Chapter Seven

7.0 PUBLIC PARTICIPATION IN PUBLIC FINANCE MANAGEMENT UNDER THE CONSTITUTION OF KENYA 2010.

7.1 INTRODUCTION

Decision making around government revenues and expenditures has historically been shrouded in mystery and secrecy. In most cases, this area has been a preserve of the Treasury, Central Bank officials, the tax administrator, and a few selected technocrats. In the past, Parliamentôs interface with public finances was by and large restricted. However, in recent years, interest and action with regard to public participation and accountability in fiscal decision making has increased. The surge in public participation globally can be attributed to the following six core factors[1].

First, the proliferation of good governance norms and standards that emphasize greater transparency, participation and accountability in all government matters. Secondly, the world has witnessed numerous transitions from closed, authoritarian political regimes to ones characterized by political contestation, separation of powers and party competition among other factors. Thirdly, the introduction of modern public finance management systems and good practices around the world has reinvigorated the clamor and desire for public participation. Fourthly, greater *decentralization and devolution of power* to raise, allocate and spend public resources immensely contributed to fiscal transparency. Other factors include the growth in number and operational capacity of independent civil society organizations and the dramatic growth, spread and use of information and communication technologies around the world.

This chapter examines public participation in public finance management in Kenya as enshrined in the Constitution of Kenya 2010. Specifically, the chapter examines the following:

(i) The constitutional and legislative public participation opportunities in Kenya;

[1] See http://www.brookings.edu/~/media/press/books/2012/openbudgets/openbudgets_chapter.pdf

(ii) The mechanisms through which the public can effectively participate in financial matters; and

(iii) Recommendations for effective public participation in fiscal decision making processes.

Most of the views expressed in this chapter have been drawn from desktop research, reference to the relevant sections of the Constitution of Kenya 2010 and the Public Finance Management Act, 2012 (PFM Act, 2012) among other important documents. The author of the chapter also gathered information through informal discussions with members of the Institute of Certified Public Accountants of Kenya (ICPAK).

7.2 Background to Public Participation in Public Finance Management in Kenya

Public participation and accountability in public finance management in Kenya can be traced back to Kenyaôs decentralization initiatives. These include the District Focus for Rural development initiatives of the 1980s to the proliferation of decentralized funds in Kenya, a trend which begun in the late 1990s and continues to date. The CDF Act 2003 provided for participation of communities through project identification at the locational and constituency levels. The CDF Act, 2003 has since been amended to align to the Constitution of Kenya 2010[2].

Equally, the Local Authority Service Delivery Action Plan (LASDAP) was introduced in 2000 in order to facilitate citizen participation in identifying their local development priorities and needs. Most studies contend that the LASDAP process was perhaps the most comprehensive tool encompassing citizen participation in planning, selection, implementation and oversight of projects in local authorities. These were supposed to be incorporated in the Local Authoritiesô planning processes. On the contrary, LASDAP did not achieve much due to elite capture and political interference which eventually led to citizen apathy[3].Kenyaôs public finance management framework and service delivery processes have been radically altered by the Constitution of Kenya (2010). The country has undergone a transition from a centralized government to the devolved system of government with the establishment of the national government and county

[2] Constituencies Development Act , 2013
[3] Budget Transparency and Citizen participation in Counties in Kenya, National Taxpayers Association, 2013

government units as distinct but interdependent governance entities[4]. Devolution is perceived as an important a vehicle for addressing and redressing the regional disparities in the country. Consequently, devolution presents an opportunity to address the delivery of local needs, choices and constraints in Kenya (World Bank 2012). Most Kenyans are optimistic that counties will effectively offer public participation spaces and eventually deliver services for the overall improvement of their welfare.

The Constitution and the PFM Act, 2012 provide a distinct opportunity to enhance the role of citizens in public financial management processes in Kenya. Chapter Twelve of the Constitution deals with Public Finance. Article 201 introduces principles of public finance, among them being, openness and accountability including public participation in financial matters. These principles, if strictly adhered to, would strengthen policy formulation and management of public resources for the improved livelihoods of many Kenyans.

Similarly, public participation in planning, budgeting and oversight at both the national and county levels of government is guaranteed by the Constitution of Kenya 2010 and the PFM Act, 2012. Sections 35(1) and 125 of the PFM Act, 2012 elaborately outline the stages in the budget process at the national and county government levels respectively in any financial year.

Despite these avenues, citizens may not effectively participate in fiscal decision making due to a number of reasons. Here, the following two reasons will suffice. First, public finance is perceived to be a technical and complex subject area. It is therefore assumedð and if we may add, wrongly soð that only the technocrats and treasury mandarins can influence public finance decisions. Secondly, the low capacity by citizens to safeguard rights as well as their low levels of awareness on rights implies that citizen spaces are vulnerable to both elite capture as well as capture by other groups with varied interests, thus crowding-out the voices of the common Mwananchi from the public participation space.

[4] Article 6(2) states that governments at the national and county levels are distinct and inter-dependent and shall conduct their mutual relations on the basis of consultation and coordination.

7.3 Analysis of Kenya's Public Finance Management Framework

7.3.1 Kenya's Public Finance Management Legislative Framework

The Constitution of Kenya 2010 introduces changes in the public finance management framework in Kenya. Specifically, Chapter Twelve of the Constitution, at Article 201 sets out the principles of public finance as follows:

(a) Openness and accountability including *public participation in financial matters*;
(b) Public finance system shall promote an equitable society;
(c) Burdens and benefits of the use of resources and public borrowing shall be shared equitably between present and future generations;
(d) Public money shall be used in prudent and responsible way; and
(e) Financial management shall be responsible and fiscal reporting shall be clear.

