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Abstract

Procurement in the energy sector has rapidly increased due to the high demand in domestic energy requirements. In the past decade, the country has grappled with the challenge of unreliable, expensive and unsustainable energy use supporting a stagnating industrial and manufacturing base. This is due to aging energy infrastructure that can no longer meet the modern day requirements as envisaged in the country's economic blueprint, the Kenya Vision 2030. The objective of the paper was to assess the impact of public procurement law on the performance of energy sector in Kenya. The legislative and regulatory framework pillar is based on the existence, availability, quality and use of the legal and regulatory framework from the highest level (Act and Regulations) down to the more detailed operational procedures, guidelines, model tender documents, and standard conditions of contract. The paper finds that sound legal framework in place with the enactment of the PPDA and Regulations. Kenya has in place a sound and comprehensive legal framework for public procurement with a clear hierarchical distinction. The study recommends that all the energy corporations should establish supplier appraisal audit policies because this will help them ensure that they will deal with qualified and competent suppliers. It was also recommended that all the energy corporations should adopt the ethical policies and guidelines that have been established by the Public Procurement and Regulatory Authority (PPRA) and the Kenya Institute of Supplies Management (KISM). This because they are all aimed at ensuring that all the public institutions conduct their supply chain processes in line with the Public Procurement and Asset Disposal Act (PPADA) 2015. The energy corporations should also establish policies on ethical use of information technology since this would be a major boost to ensure that there is transparency and accountability in the supply chain performance.

Keywords: *Public Procurement Law, Energy Sector & Kenya*

1.1 Introduction

Public procurement process is the purchase by government and state-owned enterprises of goods, services and works and is guided by the Public Procurement and Asset Disposal, 2015 (Thiankolu, 2019). Procurement starts with need identification and planning for its requirements. The organization then does risk assessment, evaluates the possible solutions and identifies the qualified supplier, award contract and payment for goods and services. The process enables a firm to get right quality a product, for the right price, with the quantity which is right, at the right time, the goods has to come from the sources which are appropriate (Muthomi, 2019).

Public Procurement and Asset Disposal Act 2015 outlines objectives which must be achieved among them maximizing economy and efficiency; promote competition, integrity and fairness; increase transparency and accountability. The Act requires that decisions be made by a team in various stages of the public procurement process to achieve value for money. The value for money concept measures the price of products as well as services rendered, quality of goods and services, resource use, fitness for purpose, timeliness and convenience (Kituyi & Makokha, 2020).

The procurement process follows the procurement cycle which includes: planning the whole process, initiating the procurement, checking availability of goods in stores, confirming availability and adequacy of funding, advertising procurement, receiving and opening of bids, bid evaluation, selecting supplier, notifying qualified suppliers, signing contract, administering contract, inspecting and receiving supplies or works (Thiankolu, 2019). Public procurement is characterized by long bureaucratic processes of acquiring goods and services which lead to delays in acquisition. The entire procurement process needs to be carefully crafted to avoid long lead-time, inadequate resources, wrongful award of contracts, cancellation of contracts, litigations, excess or insufficient/emergency stock. An efficient procurement must have rules and regulations to govern it. A sound public procurement process should ensure that an organization achieves value for money when procuring its needs. Efficient procurement process is necessary for development of the economy and well utilization of scarce public resources (Transparency International Kenya, 2017).

Some of the key energy agencies in Kenya include Rural Electrification and Renewable Energy Corporation (REREC), Geothermal Development Company (GDC), Kenya Electricity Transmission Company (KETRACO), Kenya Generation Company (KENGEN), Kenya Power and Lighting Company (KPLC) and Nuclear Power and Energy Agency (NUPEA) (Kenya National Energy Policy, 2019).

The mission of the energy policy in Kenya is to facilitate provision of sustainable, clean, secure, reliable and reasonably priced energy services at the minimal cost while conserving the environment at the same time. This policy is vital for the country as it steers to attain 2008 vision 2030. The energy Act no. 12 of 2006 and sessional paper no. 4 of 2004 realigned the energy sector to improve the sectors' performance; the energy act and the sessional paper were established to change the energy sector and increase power accessibility across the country. This policy has allowed for increased private participation in the expansion of the sector while attaining better energy services' delivery at the same time. The main aim of this reform was to enable the sector to achieve its mission of providing clean, affordable, sustainable, secure and reliable energy services using the minimum cost while without causing environmental degradation. Private sector

involvement eradicates monopolistic tendencies of companies owned by the state (Kenya National Energy Policy, 2019).

