

# Presentation on Public Procurement and Asset Disposal Act 2015

*PFM Seminar, Eastern Branch*

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# What's Public Procurement?

New vehicle dealers are losing business to importers of second-hand cars as county governments opt for the cheaper option



# What's Public Procurement?

## Sparks fly after awarding of Sh170bn tender for coal plant

The country could be up for another round of tender wars after the government's decision to award



- Procurement is defined as an activity or function that involves buying or purchasing or acquisition of goods, works and services to meet a specifically identified need e.g. a need or requirement to buy a plot for a cemetery or gravel and other building materials for a ward bridge

# Elements of Procurement



- Purchasing, hiring, leasing (Local, international)
- Storage / supplies (Receipts, stores)
- Logistics – transport, distribution
- Processing payments
- Contract management
- Disposal of obsolete, surplus, unserviceable stores.



# Introduction....Contd



- ❑ Public procurement forms the largest domestic market in many countries;
- ❑ Worldwide, procurement spending averages between 13% & 20% of GDP;
- ❑ Sound procurement system can contribute to a country's economic development;
- ❑ Corruption in public procurement means public funds are wasted on an enormous scale, and the benefits these Funds should have brought are lost.
- ❑ Taxpayers' money to pay for hospital equipment, books for schools or safer roads, for example, ends up sitting in the pockets of the corrupt.
- ❑ Cost of corruption in public contracting is not only measured by money lost->It distorts competition, reduces the quality, sustainability and safety of public projects and purchases

# Evolution of Public Procurement in Kenya



- In the past decades, the public **procurement** system in **Kenya** has undergone significant developments.
- From being a system with no regulations in the 1960s, and a system regulated by Treasury Circulars in the 1970s, 1980s, 1990s, and 2001.
- The introduction of the Public **Procurement** and Disposal Act (PPDA) of 2005 and the Regulations of 2006.
- PPDA of 2005 was repealed and replaced with PPADA 2015 and became operational on 7<sup>th</sup> Jan. 2016.