The Constitution of Kenya 2010 further creates new institutions with varying powers and responsibilities over the public finances management, at the national and county levels of government. Article 215 establishes the **Commission on Revenue Allocation (CRA)**, with the responsibility to make recommendations on the criteria for equitable sharing of national revenue and other matters relating to financial management by county governments.

Article 228 establishes the **Office of the Controller of Budget** to oversee the implementation of the national and county budgets by authorizing withdrawals from public funds under Articles 204, 206 and 207. Every four months, the Controller of Budget is required to submit to each House of Parliament a report on the implementation of the budgets of the national and county governments.

Article 229 establishes the Office of the **Auditor-General**, whose role is to audit the accounts of all entities funded from public funds, including national and county governments. Article 230 creates the **Salaries and Remuneration Commission** to regularly review and set remuneration and benefits of all State officers and public officers within the national and county governments.

In addition, the Constitution splits the national budget approval process into two phases. Phase one entails the division of revenue. Every year, at least two months prior to the commencement of the financial year, two bills ï *the Division of Revenue Bill*, containing proposals on the division of revenue between county and national government, and *the County Allocation of Revenue Bill*, which sets out proposals on how revenues[5] allocated to county governments are shared among the counties and presented to Parliament for approval.

Phase two of the budget approval process commences after the division and allocation of national revenues, and involves consideration and approval of estimates of revenue and expenditure of the government by the National Assembly. Unlike in the past where revenue and expenditure estimates were prepared and approved simultaneously, under the Constitution of Kenya(2010) , the revenue estimates are prepared and approved before the expenditures.

Equally, the Constitution splits the Controller and Auditor Generalôs Office by establishing two separate independent offices: the Auditor Generalôs Office and the Office of the Controller of Budget. The Controller of Budget exercises control over expenditure of the national and county governments. The Office is also required to prepare, publish and publicize statutory reports, conduct investigations and conduct alternative dispute resolution mechanisms to resolve disputes.

A key function of the Auditor-Generalôs office is that, within six months after the end of each financial year, it prepares audit reports in respect of that financial year, on the accounts of the national and county governments and their respective agencies that are funded from the Consolidated Fund. The Office of the Auditor General is also mandated to examine accounts of political parties funded from public funds and the public debt.

The Constitution further gives parliament budgetary oversight powers. For instance, the Senate (at Article 217) is mandated to determine the basis for allocating among the counties the share of national revenue that is annually allocated to the County level of government. The Division of

[5]Article 218 of the Constitution of Kenya 2010

Revenue Bill and County Allocation of Revenue Bill must be introduced in Parliament at least two months before the end of each financial year[6] .

The National Assembly also considers the estimates of revenue and expenditure of the national government (Executive) together with estimates submitted by the Parliamentary Service Commission (Legislature) and the Chief Registrar of the Judiciary[7]. We have witnessed rigorous debates and inputs on the vertical division revenue in both the Senate and the National Assembly. The National Assembly Budget and Appropriations Committee has been regarded as the most powerful committee in the legislature given its immense role in budget scrutiny and approval. Similarly, at the County Government level, there is separation of powers between the County Executive, led by the Governor, and the County Assembly. Again, County Assemblies in most parts of the country have flexed their muscles by refusing to approval county budges due to various reasons.

The county budget making process mirrors the national one. The respective county executives are charged with the responsibility for preparing the various documents that comprise the county budget but the County Assembly controls the passage of the budget laws. This requirement for legislative approval of financial measures is a democratic foundation stone that is enshrined in constitutions and democracies around the world.

The Constitution provides a mechanism for equitable sharing of revenue raised nationally, as well as intergovernmental transfers as set out in Articles 202 and 203 of the Constitution) [8]. The revenue raised nationally shall be shared equitably among the two levels of government (vertical share) and among forty seven county governments (horizontal share) to enable them provide services and perform functions assigned to them under the Fourth Schedule of the Constitution. Article 203(2) of the Constitution provides that a minimum of fifteen per cent of revenue raised nationally shall be transferred unconditionally to the forty seven counties. This amount shall be calculated on the basis of the most recent audited accounts of the revenue received, as approved by the national Assembly.

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[6] see Article 218 of the COK 2010

[7] See also Articles 127 and 173 of the Constitution of Kenya 2010

[8] Article 203(2) For every financial year, the equitable share of revenue raised nationally that is allocated to county governments shall be not less than fifteen per cent of all revenues collected by the national government.

Other than the equitable share, County Governments have the following resources at their disposal: conditional and unconditional grants[9]; own revenues through the imposition of property taxes, entertainment taxes and other user fees and charges; and borrowing.[10]

The Constitution also establishes the Equalization Fund to provide basic services including water, roads, health facilities and electricity to marginal areas in order to bring these services in the marginal areas to national standards[11]. The PFM Act 2012 lays a framework for the implementation of public finance principles enshrined in Article 201 of the Constitution by providing extensive public participation avenues in financial matters. . This is mandatory in the budget making processes both at the national and county levels.

7.4 Opportunities for Public Participation in Public Finance Management

Citizen participation has been poised to help in priority setting and providing feedback on government funded projects. Further, fiscal transparency in national and county budget process helps to engage and mobilize the public by showing how budget numbers relate to issues that affect peopleọs daily lives. In the literature, one of the most cited definitions for fiscal transparency is the one offered by Kopits & Craig (1998):

> Openness toward the public at large about government structure and functions, fiscal policy intentions, public sector accounts, and projections. It involves ready access to reliable, comprehensive, timely, understandable, and internationally comparable information on government activities so that the electorate and financial markets can accurately assess the governmentọs financial position and the true cost and benefits of government activities, including their present and future economic and social implications.

