Government of Kenya should develop and publish an Emergency Public Procurement Guideline framework to give policy provisions for the emergency public procurement to include measures for mitigating the risks such as prevention, and monitoring and evaluation.

²⁸ Schultz and Søreide, 2008, *Corruption in emergency procurement*

²⁹ Ibid.

³⁰ Ibid.

This would follow the example of countries like New Zealand and Tanzania who have already developed their emergency procurement guidelines.

2. The development of the emergency procurement guidelines as well as other public procurement related initiatives should make beneficiary participation paramount. The fundamental question of what to buy, from whom and how should be addressed together with relevant sector professionals in alignment with the provisions of Section 46(3) and (6), section 104 of the Public Procurement and Asset Disposal Act, 2015. This would also ensure that the provisions of Section 103 and 104 of the Act on Direct Procurement are exercised consciously in times of emergencies.
3. Additionally, we recommend giving importance to building partnerships with business and civil society for open procurement, especially in times of crisis. By way of example, the Open Procurement Partnership suggests issuing a list of essential medicines and devices in response to COVID-19 so markets can react accordingly in addition to encouraging start-ups and data-driven civil tech projects.
4. Coordination between related government agencies is important to ensure that they set clear goals and priorities, and consolidate emergency committees for quick decision-making. Section 49 of the Public Procurement and Asset Disposal Act, 2015 provides for the establishment of a procuring agency amongst agencies with common interests. If KEMSA and COG had utilised this provision to enhance coordination perhaps county governments would have effectively utilised the funds provided to them.
5. Using and sharing open procurement data so as to analyse and share information for the prediction and management of the critical supply chains during crisis. Though the president has already ordered the publication of COVID-19 related tender documents, this should be provided for in a policy to ensure that the principle is applied in all emergency procurement processes. There should also be provisions to ensure high-quality, open and complete data; disclosure of technical comments from suppliers; and publicising all contract awards under the emergency framework.
6. Engaging Civil Society with trust and support to play the important role in monitoring efficient spending and delivery of goods and services in all public procurement processes but most especially in times of emergencies. The open contracting partnership has advised governments to create digital portals that are easy to access and use, which can allow citizens to track all Coronavirus-related purchases. This would strengthen the public procurement monitoring chain which is critical in times of emergencies.
7. The Public Procurement Administrative and Review Board should consider exercising the provisions of Section 41 of the Public Procurement and Asset Disposal Act, 2015 on debarment. In light of the far-reaching negative outcomes the health sector procuring for COVID-19 will likely have, we feel that debarment is the only befitting retribution to perpetrating firms. Debarment should also be applied to all cases of malpractice as it will effectively safeguard the market from bribers. Moreover, PPRA should also consider including the list of debarred firms in their database for public knowledge.

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