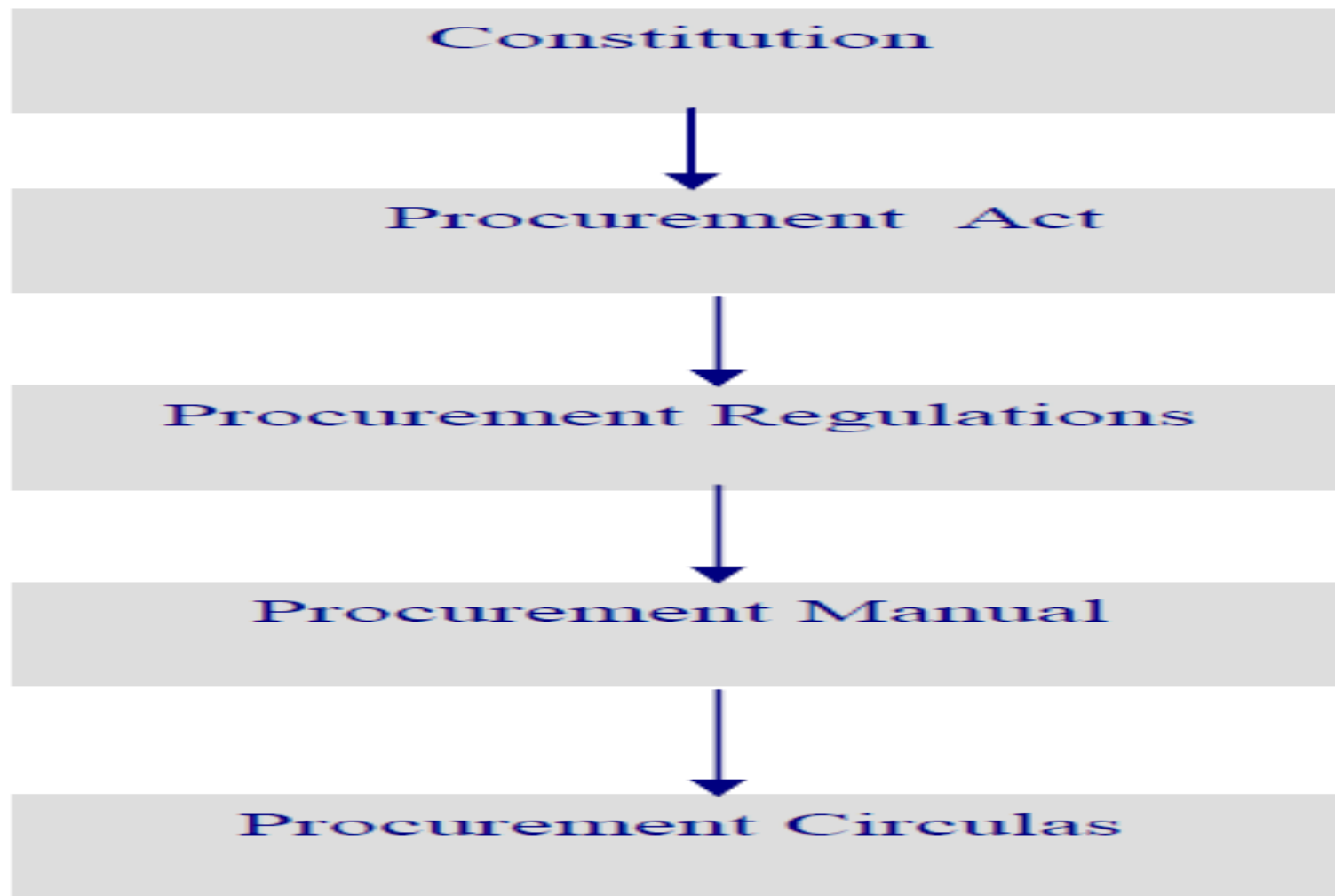
# Evolution of Public Procurement in Kenya