The legislative and regulatory framework pillar is based on the existence, availability, quality and use of the legal and regulatory framework from the highest level (Act and Regulations) down to the more detailed operational procedures, guidelines, model tender documents, and standard conditions of contract (Ndemo & Achuora, 2020).

1.2 Statement of the Problem

Procurement involves a series of decisions to be made at every stage in the process and governed by the set laws. These decisions have an impact on the cost, time and quality of output. Poor procurement decisions can be expensive which in turn affects cost of doing business.

The Public Procurement and Asset Disposal Act 2005 and reviewed as public procurement and disposal act 2015 aimed at promoting non-discrimination, transparency and fairness in public procurement and disposal of asset. It was aimed at ensuring that public funds are utilized effectively during the procurement and disposal of public assets. However, evidence indicates that the compliance to the ACT is still low at the energy sector corporations.

1.3 Objective of the Study

To assess the impact of public procurement law on the performance of energy sector in Kenya.

1.3 Research Question

What is the impact of public procurement law on the performance of energy sector in Kenya?

2.1 Theoretical Review

2.1.1 Institutional theory

Institutional Theory focuses on the resilient and deeper aspects of social structure. It explains the influence of the environment on organizations. It describes processes through which structures and authoritative guidelines, including routines, norms, rules and schemes, are established for purposes of maintaining social behavior. These structures constitute the three pillars of an institutions namely cultural cognitive, normative and regulatory. Social obligation is considered the basis for compliance in the normative pillar (Voronov & Weber, 2020).

The normative pillar encompasses values and norms. Shared understanding, common beliefs and symbols are emphasized by the cultural cognitive pillar; whereas the emphasis of the regulatory pillar is on the use of sanctions, rules, and laws to ensure compliance. As such, different aspects of the institutional theory describes how these structures are established, diffused, adapted and adopted over time and space and how they disuse and decline. In view of this theory, legitimacy can be achieved by conforming to key expectations of the stakeholders (Vailatti, Rosa & Vicente, 2017).

Institutional theory is used widely in supply chain management and sustainable procurement studies to examine determinants/elements of public procurement and to describe how organizations have adopted new practices. Mugambi and Sang (2019) used it to explore factors affecting the compliance with the procurement regulations and laws within public institutions. Aksom, Zhylynska and Gaidai (2020) used institutional theory to explore determinants of compliance with procurement regulations within the public sector. Similarly, this theory was used to explore influence of procurement practices on asset disposal within the energy sector state

corporations. Within the context of the present study, it was established that coercive governmental pressure contributed by structures and authoritative guidelines and regulations as provided in the PPDA Act of 2007 ensured public organizations comply with the pre-disposal engagement practice, post evaluation engagement practice, inventory management practice, e-procurement practice, and procurement skills practice and this ensures good asset disposal.

2.2 Literature Review

2.2.1 Overview of the Energy Sector Corporations

Kenya Power and Lighting Company

Despite the electricity tariff reforms and organizational restructuring, KPLC, which is the sole distributor of commercial electricity, has continued to manifest weak financial performance, which has impeded access to domestic and international money markets for the needed system reinforcement and expansion. Furthermore, such performance has largely influenced the demand for and degree of onerous payment security guarantees from lenders and IPPs, further aggravating the already weak financial situation of KPLC. There is therefore need to undertake further reforms to improve KPLC's performance and create an appropriate power market structure capable of attracting both domestic and foreign investments, at competitive costs (Kenya National Energy Policy, 2019).

Kenya Electricity Transmission Company

Kenya Electricity Transmission Company (KETRACO) is a State Owned Corporation that was established to develop new high voltage electricity transmission infrastructure that will form the backbone of the National Transmission Grid, in line with Kenya Vision 2030. It is involved in the planning, designing, building, and maintaining electricity transmission lines and associated substations (Kenya National Energy Policy, 2019).

Rural Electrification Authority

The Rural Electrification Authority was established by the Energy Act of 2006 with the mandate to accelerate the pace of rural electrification in the country, in order to promote sustainable socio-economic development (Kenya National Energy Policy, 2019).

