



CSO GUIDE

TO PUBLIC PROCUREMENT IN KENYA.



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CSOs GUIDE TO PUBLIC PROCUREMENT IN KENYA

A user guide to assist various stakeholders in understanding and participating in Kenya's National and County procurement process.

What is Public Procurement?

Public Procurement is the acquisition of any type of works, assets, services or goods by procuring entities using public funds.

Common Procurement Terms

Procuring Entity

is a public institution making an acquisition or asset disposal. A public entity can include the national government, County government, ministry, state department/state corporations, the Judiciary, a public school, public university/college, a pension fund for a public entity and any other establishments that use public money for purposes of procurement.

Accounting Officer

is responsible for the management of finances in the public entity such as a Principal Secretary in the Ministry or a Chief Officer in a County Department. This officer approves and sign all contracts.

Tender

is an offer in writing by a person to supply goods, services or works at a price or to acquire or dispose of equipment/assets. This is in response to an invitation to tender by a public entity.

Tenderer

is the person who submits a tender pursuant to an invitation by a public entity.

Tender Security

is a guarantee required from tenderers by the procuring entity to secure the fulfilment of any obligation in the tender process e.g. cash deposits, promissory notes or other guarantees from institutions as may be prescribed.

Contract Period

is the number of days between contract start date and end date as outlined in the contract.

Price schedule or bills of quantities

a list giving a breakdown of the item(s) to be procured and the prices as submitted by the tenderer.

Pre-qualified suppliers

are providers who have undergone a prequalification procedure and are shortlisted as tenderers in a procurement process.

E-procurement

is the process of procurement using electronic medium such as the internet or other information and communication technologies.

Preference and Reservations

is the right to select a tenderer from an identified target group mostly to increase their chances of participating in procurement e.g. Women, Youth and Persons Living with Disabilities. An example is the Access to Government Procurement Opportunities (AGPO) that reserves at least 30% of procurement budget for youth, women and persons with disability.

PROCUREMENT LAWS AND REGULATIONS IN KENYA

LAWS AND REGULATIONS

CONSTITUTION OF KENYA, Article 227

THE PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT, 2015 (PPAD ACT)

EXECUTIVE ORDER NO.2 OF 2018

PUBLIC FINANCE MANAGEMENT ACT 2012

THE PUBLIC PROCUREMENT AND ASSET DISPOSAL REGULATIONS, 2020

PROVISION

When a state organ or any other public entity contracts for goods/ services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.

Provides procedures for efficient public procurement and assets disposal by public entities. The Act defines the persons to perform specific roles in relation to procurement (who), how the roles are exercised (process/procedure) and the timelines for various steps in the process (when).

Requires all public entities to continuously update and publicize procurement information.

It is the main legislation giving guidance on public finance management in Kenya. It gives guidance on various budget-making process from formulation, approval, implementation (including procurement) and evaluation.

The object and purpose of these Regulations is to operationalize the Public Procurement and Asset Disposal Act, 2015, on the coordination of procurement and disposal procedures by procuring entities.

BODIES RESPONSIBLE FOR PUBLIC PROCUREMENT

BODY	Function
The National Treasury of Kenya	<ul style="list-style-type: none"> → Responsible for public procurement and asset disposal policy formulation, also provides technical assistance in the implementation and operation of the public procurement and asset disposal system.
County Treasury	<ul style="list-style-type: none"> → Responsible for the implementation of public procurement and asset disposal policy in the county. → Coordinate consultations with county stakeholders of the public procurement and asset disposal system in liaison with the National Treasury and the Public Procurement Regulatory Authority. → 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 → Promote preference and reservation schemes for residents of the counties to ensure a minimum of 20% in public procurement at the counties.
The Public Procurement Regulatory Authority (PPRA)	<ul style="list-style-type: none"> → 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 and make recommendations for improvements. → Monitor the implementation Access to Government Procurement Opportunities (AGPO). → Prepare, issue and publish public procurement and asset disposal documents on the Public Procurement Information Portal (PPIP). → Manage the PPIP and ensure that it is available and easily accessible. → 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. → Create a central repository or database that includes: a record of debarred or blacklisted companies, Price comparisons and market prices of goods, services and works across the

country and State organs and public entities that are non-compliant with procurement laws.