[9] Article 202(2);
[10] Article 209;
[11] Article 204

To understand public participation in public finance, we need to interrogate the following questions: Who participates? What are they participating in? What are the forms of participation? Who must ensure that they participate?

Public participation is important in promoting transparency and accountability in financial matters. Fiscal transparency can positively impact the economy in numerous ways. Two of the key examples include:

(i) Transparency can help attract cheaper credit

Research by the International Budget Partnership (IBP) indicates that countries with higher levels of fiscal transparency have higher credit ratings and lower spreads between borrowing and lending rates, thus reducing governments borrowing costs.

(ii) Opacity in fiscal matters can undermine fiscal discipline

A study by the International Monetary Fund (IMF) [12]finds that an important predictor of a countryǿs fiscal credibility and performance is the level of transparency in its public finance systems and practices.

Equally important, transparency and public participation can help shine the light on leakages and improve efficiency in public expenditures. In addition, fiscal transparency and participation can foster equity by matching national resources with national priorities.

According to International Budget Partnership[13], public participation in the public finance management is based on the following basic principles:

(i) Participation should occur throughout the public finance management process
(ii) Participation should occur with all parts of the government from the legislatures, implementers to oversight institutions

[12] See, ñIMF Paper on Fiscal Transparency, Accountability and Risk, (2012)
[13] See Open Budget Survey 2012, by International Budget Partnership (2012)

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(iii) Participation should have a legal basis. The government should be obligated under law to engage the public in the budget making process and should not discriminate against any individual or groups.

(iv) The purpose for public engagement should be publicized in advance. The government should clearly specify the scope of the consultation.

(v) Multiple mechanisms for public engagement should be implemented. The government should use appropriate forums at different points of time to obtain the publicøs input.

(vi) The Public should be provided with feedback on their inputs. The government should publish reports of the input received from its public consultations and explain how the input has been used in budget decisions, execution and oversight.

In Kenya, the practice of PFM has attempted to incorporate the foregoing principles in a number of ways. For example Sections 35(1) and 125 of the Public Financial Management Act (2012) outlines the stages in the budget process at the national and county government levels respectively in any financial year. The stages are as follows:

Issuance of budget Circular

The National Treasury releases a circular to all government agencies starting the process, and setting out guidelines for public participation. The County Executive Member for finance must also release a circular by this date doing the same at county level. The budget circular provides guidelines and key policy directions to the budget process. This is supposed to be done by August 30 of every financial year.

Priority setting

Public participation in identifying and setting priorities is crucial in the budget making processes. This not only fosters participatory development but also ensures ownership of government initiated projects. In Kenya, citizens can participate at both the national and county planning processes. At the County level, the integrated development planning process offers such an opportunity. Counties must prepare and table a county development plan in the County Assembly. The integrated development planning process must include both long term and medium term planning. The County Government Act 2012 provides that the development of this document should be done through a consultative manner by incorporating the views and input from most of the stakeholders, including citizens in the county. The deadline for this is September 1.

The County Budget and Economic Forum

The PFM Act, 2012 establishes the County Budget and Economic Forum to provide a means for consultation by the county government on preparation of county plans, the County Fiscal Strategy Paper and the Budget Review and Outlook Paper for the County. This Forum also discusses matters related to budgeting, the economy and financial management at the county level.

The membership of this important consultative body is drawn from organizations representing professionals, business, labour issues, women, persons with disabilities, the elderly and faith based groups at the county level. The public should thus lobby for inclusion or actively engage this body to influence County public finance matters.

Public Hearings

Public hearings on the budget present an important opportunity for the public to participate. This exercise commences from September 1 to February 15 of every financial year. The National Treasury, various ministries and agencies undertake consultation with the public and other stakeholders to solicit proposals on the budget. Views from the public are expected to feed into the formulation of the Budget Policy Statement.

CRA recommendations on revenue sharing (vertical and horizontal)

By January 1 of every year, the Commission on Revenue Allocation is expected to submit its recommendations for the division of revenue between national and county governments (Vertical), and among the counties (Horizontal), to parliament. After CRA recommendations are received, Treasury begins work on the fiscal framework (economic forecast, aggregate revenues, borrowing and spending ceilings). The public can make recommendations on the content of this report.

Submission of the Budget Policy Statement and the County Fiscal Strategy Paper

The Cabinet Secretary for Finance submits the Budget Policy Statement to Parliament by February 15. This is also the deadline for the debt management strategy paper, and the Division of Revenue and County Allocation of Revenue Bills to go to Parliament. The County Fiscal Strategy Paper fulfils the same function as the BPS in setting the fiscal aggregates within which the county budgets would be framed. Treasury must give CRA an opportunity to comment on the Budget Policy Statement. Equally CRA is also required to respond to the 47 County Fiscal Strategy Papers. The Budget Policy Statement should be approved by February 28 which is also the deadline for the County Fiscal Strategy Paper to be tabled in each County Assembly. March1 is the deadline for BPS to be made available to the public

Division of Revenue and County Allocation of Revenue Bills

These two Bills are important to the financing of the devolved system of government. Article 218 of the constitution states that, at least two months before the end of each financial year, there shall be introduced in Parliamentï ï (*a*) Division of Revenue Bill, which shall divide revenue raised by the national government among the national and county levels of government ; and (*b*) County Allocation of Revenue Bill, which shall divide revenue among the counties. Citizens have an opportunity to give proposals to the relevant Senate and National Assembly Committees on the contents and amounts allocated between national and county governments; and among county governments.

Budget Estimates to Parliament and County Assemblies

The Constitution under Article 221states that the Cabinet Secretary responsible for finance shall submit to the National Assembly estimates of the revenue and expenditure of the national government for the next financial year at least two months before the end of the financial year. It is also the deadline for the Judiciary and the Parliamentary Services Commission to submit their budgets to Parliament. This is also the date for the county budget proposal to be submitted to the County Assembly. The County Executive member for Finance presents comments on the County Assembly budget.