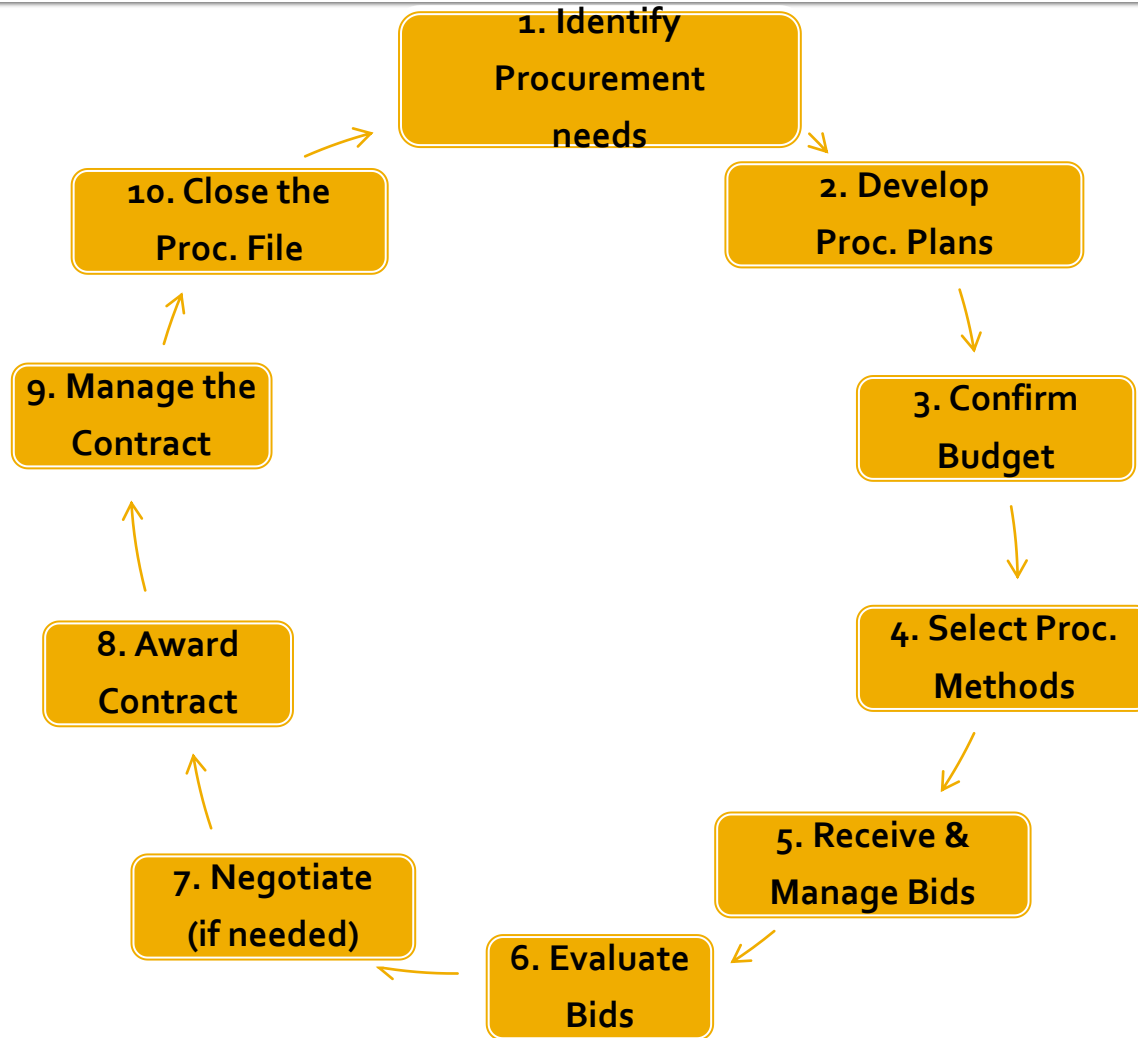
- ❑ Procurement is a key component in the PFM System
- ❑ Article 201 of the Constitution of Kenya provides that public money shall be used prudently and responsibly
- ❑ **Article 227 of the constitution provides that:- when a state organ or any other public entity contracts for goods / service, it shall do so in accordance with a system that is fair equitable, transparent competitive and cost effective**
- ❑ The current framework for public procurement is the PPADA, 2015 and the relevant regulations.



# Public Procurement Legal Framework



# Key Activities in a Procurement Cycle



# Overview of the Legal Framework



- ❑ The PPADA, 2015 has been in force since January 7<sup>th</sup> 2016
- ❑ Change from PPDA, 2005 to PPADA, 2015 was to ensure the procurement legislation is in line with the Constitution and the PFM Act, 2012

[Treasury circular on Procurement -02-2016.pdf](#)

- ❑ The Act has 18 parts;
- ❑ The Act defines the persons to perform specific roles in relation to procurement (who), how the roles are exercised (process / procedure) and the timelines for various steps in the process (when)

# Guiding Principles S.3



- a) National values and principles provided for under Article 10;
- b) Equality & freedom from discrimination provided for under Art.27;
- c) Affirmative action programmes (Articles 55 & 56);
- d) Principles of integrity under the Leadership and Integrity Act, 2012
- e) Principles of public finance under Article 201;
- f) Values and principles of public service (Article 232);
- g) Principles governing the procurement profession, international norms;
- h) maximization of value for money;
- i) Promotion of local industry, sustainable development & protection of the environment;
- j) Promotion of citizen contractors.

# Application of the Act S.4



The Act applies to all State organs & public entities with respect to—

- a) procurement planning;
- b) procurement processing;
- c) inventory and asset management;
- d) disposal of assets; and
- e) contract management.