→ Cooperate with state and non-state actors with a view to obtaining recommendations on how public procurement and disposal can be improved.

Public Procurement Regulatory Board (PPRB)

→ Ensures the proper and effective performance of functions of the Public Procurement Regulatory Authority (PPRA).

→ Approves and ratify the policies of the Procurement Regulatory Authority (PPRA).

Public Procurement Administrative Review Board (PPRAB)

→ Reviewing, hearing and determining tendering and asset disposal disputes.

Methods of Procurement in Kenya

a) Open Tender

A procuring entity invites interested members of the public to submit tenders for provisions of goods, works or services. The procuring entity shall advertise in the dedicated Government tenders portals or in its website, or a notice in at least two daily newspapers of nationwide circulation. It is the most common type of procurement in Kenya. Upon advertisement, the accounting officer shall upload the tender document on the website for public access.

b) Restricted Tendering

Involves direct invitation to a shortlist of pre-qualified, pre-registered or known contractors, and is subject to a specific prior approval by the accounting officer. Usually used when it is a case of a specialized nature or has requirements of public safety, or public security which make an open tender impossible.

c) Single Source/ Direct Procurement

A method of procurement in which the procuring entity determines not to use competitive procurement on the grounds of urgency or some other legal principle and negotiates a contract with a single supplier or contractor. Usually, when the item or expertise can only be provided by one source.

d) Request for Quotations (RFQs)

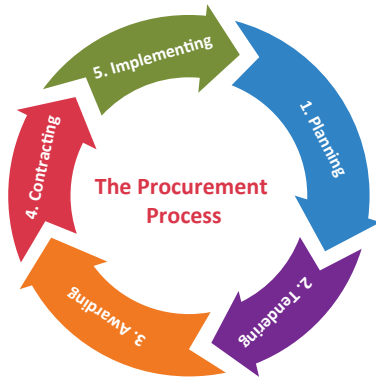
A procuring entity may use a request for quotations from the register of suppliers. The procuring entity determines which contractors, suppliers or service providers to request quotations from, as long as a minimum of three suppliers are invited. The successful quotation shall be the quotation with the lowest price with the highest standards.

e) Request for Proposals (RFPs)

A procurement method for services or a combination of goods and services; and the services to be procured are advisory or otherwise of a predominately intellectual nature.

The Procurement Process Simplified

The Procurement Process has five key stages as stated below:

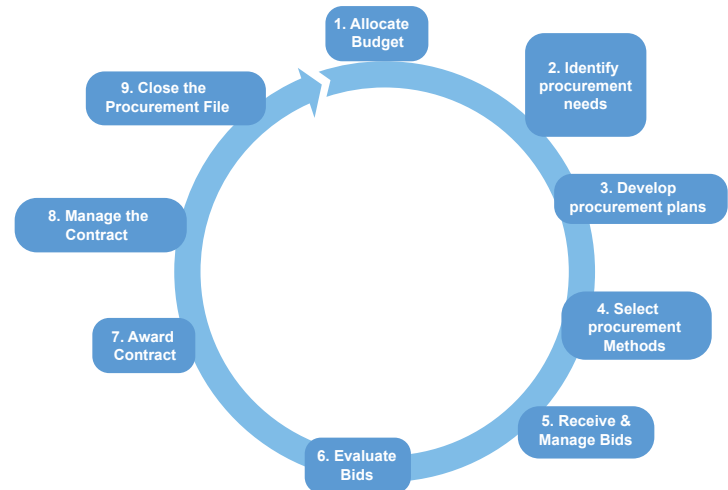


- This includes budgeting and identifying procurement needs and plans.
- Involves selecting procurement methods, advertising tenders, managing and accepting bids.
- This entails evaluating bids, negotiations and awarding the selected supplier/contractor.
- Signing a contract with the selected supplier.
- following up on project progress report, finalizing payments and closing procurement file.