KenGen

KenGen, a 100% state owned company, and KPLC in which state interest stands at 51% of the equity are the principal players in the power sub-sector. KPLC has a virtual monopoly in power transmission and distribution. Furthermore, KPLC as the only licensed Public Electricity Supplier has energy purchase contracts with IPPs and KenGen. KenGen accounts for about 82.1% of the total installed capacity, the private sector for about 15.2%, imports for about 2.4% and the Government under the Rural Electrification Programme for less than 1%. The two parastatals: KenGen and KPLC, have the responsibility of raising funds needed for system expansion with and without state guarantees (Kenya National Energy Policy, 2019).

Kenya Petroleum Refineries Ltd

Direct Government involvement in the petroleum industry is in the oil refinery where it co-owns the Kenya Petroleum Refineries Ltd (KPRL) with three private companies (Shell, BP Petroleum and Caltex) on a 50-50 % equity basis and in oil storage facilities at Kipevu, capable of holding 1.5 million barrels. The storage facilities are available to all licensed importers at a fee.

Kenya Pipeline Company

The Government through the Kenya Pipeline Company (KPC), in which it has 100% equity, owns a petroleum pipeline that runs from Mombasa to Nairobi and western Kenya with terminals in Nakuru, Eldoret and Kisumu (Kenya National Energy Policy, 2019).

National Oil Corporation of Kenya

The Government is also the sole owner of the National Oil Corporation of Kenya (NOCK), which is involved in oil supply and distribution. NOCK also undertakes oil exploration on behalf of the Government. NOCK, on the other hand has seen its market share decline from about 2% in 2000 to about 0.6% in 2003 and has thus failed to live to the original Government objective of using the company to regulate petroleum market prices through competition, following the deregulation of the industry in 1994 (Kenya National Energy Policy, 2019).

Geothermal Development Corporation

The Geothermal Development Corporation (GDC) is a State Owned Enterprise with the mandate to fast track development of geothermal resources in the country. GDC was established by the Energy Act of 2006 (Kenya National Energy Policy, 2019).

2.2 Procurement Practice in Kenya

Public procurement is the process of acquiring goods, works and services involving the use of public funds to accomplish specified public purposes. It begins with the identification of a need and ends with completion of the contract. The Kenyan procurement process as detailed in the Public Procurement and Assets Disposal Act and Regulations involves several steps. This includes identification of requirements; procurement planning; definition of requirements; determination of source; evaluation and selection of vendor; contract award; contract implementation; payment for goods and services; and disposal.

There are five different types of procurement. These include open tendering, restricted tendering, direct procurement, request for proposals and request for quotations. Open tendering offers a fair and competitive type of procurement and is the most preferred method. Section 45 (2) of the Anti-Corruption and Economic Crimes Act (ACECA) criminalizes the commission of breaches related to public procurement procedures. It provides: “An officer or person whose functions concern the administration, custody, management, receipt or use of any part of the public revenue or public property is guilty of an offence if the person:

- a) Fraudulently makes payment or excessive payment from public revenues for sub-standard or defective goods; goods not supplied or not supplied in full; or services not rendered or not adequately rendered
- b) Wilfully or carelessly fails to comply with any law or applicable procedures and guidelines relating to the procurement, allocation, sale or disposal of property, tendering of contracts, management of funds or incurring of expenditures; or
- c) Engages in a project without prior planning.

2.3 Regulatory Framework

The main laws and regulations governing the electricity sector are the:

Constitution of Kenya 2010: The Constitution provides that natural resources vest in the people of Kenya, and gives the government power to regulate and administer natural resources on behalf of the public. The MoEP is responsible for establishing the energy policy under the Fourth Schedule to the Constitution (The Constitution of Kenya, 2010).

Energy Act 2019 and its subsidiary legislation. The Energy Act is the main act regulating all energy activities in Kenya through EPRA. The Energy Act consolidates various laws relating to energy. It amended the Energy Act 2006, the Kenya Nuclear Electricity Board Order 2013 and the Geothermal Resources Act 1982.

Public Procurement and Asset Disposal Act 2005 (PPADA): The PPADA and related regulations govern procurement processes in power projects, by setting out the procedures for efficient public procurement and asset disposals by public entities.

Public Procurement and Asset Disposal Regulations 2020 (PPADR): The PPADR came into effect on 2 July 2020 and seek to harmonize and operationalize the public procurement procedure. The PPADR provide further guidance on various aspects of the procurement and asset disposal process; procurement contracts; e-procurement; and preferences and reservations to be applied by procuring entities.