# Role of the National Treasury S.7



- ❑ Formulate, evaluate, promote & research on national & county public procurement and asset disposal policy
- ❑ Develop policy guidelines for the efficient procurement management & disposal system
- ❑ Design & prescribe an efficient procurement management system for the national & county governments to ensure transparent procurement and asset disposal as contemplated by Article 227 of the Constitution:
- ❑ Provide technical assistance on procurement & assist in the implementation & operation of the public procurement and asset disposal system;



# Role of the National Treasury S.7..



- ❑ carry out general research, develop and promote electronic procurement strategies and policies in both the national and county governments
- ❑ carry out review of procurement and supply chain management system to assist procuring entities;
- ❑ develop and review policy on procurement of common user items in the public sector both at national and county government levels;
- ❑ develop policy on the administration of preference and reservations scheme and registration of target groups under preference and reservations scheme as prescribed;
- ❑ facilitate affirmative action for disadvantaged groups in accordance with the Constitution and advance their participation in the procurement process;
- ❑ develop and review policies and guidelines on the management of assets;
- ❑ issue guidelines to public entities with respect to procurement matters

# Public Procurement Regulatory Authority S.9



- ❑ Monitor, assess and review the public procurement and asset disposal system to ensure that they respect the national values and the Constitution(Article 227
- ❑ Monitor the public procurement system and report on the overall functioning of it and present to the Cabinet Secretary and the county executive member for finance in each county
- ❑ Enforce any standards developed under the Act;
- ❑ Monitor classified procurement information, including that of specific items of security organs and make recommendations to the Cabinet Secretary;
- ❑ Monitor the implementation of the preference and reservation schemes by procuring entities;

# Public Procurement Regulatory Authority S.9



- ❑ prepare, issue and publicize standard public procurement and asset disposal documents and formats to be used by public entities and other stakeholders;
- ❑ provide advice and technical support upon request;
- ❑ to investigate and act on complaints received on procurement and asset disposal proceedings
- ❑ research on the public procurement and asset disposal system and any developments arising from the same;
- ❑ advise the Cabinet Secretary on the setting of standards including international public procurement and asset disposal standards;
- ❑ develop and manage the State portal on procurement and asset disposal and ensure that it is available and easily accessible;
- ❑ monitor and evaluate the preference and reservations provided for under this Act and provide quarterly public reports;

create a central repository or database that includes—

- i. complaints made on procuring entities;
- ii. a record of those prohibited from participating in tenders or those debarred;
- iii. market prices of goods, services and works; [Procurement - MPI JUNE 2017.pdf](#)
- iv. benchmarked prices;
- v. State organs and public entities that are non-compliant with procurement laws;
- vi. statistics related to public procurement and asset disposal;
- vii. price comparisons for goods, services and works; and
- viii. any information related to procurement that may be necessary for the public;

# Public Procurement Regulatory Board S.10



Composed of the following:

- ❑ a chairperson nominated by the Cabinet Secretary and appointed by the President;
- ❑ four members who shall be appointed by the Cabinet Secretary after nomination, through a fair process, by—
  - i. the Law Society of Kenya;
  - ii. the Institute of Certified Public Accountants of Kenya;
  - iii. the Kenya Institute of Supplies Management;
  - iv. the Association of Professional Societies in East Africa,
- ❑ two persons nominated by the respective organizations representing— the youth; and persons with disabilities;
- ❑ the Cabinet Secretary or his or her representative; and
- ❑ the Attorney-General or his or her representative.