Procurement Process Explained

1. **Allocate a budget** - This means planning and identifying priorities and resources for a procuring entity.
2. **Identify procurement needs for user department** - means the unit of a procuring entity that has made a requisition for the goods, works or services to be procured for, e.g. health department.
3. **Developing a Procurement Plan** - 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.
4. **Select Procurement Methods** - These can include open tender, restricted tender, single sourcing as set out in the Act and Regulations.

The procurement cycle illustrated



5. **Receiving and Managing Bids** - The procuring entity shall ensure that the place or site where tenders shall be submitted is open and accessible and shall provide, in that place or site, a tender box including an electronic tender box that complies with the prescribed requirements in regulations. Each tender that is delivered shall be placed unopened in the tender box.
6. **Evaluate bids** - The evaluation committee shall evaluate and compare the responsive tenders and prepare a report containing a summary of the evaluation and comparison of tenders. The committee shall submit the report to the procurement officer for his or her review. The evaluation shall be carried out within a maximum period of 30 days. This step also includes :
 - a) **Tender Opening** - this is done by a committee that shall have at least three members with at least one of them not directly involved in the processing or evaluation of the tenders. This committee shall assign an identification number to each tender received and record the number of pages per tender. As each tender is opened, the name of the person submitting the tender and the total price will be read out loud and recorded in a document to be called the tender opening register. A copy of the register can be provided to the tenderers upon request. No tenderer shall be disqualified by the procuring entity during opening of tenders. The tender opening committee shall prepare minutes which will include a record of the procedure followed in opening the tenders; and the details of tenderers who attended the opening of the tenders.
7. **Award Contract** - the successful tender shall be the bid with the lowest evaluated price and the highest technical score. The procuring entity shall notify in writing

the successful tenderer that his tender has been accepted. The successful bidder shall signify in writing acceptance of the award within the timeframe specified in the notification of award.

8. **Manage the contract/Implementation** - The two key components are:
 - a) **Inspection and acceptance committee** - which shall inspect and review the goods, works or services in order to ensure compliance with the terms and specifications of the contract and where necessary, test the goods received to ensure that is the correct quantity/quality of the goods received and that they have been delivered or completed on time.
 - b) **Contract Implementation Team** - for complex and specialized procurements, a procuring entity shall appoint a contract implementation team which shall include members from the procurement function, the person doing the requisition, the relevant technical department and a consultant where applicable. The contract implementation team will monitor the performance of the contractor, to ensure that all delivery or performance obligations are met or appropriate action taken by the procuring entity in the event obligations are not met. The team also ensures that there is right quality and within the timeframe, manage handover or acceptance procedures as prescribed.
9. **Close the procurement file** - the Contract Implementation Team makes recommendations for contract termination, where appropriate; ensure that the contract is complete, prior to closing the contract file including all handover procedures, transfers of title if need be; ensure that all contract administration

records are complete, up to date, filed and archived as required. Part of closing the procurement file is the disposal committee. This step also includes the payment process.

Procurement Contract Signing

- An accounting officer of a procuring entity shall ensure that all contracts of a value exceeding Kshs. 5 billion are cleared by the Attorney-General before they are signed.
- Each Cabinet Secretary shall regularly inform the Cabinet and National Treasury of all government contracts exceeding Kshs. 5 billion.

Summary of Procurement tender documents

Tender Documents

A procuring entity may charge a fee for obtaining tender documents as prescribed by regulations and stated in the tender documents. A tender, proposal or quotation submitted by a person shall include a declaration that the person will not engage in any corrupt or fraudulent practice and a declaration that the person or his or her sub-contractors are not debarred.

The tender documents shall be the basis of all procurement contracts and shall, constitute at a minimum:

- a) Contract Agreement Form
- b) Tender Form
- c) Price schedule or bills of quantities submitted by the tenderer
- d) Schedule of Requirements

- e) Technical Specifications
- f) General Conditions of Contract
- g) Special Conditions of Contract
- h) Notification of Award.