Public Hearing on the Budget Estimates

After the estimates have been submitted to parliament, the budget and appropriations Committee will begin to hold public hearings on the budget. The Committee tables the resulting recommendations on the budget in parliament. This process is also replicated at the County level where the relevant County Assembly Committee in charge of budget must hold public hearing on the County budget estimates. This process is done between May and June.

Finance and Appropriation Bills

The national Finance Bill to authorize tax and revenue collection is tabled in Parliament immediately after parliamentary debate on the budget estimates. A county Finance Bill is also tabled at this time in the County Assembly. June 30 marks the end of the financial year and the deadline for the appropriations bill to be passed by parliament to authorize spending for the new budget year. At the same time county assemblies are expected to pass the county appropriation bill. Section 127 of the PFM Act, 2012 stipulates that not later than 15th June of each financial year, every county government shall prepare an annual cash flow projection for the county for the next financial year, and submit the cash flow projection to the Controller of Budget with copies to the Intergovernmental Budget and Economic Council and the National Treasury.

Passing of the Finance Bill

As per section 41 of the PFM Act 2012, not later than ninety days after passing the Appropriation Bill, the national assembly shall consider and approve the finance bill with or without amendments. Similarly section 133 of the Act requires that not later than ninety days after passing the appropriation bill, the county assembly shall consider and approve the finance bill with or without amendments.

Budget Execution, Auditing, Monitoring and Evaluation

Upon debate and approval of the Finance Bill into the Finance Act, the entire budget is effectively authorized by Parliament (for National Government) and County Assemblies (for County Governments). All these must be approved by the Controller of Budget. There are numerous avenues for the citizens to interrogate the Controller of Budget and Auditor-Generalȏs reports to hold the government at two levels accountable.

During the budget execution stage, the government should publish the following reports:

(i) **In-Year Reports**, which include information on revenues collected, actual expenditures made, debt incurred. This can be done through monthly or quarterly publications.

(ii) **A Mid-Year Review**, which summarized the actual budget data for the first 6 months of the year, that is, revenues, expenditures and debt. This report also re-evaluates the economic and financial assumptions upon which the budget was initially drafted.

(iii) **A Year-End Report**, that illustrates the situation of the government accounts at the end of the fiscal year.

(iv) **An Audit Report** that evaluates the financial performance of the government in the previous budget year.

The government is expected to publish the foregoing reports in simple and clear abridged versions for public consumption. This is expected to enhance effective public participation in budget monitoring process.

Social Impact Assessments

Citizens can also participate in Public Finance Management through various forms of social accountability, such as social audits, public expenditure tracking surveys and citizen report cards among others to monitor the social impact of public spending. Itốs only through such active participation that governments will be compelled to put in place systems to monitor budget implementation on a real time basis.

In addition, a social impact assessment helps in ensuring optimal resource allocation in any economy. Currently, the Public Finance Management Act 2012 puts a cap on the spread of recurrent and development expenditure both at the National and County Government levels. The Act[14] provides that over the medium term a minimum of thirty percent (30%) of the National and County Governmentôs budget must be allocated to the development expenditure.

7.5 International Trends and Best Practices in Public Finance Management

7.5.1 New Zealand

[14] Section 15(2a) Public Finance Management Act, 2012

New Zealandôs public sector reforms have been hailed as model throughout the world. The year 2004 marked a first major change to New Zealandôs public financial management system when the government passed the Public Finance (State Sector Management) Bill. The Bill resulted in significant amendments to the Public Finance Act, 1989, with the purpose of improving performance, accountability and integration across the New Zealandôs public sector.

Like here in Kenya, New Zealandôs Parliament is the supreme law making authority. Itôs able to scrutinize and control the government through the regular process of granting financial authority to the government.

New Zealandôs Public Finance Act is founded on two key principles, that is, increased transparency and greater accountability. The Act requires governments to be explicit in their long-term fiscal intentions and to assess them against principles of responsible fiscal management. In 2005, the New Zealand treasury published a Guide to the Public Finance Act that provides a detailed explanation of how the Actôs provisions promote fiscal transparency. The Guide specifies how the budget policy statements enhance fiscal transparency.

In addition to enhancing the transparency and credibility of fiscal forecasts, the act requires at a minimum, disclosure of the underlying forecasts of New Zealandôs GDP, consumer prices, employment and current account of the balance of payments.

7.5.2 South Africa

The country operates a three-tier unitary system of government, at national, provincial and municipality levels. The management of finances in national and provincial government is regulated by the South Africa Public Finance and Management Act (1999). This law sets out the procedures for efficient and effective management of all revenue, expenditure, assets and liabilities. The Act further establishes the duties and responsibilities of government officials in charge of finances; and aims to secure transparency, accountability and sound financial management in government and public institutions.

The Act, which came into effect from 1 April 2000, gives effect to sections 213 and 215 to 219 of The Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996) for the national and provincial spheres of government. These sections require national legislation to establish a national treasury, to introduce uniform treasury norms and standards, to prescribe measures to ensure transparency and expenditure control in all spheres of government, and to set the operational procedures for borrowing, guarantees, procurement and oversight over the various national and provincial revenue funds.

Prior to 1994 the participation of citizens, civil society and the private sector in the parliamentary budget debates was restricted to a small number of private sector interests who regularly made submissions to Parliamentary committee hearings. Nevertheless, with the reforms in the public finance management system, the number and frequency of submissions increased significantly.