FiT Policy 2012: Kenya adopted the FiT Policy to meet its targets for tackling climate change by reducing reliance on fossil fuels. The FiT Policy promotes the generation of electricity from renewable energy sources by enabling power producers to sell electricity generated at a pre-determined tariff for a given period. Tariffs are available for energy generated from wind power, biomass, small-hydro, geothermal, biogas, and solar resources.

Energy (Liquefied Petroleum Gas) Regulations 2019: These were enacted to increase compliance in the liquefied petroleum gas (LPG) sub-sector and promote the use of LPG as a safe and clean source of domestic cooking energy.

2.4 Procurement Law in the Energy Sector

While the Public Contract Law Journal dates back to 1981 and Public Procurement Law Review to 1992, both had anchorage in the legal and regulatory disciplines. It was noted that there was differentiation between public procurement and private sector procurement in the last decade (Edquist & Zabala-Iturriagagoitia, 2020). According to Khakata (2017), public procurement systems are inherently complex and dynamic due to the multiplicity of objectives they have to achieve. For instance, the main motive of public procurement is to serve the public through a political purpose and the general well-being of the society unlike privately funded projects whose *raison d'être* is the profit motive.

Public service agencies aim at making the best use of 'value for money' for the members of the public this involves client satisfaction, public interest, fair play, honesty, justice and equity (Ndumbi 2019). Schlosser (2020) pointed out the significance of moral and ethical behavior in addition to technical and professional competencies. Publicly owned properties like in this case state corporation assets are an integral part of the social fabric of many communities and there is an expectation that the GOK, as custodian, will conserve, retain and manage these properties responsibly.

The public procurement system in Kenya has reformed to an orderly and legally regulated system governed by the PPDA, 2015. Before in the Central Government it was governed by Treasury Circulars from 1969, then the Supplies Manual of 1978, prior to the promulgation of the Exchequer and Audit (Public Procurement) Regulations, 2001, All the reform initiatives were focused on improving the public procurement system by enhancing accountability and transparency. These reforms have ensured fairness and competition among suppliers of goods, works and services, thereby restoring the confidence in the public procurement process while at the same time ensuring that the Government gets the best value for money.

The PPDA, effective from 1st January 2007 and reviewed in 2015, applies to all procurement of goods, works and services, as well as the disposal of assets by public entities. Public entities are those that procure goods, services or works utilizing public funds. As such, public entities include the central and county governments, courts, commissions, state corporations, cooperatives, and educational institutions such as colleges, schools and universities. This Act does not directly seek to regulate the private sector, though it does regulate its interaction with public entities (Government of Kenya, 2020). It ensures the following issues maximize economy and efficiency, promote competition and ensure that competitors are treated fairly, promote the integrity and fairness of procurement procedures, increase transparency and accountability in those procedures, increase public confidence in the procedures, enhance the promotion of local industry and economic development, (Odhiambo, 2018). The act however put more focus on procurement of public property rather than disposal. This creates a gap for loss of public resources through unregulated disposal where malpractices are encountered such as fraudulent practices, corruption, collusion, conflicts of interests and even breach of confidentiality (Odhiambo, 2018).

The PPDA sets-up the Public Procurement Oversight Authority (PPOA), whose primary role is to ensure that procurement procedures established under the Act are adhered to. In doing so, the PPOA has to guide, set-up standards, and train procurement entities and persons, as well as advise government on policy issues. The PPOA role is: Monitoring implementation of procurement policies to ensure that organizations are accorded opportunities to participate in public procurement, building capacities of procurement personnel to ensure that procurement is carried out effectively and efficiently, building suppliers capacity to carry out business with the government (Government of Kenya, 2020)

PPOA is also mandated to organize public forums to solicit feedback from stakeholders on the implementation of procurement policies, improving provision of information about procurement opportunities by putting in place communication channels at the PPOA and within the procuring entities, ensuring e-procurement is practiced. The Public Procurement Oversight Authority (PPOA) is also tasked with monitoring performance of the system and bringing about modernization of the procurement system including through the introduction of e-procurement. The authority has an advisory board tasked with promoting corporate decision making and greater accountability and transparency on procurement. The law introduces an institutional framework in public entities that should ensure that decisions on procurement are made in a corporate fashion i.e. no one individual will be responsible for all procurement decisions. This should enhance checks and balances and bring greater accountability by public officials. The law also clarifies who is accountable for which decisions and makes mandatory the publication of information on procurement including on contract awards (PPAD, 2016).