Administrative Review of Procurement

The Public Procurement and Asset Disposal Act established the Public Procurement Administrative Review Board whose jurisdiction is to review, hear and determine tendering and asset disposal disputes in public procurement. It can only review, hear and determine tendering and asset disposal disputes once it establishes that an aggrieved person is a candidate or tenderer in a given procurement process.

A candidate or a tenderer who claims to have suffered or risks suffering, loss or damage due to the breach of a duty imposed on a procuring entity, may seek administrative review within 14 days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process.

A request for review shall be heard and determined in an open forum unless the matter at hand is likely to compromise national security or the review procedure. The Review Board shall complete its review within 21 days after receiving the request for the review.

The decisions of the Review Board are taken by a simple majority but in the case of a tie, the proposal supported by the Chairperson prevails. A person aggrieved by a decision made by the Review Board may seek judicial review by the High Court 14 days from the date of the Review Board's decision, failure to which the decision of

the Review Board shall be final and binding to both parties. The High Court shall determine the judicial review application within 45 days after such an application. The Review Board may dismiss with costs a request if it is of the opinion that the request is malicious or was made solely for the purpose of delaying the procurement proceedings or performance of a contract and the applicant shall forfeit the deposit paid.

Confidentiality in Procurement Information

During or after procurement proceedings, no procuring entity/employee/agent of the procuring entity or member of a board, commission or committee of the procuring entity shall disclose the following:

- a) Information relating to a procurement whose disclosure would impede law enforcement or whose disclosure would not be in public interest;
- b) Information relating to a procurement whose disclosure would prejudice legitimate commercial interests, intellectual property rights or inhibit fair competition;
- c) Information relating to the evaluation, comparison or clarification of tenders, proposals or quotations;
- d) Contents of tenders, proposals or quotations.

Limitation on contracts with state and public officers

A State organ or public entity shall not enter into a procurement contract with the following parties:

- A public officer or state officer or a member of a committee or Board of that State organ or public entity.
- Himself or herself, spouse or child, a business associate or agent; or a corporation, private company, partnership or other body in which the officer has a

substantial or controlling interest.

- A state officer or public officer who has an interest in a matter under consideration in a public procurement or asset disposal and shall not participate in any procurement or asset disposal relating to that interest.

Procurement offences in Kenya

A person shall not:

- a) Delay without justifiable cause the opening or evaluation of tenders, the awarding of contract beyond the prescribed period or payment of contractors beyond contractual period and contractual performance obligations.
- b) Unduly influence or exert pressure on any member of a tender opening committee and disposal committee or on any employee or agent of a procuring entity or the accounting officer to take a particular action which favours or tends to favour a particular tenderer.
- c) Open any sealed tender, including such tenders electronically submitted and any document required to be sealed, or divulge their contents prior to the appointed time for the public opening of the tender.
- d) Inappropriately influence tender evaluations.
- e) Commit a fraudulent act.
- f) Knowingly withholds the notification of award to a successful tenderer/ knowingly withholds notification to unsuccessful tenderer;
- g) Sign a contract contrary to the Contrary to the requirements of the PPADA 2015 or Regulations made thereunder.

Penalties for Procurement offences in Kenya

A person who contravenes the provisions of the PPADA 2015, commits an offense and shall be liable upon conviction;

- a) If the person is a natural person, to a fine not exceeding Kshs. 4 million or to imprisonment for a term not exceeding 10 years, or to both;
- b) If the person is a body corporate, to a fine not exceeding Kshs. 10 million.

Access to Government Procurement Opportunities (AGPO)

- An accounting officer of a procuring entity shall, when processing procurement, reserve a prescribed percentage of its procurement budget, which shall not be less than 30%, to the disadvantaged Groups and comply with the provisions of the PPAD Act and the regulations in respect of preferences and reservations. All money paid out to an enterprise owned by youth, women or persons with disability should be paid into an account where the mandatory signatory is a youth, woman or person with disability.
- The procuring entities at the national and county level provide an AGPO report after every six months to the PPRA. The Authority shall make a report to Parliament after every six months that contains details of the procuring entities and how they have complied with the AGPO provisions.
- The National Treasury shall operationalize an AGPO secretariat to be responsible for the implementation of the registration, prequalification and certification of the

persons, categories of persons or groups, training and capacity building of the above, providing technical and advisory assistance to procuring entities in the implementation of AGPO.