Similarly, access to public budget information was restricted to aggregate data on the size of the budget and inter-departmental allocations. Since 2000, South Africa has had improvements in the availability, timeliness, scope and usefulness of the information provided. The Public Finance Management Act (PFMA) provides detailed specifications for the tabling of information in national and provincial legislatures. This in turn provides regular reporting on budget implementation, borrowing and timely audit reports.

7.5.3 South Korea

The Ministry of Finance in South Korea has established a wide range of measures to gather public information before developing its budget. These measures include field trips taken by officials across the country to learn about realities on the ground. The Ministry also organizes public hearings on its proposed budget measures.

The widespread coverage of internet services across the country and the use of social media has enabled the government to obtain views from citizens and for citizens to voice opinion on the proposed budget measures.

8.0 Recommendations on Strengthening Participation in Public Finance Management

Public participation in public financial management should be thought of as a civic duty aimed at contributing to the management of public resources. The public can participate through written submissions and petitions to Parliament and County Assemblies. Public participation serves to guarantee public ownership of government expenditure programmes.

Successful citizen participation in public finance is hinged on a number of important preconditions.

(i) **Public participation policy**

There is need for a consultatively developed policy and framework to guide the public participation process at the National and County levels. This will help us move away from tokenism to real and effective participation

(ii) **Citizen Capacity and Awareness**

There is need for awareness creation and capacity building of citizens on their rights; and the available opportunities for participation in public financial management. This will enhance the quality of the public input in key documents such as plans and budgets.

(iii) **Focus Group Approach**

The government should also consider taking a FGD approach particularly on technical fiscal issues that require relevant expertise in public finance, economics or taxation among other issues. This is based on the fact that not every citizen will effectively contribute on public policy matters.

(iv) **Timely Disclosure of Fiscal Information**

For fiscal transparency and public participation to be realized, there is need for regular and timely disclosure of fiscal data such as plans, budgets, fiscal forecasts and budget monitoring reports among other relevant documents. This should be prepared in a simple and clear language that is easily accessible to the public. Worldwide, the level of budget transparency is still poor. According to the Open Budget Index 2012, only 23 out of 100 countries assessed provide significant or better, while 41 provide minimal, scant or no information. According to this survey, Kenya provided limited budget information.

(v) **Timeliness and Setting the Agenda on Participation in Public Finance Management**

The purpose for public engagement should be publicized in advance. The government should clearly specify the scope and agenda of the consultation. The public must be given enough time to internalize the subject matter and develop their submissions.

(vi) **Feedback Mechanism**

The public should be provided with feedback on their input in the budget making process. The government should publish reports of the input received from its public consultations and explain how the input has been used in budget decisions, execution and oversight.

(vii) **Budget allocation**

Counties should budget for public participation. Such allocation will assist in awareness creation for meaningful participation

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Chapter Eight

8.0 PUBLIC PARTICIPATION IN PUBLIC PROCUREMENT INKENYA

8.1 INTRODUCTION

Public participation in procurement builds trust and confidence in procurement processes. Article 201(a) of the Constitution of Kenya 2010, provides for public participation in financial matters as one of the core principles of public finance. Article 227 (1) of the Constitution requires that the public procurement system be fair, equitable, transparent, competitive and cost-effective. In addition, participation is a statutory requirement under Section 2 of the Public Procurement and Disposals Act, 2005.

Despite the progress made in providing the requisite legislative and enabling environment, public participation in procurement in Kenya continues to face a myriad of obstacles such as corruption, delayed payments to suppliers, non-compliance to laws and regulations, and poor public procurement monitoring and evaluation systems. Public procurement also faces capacity constraints in terms of access to finance and intense competition from international bidders.

The objective of this chapter is to critically analyze the various opportunities existing within and outside the public procurement and disposal framework through which the public can proactively participate in the process. Additionally, we seek to provide various proposals that will enhance the process of public participation in the process while at the same time providing the justification for public involvement in the process. This chapter provides a review of the Kenyan Constitution and the various existing legislations that guide public procurement processes in the country.

Public Procurement Reforms in Kenya

Public procurement in Kenya plays a critical role in the financial management in the public sector institutions. The government is the largest single buyer of goods and services in the country and this makes public procurement process of interest to the tax payers whom they should be accountable to. Public Procurement in Kenya has evolved significantly from being regulated through Treasury circulars during pre-independence period which culminated into the creation of Central Tender Board (CTB) in 1955. The same system was adopted upon attainment of independence in 1963 even though with slight variations in terms of operations. In 1982 with the government formulation of the District Focus for Rural Development strategy, public procurement activities were shifted to three bodies being; District Tender Committees, Ministerial Tender Committee and Central Tender Committee. These developments did not solve the problems that continued to bedevil the public procurement system in the country.

- The process to reform the public procurement system in Kenya started in the year 1997 after the World Bank had conducted a county procurement assessment review. The assessment identified the following weaknesses in the public procurement system that reduced effectiveness of public financial management and governmentôs ability to deliver services effectively:[15] Obscure rules not based on a sound and transparent legal framework, and
- The system did not promote fair competition, thereby rendering it to serious abuse

With this report in place, there was need for a systematic review of the Kenya procurement laws to address the problems. Several strategies were adopted in this regard which included formulation of the public procurement reform program launched in 1998. This resulted in the issuance of public procurement regulations in the year 2001 under the Exchequer and Audit Act which abolished the Central Tender Board and heralded the establishment of Ministerial Tender Committee, Procurement Appeals Board and the Public Procurement Directorate as oversight agencies.

[15] Development and reform of the Kenyan public procurement system-J. Ochiengô

In 2005, the Public Procurement and Disposal Act was enacted by parliament to establish procedures for efficient public procurement and for the disposal of unserviceable, obsolete or surplus stores, assets and equipment. Further, the Act was to promote and ensure that competitors are treated fairly and that integrity and fairness of the whole process is promoted. All these were to increase public confidence in public procurement.