Public Procurement Oversight Authority (PPOA) is also tasked to ensure better management of disposal of public assets. This has been one area that has been neglected and has caused the public

to loose large sums of money through irregular disposal methods. The new rules on disposal should bring an end to that and ensure that the public gets proper value when public assets are disposed off. The Act establishes clear procedures to be followed when assets are disposed and provides for the proper management of the disposal process (PPDA, 2015).

Sound legal framework in place with the enactment of the PPDA and Regulations. Kenya has in place a sound and comprehensive legal framework for public procurement with a clear hierarchical distinction. The PPDA clearly establishes the procurement and disposal methods to be applied, advertising rules and time limits, the content of tender documents and technical specifications, tender evaluation and award criteria, procedures for submission, receipt and opening of tenders, and the complaints system structure and sequence. The PPDA and Regulations cover goods, works and services for all procurement using national funds (KPMG, 2018).

3.1 Conclusion

Increased spending on government contracts magnifies the opportunity for corruption in public procurement especially in the energy sector. Detecting and preventing fraud in procurement requires an understanding of the basic elements of corruption in the process and the likely high risk areas. Corruption in public procurement covers an array of irregularities and illegal acts characterized by intentional deception. This fraud can take place at all points in the procurement process. To properly deal with 'procurement corruption requires one to focus on the entire procurement process and develop an understanding of the high risk areas of the procurement process that are prone to fraud.

To address the issues arising in the tendering phase of the procurement cycle (phase two), all persons participating in a public procurement process for a specific contract should access the information relating to request for proposals, bids submission, bids evaluation and contract award at the same time. Some suppliers accessing crucial information on tenders earlier than their competitors have undue advantage over the other suppliers.

4.1 Recommendations

E-procurement is less prone to manipulation. In spite of the adoption of e-procurement by most Ministries, Departments and Agencies, the strategy has not been completely effective especially at the post award stage in relation to contract management, riddled with supplier breaches in terms of product quality, price variations, adjustments to timelines and delivery of sub-standard work. More mechanisms that are robust should be implemented in e-procurement to enhance its functionalities at all the stages of the public procurement cycle.

The study recommended that the management of energy corporations should put measures in place to ensure that all the drawn ethical policies and codes are adhered to by all the supply chain staff i.e. implementation of ethical procurement practices as well as by the suppliers that they deal with. The energy corporations should therefore firmly deal with conflicts of interest in supply chain, ensure fair dealings with the suppliers, treat suppliers' information with utmost confidentiality and adhere strictly to all their ethical policy statements, to improve their supply chain performance. Since the establishment of corruption prevention committees is not entrenched in our public procurement law, the study also recommended that the management of all the energy corporations should establish corruption prevention committees that will be mandated with ensuring that all corruption, fraudulent, coercive and collusive practices are prevented and firmly dealt with.

The study recommended that all the energy corporations should establish supplier appraisal audit policies because this will help them ensure that they will deal with qualified and competent suppliers. It was also recommended that all the energy corporations should adopt the ethical policies and guidelines that have been established by the Public Procurement and Regulatory Authority (PPRA) and the Kenya Institute of Supplies Management (KISM). This because they are all aimed at ensuring that all the public institutions conduct their supply chain processes in line with the Public Procurement and Asset Disposal Act (PPADA) 2015. The energy corporations should also establish policies on ethical use of information technology since this would be a major boost to ensure that there is transparency and accountability in the supply chain performance.

The study recommended that the supply chain managers should be holding regular supplier appraisals and meetings to know the areas of improvement on the part of the suppliers. This will appropriate to select a dependable supplier and the best supplier in the international arena.

The study further recommended that all the state corporations should work tirelessly to incorporate supplier diversity in their supply chain process to improve their supply chain performance and closely monitor its implementation for better procurement performance. To bring the minority owned businesses on board, the state corporations in Kenya should create awareness of the government's preference schemes. Enhancing supplier diversity through supplier diversity programmes and committing to strengthening strategic partnerships with minority owned businesses were perceived to play a big role in enhancing supply chain performance and therefore the state corporations should ensure that this is achieved.

The state corporations should always budget for the sensitization forums on the supply chain opportunities available for the disadvantaged groups. This will help in ensuring that they always plan for them and do the sensitization regularly and in good time. The state corporations should work closely with the PPRA and KISM to document these sensitization forums to ensure that they are conducted within the public procurement law.

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