Civilian Oversight and Enhancing Transparency in Procurement

Citizens can participate in public procurement oversight through accessing procurement information in various platforms as outlined in the Public Procurement and Asset Disposal Act 2015. Understanding procurement data allows citizens to identify red flags and corruption risks that are associated with procurement.

- Citizens can understand more about Public Procurement through the PPRA website www.ppra.go.ke, that has various sections that include ;
 - i) Complaints made on procuring entities; as well as forms citizens can use to lodge complains against suspicious procurements;
 - ii) A record of those prohibited from participating in tenders or those debarred;
 - iii) Market prices of goods, services and works;
 - iv) Benchmarked prices of goods across the country;
 - 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.
- Public information about procurements can also be accessed at the Public Procurement Information Portal (PPIP) at www.tenders.go.ke.
 - The accounting officer of a procuring entity shall publish and publicize all contract awards on their notice boards at conspicuous places, and website if available within a period as prescribed. This gives an opportunity to citizens to oversight procurement contracts at their localities
 - An investigation may be initiated on request in writing by a public institution or any other citizen of Kenya. The Authority, may undertake investigations, at any reasonable time, by among other things examining the records and accounts of the procuring entity and contractor, supplier or consultant for the purpose of determining whether there has been a breach of the procurement Act or the Regulations.
 - An accounting officer of a procuring entity shall keep records for each procurement for at least six (6) years after the resulting contract has been completed or, if no contract resulted after the procurement proceedings were terminated. The accounting officer of a procuring entity may charge a fee for making the records available, but the fee shall not exceed the costs of making the records available to any person.
 - The National Treasury shall convene meetings at least annually for the purpose of consulting with persons in the public and private sectors who have an interest in the proper functioning of the public procurement and asset disposal system.



For complaints and general inquiries on public procurement issues the public can write to, call or visit the following offices;

The National Treasury

Treasury Building, Harambee Avenue

P.O Box 30007-00100

Nairobi

Tel. +254 20 2252299

Email: ps@treasury.go.ke

General Enquiries

Email: info@treasury.go.ke

Complaints

Email: complaints@treasury.go.ke

Tel: 0771 448232

The Public Procurement Regulatory Authority

THE HEAD OFFICE

National Bank Building, 11th Floor, Harambee Avenue

P.O Box 58535- 00200, Nairobi Kenya

Telephone: +254 020 3244000, 2213106/7

Email: info@ppra.go.ke

Complaints, Feedback and Inquiries

feedback@ppra.go.ke and reports@ppra.go.ke

COAST REGIONAL OFFICE

Uhuru na Kazi Building, 7th Floor, Mama Ngina Drive

P.O Box 2605-80100

Telephone: 041 2224040

Mobile: 0700 195220, 0773 734843

Email: Mombasa@ppra.go.ke

WESTERN KENYA REGIONAL OFFICE

Prosperity House, Wing C, 6th Floor, Oluor Otiende

Avenue, P.O Box 2916-40100

Telephone: 057 2024000, Kisumu, Kenya

Email: kisumu@ppra.go.ke

NORTH RIFT REGIONAL OFFICE

Ainabkoi Sub County Offices

P.O Box 799-30100, Eldoret, Kenya

Email: eldoret@ppra.go.ke

HEAD OFFICE

Kindaruma Road, Off Ring Road, Kilimani Gate No. 713; Suite No. 4
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Email: transparency@tikenya.org

REGIONAL OFFICES & ADVOCACY AND LEGAL ADVICE CENTRES

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2nd floor, KNCHR offices Panal
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Mobile: 0728418822
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P.O BOX 842 - 30100, NCKK
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ALAC WESTERN

Nyalenda Railways Estate-along
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Email: alacwestern@tikenya.org

**CALL OUR FREE ANTI-CORRUPTION HELPLINE 0800-720-721 or
SMS 40019 To get assistance on corruption related cases**