The new constitution enacted in 2010 significantly gave people the right to determine the way they are governed. It also introduced the principles of good financial governance which are laid down in its twelfth chapter. The most important point to note is that it advocates for openness and accountability, including public participation in financial matters. Article 227 of the Constitution specifically provides that a state organ or public entity shall contract for goods and services in accordance with a system that is fair, equitable, transparent, competitive and cost effective. The public therefore is called upon to take its rightful place in ensuring that these principles are adhered to by the public entities.

8.2 Public Participation In Public Procurement Processes: What Does It Entail?

8.2.1 Understanding Public Participation in Public Procurement

Public participation is the deliberate process by which interested or affected citizens, civil society organizations, and government actors are involved in policy-making before political decisions are taken[16]. It entails citizen involvement in making service delivery and management decisions. It is the process by which public concerns, views, needs and values are incorporated into governmental and corporate decision making. This occurs when citizens and public officials have participation needs and when participation mechanisms exist. In other words it is not something that happens accidentally or coincidentally. The process should be well designed and capable of assessment in terms of its impact.

[16] Public participation in Europe: An International Perspective

Basically, participation mechanisms include public hearings, citizen forums, community or neighborhood meetings, citizen advisory groups and individual citizen representation. Effective public participation entails involvement of citizens in policy discussions and decision making. It presupposes involvement of citizens in goal setting, strategy, policy, and capacity determination and implementation evaluation.

Public participation in Kenya has not been effective even with the enactment of Kenyan Constitution in the year 2010. Most public officers misconstrue this to mean public hearing at which the public comments on what a public entity/body proposes to do. For public participation framework to be developed, it would be important that a clear understanding of the term is achieved from the onset. Section 87 of County Government Act 2012 gives principles of citizen participation in county affairs but fails to clearly bring out the meaning of public participation.

Public participation becomes effective if the following key factors are considered and applied in totality during the process:

1. ***Inform the public***-The public must be provided with balance and objective information to assist them in understanding the problem, alternatives, opportunities and/or solution
2. ***Listen to the public***-This is perhaps the most crucial element of public participation. It seeks to obtain public feedback on analysis, alternatives and /or decisions. Most public entities/bodies fail in achieving this. We have seen some adverts in the daily newspapers requesting the public to submit their memoranda on certain issues within two days.
3. ***Engage in problem solving***-public entity work directly with the public throughout the process to ensure that public concerns and aspirations are consistently understood and considered.
4. ***Develop agreement***- public entity partners with the public in each aspect of the decision including the development of alternatives and the identification of the preferred solution
5. ***Empower***-the final decision making is placed in the hand of the public

8.2.2 The Rationale for Public Participation in Procurement Processes

Article 201(a) of the Kenyan Constitution advocates for openness and accountability including public participation in financial matters. Public procurement involves substantial amounts of taxpayersô money and this calls for citizens to demand accountability and transparency in the way the funds are applied. The inefficiencies and improprieties witnessed in public procurement process within government organizations are reasons enough to arouse public interest in the process.

The public needs to satisfy itself that the amounts of money that they contribute to the exchequer is put to good use and that it does not end up in individuals pockets, at least illegally. Additionally, public opinion in the process can only be realized through active participation and interaction with the public procurement system. Participation allows the public to voice its needs, which provides legitimacy for government to develop publicly supported goals, missions and service priorities.

Generally speaking, participating in a decision/process gives people a sense of ownership for that decision and once that decision has been made they want to see it work. There are instances where a community disowns a project just by the mere fact that they were not consulted. By involving the public, not only is there political support for implementation but groups and individuals may enthusiastically assist in making sure that the project succeeds. Public participation, especially in procuring community projects, is therefore key for successful project implementation.

Government entities have lost substantial amount of public money in law suits filed by unsuccessful or disgruntled players in the procurement process. These kinds of legal battles can be avoided through the inclusion of the key stakeholders in the most transparent ways. An all inclusive public procurement process devoid of high handedness and secrecy is the surest way of evading such legal battles. This will further go a long way in achieving and maintaining legitimacy of the entire process.

Lack of knowledge and information is one of the factors that have been hindering public participation in decision making process. A survey conducted by Transparency International (TI) after disbursement of devolved funds revealed that only 17 per cent of Kenyans are aware of the amount of cash disbursed to their county governments.[17] Further, of the 17 per cent, less than half know where to get information on the funds disbursed to the counties for both recurrent and development expenditure. Public participation leads to a better educated public. Participants not only learn about the subject matter but also they learn how decisions are made by their government / elected leaders. This in essence means that the public gets to hold their leaders accountable for all the decisions they make.

8.3 Proposal on Framework for Public Participation in Procurement in Kenya

8.3.1Who is the Public?

The public is an open and unlimited circle of persons comprising all members and organizational forms of a society[18]. It encompasses individuals just as much as it does groups. Key players in public procurement can be viewed as comprising of special interest groups and the general public (individuals).

a. Special interest groups

This consists of the various formal groupings, associations or organizations that are key stakeholders in the process. This group is important in policy formulation and evaluation. They include groups of persons with formal operating structures and in most cases legally recognized in law through registration or statutes. They have specific objectives and clear organizational structures. This category includes the civil society organizations, the professional bodies, business associations or groupings, Small and Medium Enterprises (SMEs), Trade Unions, the youth and women groups among others.

b. General public

[17] Provide reference
[18] Bundeskanzleramt Osterreich-Standards of Public Participation-Recommendations for Good Practice

General public consist of the various informal groups within the population which are in one way or another affected by the procurement process. Unlike the special/critical public, they do not have formal structures and lack specific identifiable objectives. The general public could, for example, be a group of villagers where the government is constructing a road or putting up a dam.

8.3.2 Basis for Public Participation in Procurement

The framework for public participation in procurement process must be anchored on the existing legislations that lay down rules and regulations to be followed by all those involved in it. In this regard, our proposal will be based on the following two legislations;

1. Public Procurement and Disposal Act, 2005; and
2. Public Procurement and Disposal Regulations, 2006.

It would be important that we identify relevant provisions in these legislations that offer opportunities through which the public can participate.

Public participation in procurement can be viewed through the following avenues:

- Policy formulation
- Representation at the board/Committees
- Project monitoring and evaluation
- Participation of special interest groups-Youth, women, SMEs etc

8.4 Opportunities for Improving Public Procurement Systems There is need to improve efficiency in public procurement system in order to enhance public participation and accountability in decision making structures. This can be achieved through the following proposals.

First, a robust procurement legal regime that promotes public participation and efficiency. Ideal laws should be clear, consistent, competent and flexible.

Secondly, a competent professional workforce equipped with defined skills and knowledge for specific procurement jobs. Employees should be held to account to a set of ethical standards. Training becomes a necessity in this regard.

Thirdly, entrench procurement planning in budget cycle. The purpose of planning is to ensure that the procurement agents meet the public and governmentøs needs in the most effective, economical and timely manner.

Pre and post procurement impact assessments are essential in improving accountability. We must create systems to assess the impact of procurement on the holistic service delivery agenda.

Equally, public procurement must take up ICT as an enabler. Leveraging on ICT reduces direct physical intervention by procuring officials consequently reducing procurement related corruption.

Public procurement can form vital tool for improving service delivery. As we implement devolution, it is imperative that public procurement laws and regulations are reformed to comply with the provisions of the Constitution and best practice. Efficiency and effectiveness of public procurement may require a deeper look at these proposals.

a. Public participation in Policy Formulation and Legislative Review

Procurement in public service is administered through the Public Procurement and Disposal Act, 2005 and Public Procurement and Disposal Regulations, 2006. These laws are continuously reviewed to ensure that they are at par with the emerging global trends and the countryøs economic agenda. The review of existing laws and formulation of procurement policies should not be done in õsecrecyö but in an all inclusive process involving all stakeholders and the public at large.

The critical public participants should in this regard be involved from the initial stages of legislative review and policy formulation. The Treasury and other government bodies that are charged with the mandate of reviewing these laws should consult with the civil society organizations, professional bodies and trade union associations to ensure that their input is taken into account.

For effective participation in public procurement policy review, it would be important that the critical bodies coalesce under an umbrella body and not on their individual capacity. This will create maximum impact in the sense that policy drafters and parliamentary committee sessions will not have to receive numerous presentations and memoranda on the same subject matter that they may not be able to review in totality. Since parliament operates on strict timelines, it would be important that public presentations to relevant committees are made a minimum as possible hence the need for the bodies to join together under one body. Further, the policy makers must ensure adequate sharing of information from the initial stages of formulation to give these participants adequate time to research, consult and prepare their comments.

As explained earlier, public participation is only effective if there is a feedback mechanism where participants and public officials share their thoughts. In this regard, it would be paramount that the process is done in such a way that enables the public to question decisions or provisions made by officers and on the flip side the officers should explain to this critical group why their proposal may not be taken.

It will also be important that public hearings are conducted as a means of roping in the general public which may not be well informed on the procurement operations so as to inform them of how the laws may impact on them. Public hearings can also be avenues through which opinions can be received on the basic issues within the policy framework.

b.Participation through Representation on the Public Procurement Bodies

The Public Procurement and Disposal Act, 2005 establishes three bodies to regulate public procurement. These are:

- Public Procurement Oversight Authority (PPOA);
- Public Procurement Oversight Advisory Board (PPOAB); and

- Public Procurement Administrative Review Board (PPARB)

Regulation 5(1) of Public Procurement and Disposal Regulations, 2006 gives the Cabinet Secretary mandate to nominate 9 persons from various professional and business bodies to be members of the Public Procurement Oversight Advisory Board. This presents an opportunity for the public to participate in the procurement process through electing one of their members to represent them. Further, Regulation 68 (1) also provides anopportunity for the public through their professional bodies to be represented in the Public Procurement Administrative Review Board. The second schedule to the regulations also provides opportunity for public representation to the Constituency Development Fund tender committee.

Participation through representatives is one of the avenues through which the public can effectively engage with the players. The public can channel their views and opinions through their nominated representatives to these key bodies in the public procurement process.

A. Monitoring and Evaluation and public participation

Procurement process does not end with the purchase of goods and services but with the completion of the project. There are instances where a lot of funds have been used to source for projects only for them to be abandoned mid-way or they are done contrary to the contract agreement signed with the service providers. This has been common with CDF projects where they are abandoned before completion for lack of finances. As per the Constituency Development Fund Act, 2003, a procurement entity shall not commence any procurement procedure until it is satisfied that sufficient funds have been set aside in its budget to meet the obligations of the resulting contract[19].

The public needs to be vigilant in the entire process by ensuring that they put in place monitoring and evaluation mechanisms to ensure that projects are delivered as per agreed contracts. Civil

[19] Section 26(6)

society and community based organization should develop mechanisms through which they can monitor projects procured through public resources.

c. Youth and Women Empowerment through Public Procurement

Public procurement attracts a number of key players both within and without the country. . As a result of this, there are a lot of vested interests leading to corrupt practices where laid down procedures are deliberately flouted. Tenders are awarded to well-connected individuals and companies who may not have qualified. As a result of these, the majority of youths and women who operate small businesses do not get opportunities to participate in the process. Further, the local companies and businesses more often than not lose out on mega contracts to their foreign counterparts.

The immediate former president directed two years ago that 10% of government tenders be given to the youths in a bid to encourage them to participate and also to uplift them economically. This directive has since been reviewed by the current president H.E Uhuru Kenyatta by capping the threshold for both the youth and women at 30%. This is a welcome move as it will ensure that these special category in the economy are given preference thereby shielding them from intense competition from well established firms.

d. Facilitating the Participation of SMEs in Public Procurement

The Government at both levels (National and County) must recognize that the small and medium enterprise (SMEs) sector is very important to the economy and that public procurement can be an important source of business for SMEs. The competition for public contracts has intensified at both levels of government and most SMEs are finding it more difficult to win such business. The bigger players including foreign companies have invaded even the regional businesses making life difficult for SMEs and local enterprises.

As a way of facilitating public participation, the national treasury and county governments should come up with policies that will guarantee participation of both the small and medium enterprise and the local entrepreneurs by shielding them form intense competition from multinational and national companies. However, such guidelines and policies should not be designed to favor the SME sector over other sectors but rather to provide SMEs with a level playing field in competing for public contracts. Some of the policies that can be adopted are outlined below:

1. **Sub-dividing contracts into lots**

   SMEs interested in public contracts often complain that they are excluded from public procurement contracts simply because they do not have the capacity to tender for the whole contract. This challenge can be addressed through directives to allow contracts to be awarded in the form of separate lots. The sub-division of public purchases into lots clearly facilitates access by SMEs both quantitatively and qualitatively.

2. **Setting proportionate qualification levels and financial requirement**

   In most cases, contracting authorities or public entities fix too high capacity and ability levels which effectively lock out SMEs from participating in public procurement. Selection criteria must be clear, non-discriminatory and proportionate to the contract in question. Further, selection criteria must not address irrelevant matters. For example, a requirement that only experience acquired in dealing with public sector will be taken into account is irrelevant and limits competition. While prior experience is key, it should not be used as a tool to block potential SMEs.

3. **Administrative burden**

   Kenyan public procurement is characterized by time-consuming paperwork which require that potential suppliers have a well functioning and skilled work force to meet. SMEs normally do not have large and specialized administrative capacities. In this regard, keeping administrative requirements to a bare minimum is essential to facilitate SMEs participation in public procurement.

9.0 Recommendations on Enhancing Public Participation in Procurement

Public participation in procurement should be given more emphasis than before based on the fact that a lot of funds and functions pertaining to it have been devolved to the regional government. The public participation framework in procurement should aim at ensuring that there is adequate access to information to start with while at the same time promoting accountability and strengthening the commitment of stakeholders towards improved governance. There should also be monitoring and evaluation framework that will give feedback to the process. Specifically however, we provide the following recommendations as a way of enhancing public participation in the procurement process:

a) Leverage on technology as a way of enhancing access to information

Procurement process in the country has been conducted under a lot of secrecy to the extent that critical information is deliberately not availed to the public. Ensuring easy access to all the relevant information on business opportunities in public procurement is of key importance to the public. In this regard, contracting entities as a norm should use E-procurement as it allows easier access to the relevant information on business opportunities. As is practiced in most jurisdictions, all public tender notices should be published on a single web portal which is accessible free of charge. Players should be given adequate time to prepare and respond on the procurement opportunities available.

County governments can also as a matter of priority come up with information centres within their jurisdictions where such information to do with public procurement can be communicated to the local businessmen who may not be endowed with accessibility to digital information.

b) **Objectivity as a basis for tender evaluation**

Public participation should be conducted in the most transparent way, capable of being verified. To enhance public participation in procurement, contracting authorities must develop objective and non-discriminatory criteria of evaluation. All players should be given equal opportunity to participate and the contracting authorities should be able to de-brief unsuccessful tenderers on why they failed. Objectivity can further be achieved by use of simple and where possible standard documentation to assist even local suppliers who may not have skillful work force apply for tenders. Contracting authority should allow applicants to self declare their capacity to undertake the contract, and should seek verification or evidence of such capacity only in the event of the tenderer being short-listed.

c) **Community Empowerment Programs to facilitate procurement monitoring**

Monitoring and evaluations are part and parcel of the procurement process. The local citizens must be empowered to build their capacity to hold duty bearers accountable in the procurement process. Perhaps the numerous problems that were experienced with the Constituency Development Fund (CDF) could have been avoided had the communities been empowered to have requisite skills of project monitoring and evaluation. Empowerment will also go a long way in helping the local citizen prioritize on development projects before they are procured by their Governments.

d) Joint bidding for Small and Medium Enterprises and Sub-Contracts for large Contracts

Among the problems facing local entrepreneurs and SMEs in public procurement is inability to qualify for large contracts. As a way of ensuring their participation, we recommend a framework that will allow them to joint bidding and also sub-contracting large contracts which they may not qualify for individually.

e) Use of Open Tender

The contracting authorities should use open tender procedures for advertised contracts for supplies and services. This will give equal opportunities to all interested parties and will go a long way in enhancing accountability in the process.

f) Limit restrictions to public procurement

Contracting authorities should only set limitations to contracting that are relevant and proportionate to the circumstances of the contracts. Further, cost of tendering must never be prohibitive to lock out potential tenderers.

9.0 CONCLUSION

The participation of citizens in the procurement process cannot be understated based on the analysis provided. It is a fundamental aspect of good governance and has potential to improve economic growth and development in any country. Public participation should go beyond influencing procurement policies to incorporate wider public access to procurement opportunities. It not only ensures that citizens influence the decisions and actions that are made, but also legitimizes the processes and leads to citizen ownership of the means and the end products.

Procuring public entities should use simple, and where possible, standard documentation to facilitate wider public participation. Public procurement must be undertaken in a structured manner to demystify public procurement process.

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