# PPR Board Functions S.12



- a) ensure the proper and effective performance of the functions of the Authority;
- b) approve and ratify the policies of the Authority;
- c) oversee the management, control and administration of the assets of the Authority
- d) receive any gifts, grants, donations or endowments made to the Authority;
- e) determine the provisions to be made for capital and recurrent expenditure, and for the reserves of the Authority;
- f) open bank accounts for the funds of the Authority in accordance with PFM Act
- g) subject to the approval of the CS, invest any of the Authority funds
- h) co-operate with other organizations undertaking functions similar to its own, whether within or outside Kenya



# PPR Board Functions S.12....contd



- ❑ Members of the Board shall be paid allowances determined by the CS, in consultation with the SRC
- ❑ In case of conflict of interest, the Board member concerned shall disclose such and not take part in such decisions
- ❑ A member of the Board of the Authority including the chairperson shall hold office for a term of three years but shall be eligible for re-appointment for a further term of three years.

# Director General Office S.15-22



- ❑ DG of the Authority appointed by the CS on the advise of the Board
- ❑ DG shall be the CEO of the Authority & the Secretary to the Board
- ❑ DG shall hold office for a term of 3 years but shall be eligible for re-appointment for a further term of three years.
- ❑ DG shall be responsible for the day to day management of the affairs of the Authority and shall be answerable to the Board in the performance

# Public Procurement Administrative Review Board S27/28



- ❑ reviewing, hearing and determining tendering and asset disposal disputes; and
- ❑ perform any other function conferred to the Review Board by this Act, Regulations or any other written law.
- ❑ The Authority shall provide secretariat and administrative services to the Review Board

# Part IV- Powers to Ensure Compliance



- 35- Investigations :
- 36- Power of Investigators
- 37- Investigation Report
- 38- Order by the Director General
- 39- Request for Judicial Review
- 40- No Investigation if issue is before the Judicial Board
- 41- Debarment [Debarred Firms.htm](#)

# Responsibilities of Accounting Officers S-44



- ❑ Shall be primarily responsible for ensuring the public entity complies with the Act and the Regulations
- ❑ Shall establish systems and procedures to facilitate systematic & structure decision making in procurement
  - ❑ Establishment of a procurement unit staffed by procurement professional
  - ❑ Internal procurement procedures manual
  - ❑ Appointment of various committees / teams e.g. Tender Opening Committee, Tender evaluation committee, Inspection and acceptance committee, project management team, Disposal Committee
- ❑ Ensure annual procurement and disposal plans are prepared

# Accounting Officers.... Contd



- ❑ Ensure procurement and disposal processes comply with the PPAD Act
- ❑ Ensure compliance with sections 68, 147, 148, 149 of the PFM Act
- ❑ Approve and sign all contracts
- ❑ Ensure segregation of responsibilities
- ❑ Submit to the Authority procurement plan demonstrating the application of the pref. & reservation scheme within 60 days after commencement of financial year
- ❑ Ensure procurement is within the approved budget.
- ❑ Maintain procurement records for each procurement for 6 yrs



# Evaluation Committee S-46



- ❑ An Accounting officer shall ensure that an ad hoc evaluation committee is established from within the members of staff, with the relevant expertise
- ❑ where technical expertise is required from outside the organization, such expertise may be obtained from other procuring entities
- ❑ An evaluation committee established shall—
  1. deal with the technical and financial aspects of a procurement
  2. consist of between 3-5 members appointed on a rotational basis comprising heads of user department and two other departments or their representatives and where necessary, procured consultants or professionals;
  3. have as its secretary, the person in charge of the procurement function
  4. complete the procurement process for which it was appointed and no new committee shall be appointed on the same issue unless the one handling the issue has been procedurally disbanded;
  5. adhere to Articles 201(d) and 227 (1) of the Constitution.

# Inspection and Acceptance Committee S-48



The inspection and acceptance committee shall immediately after the delivery of the goods, works or services—

- a) inspect and where necessary ,test the goods received;
- b) inspect and review the goods ,works or services in order to ensure compliance with the terms and specifications of the contract; and
- c) accept or reject, on behalf of the procuring entity, the delivered goods, works or services.

The inspection and acceptance committee shall—

- a) ensure that the correct quantity of the goods is received;
- b) ensure that the goods, works or services meet the technical standards defined in the contract;
- c) ensure that the goods, works or services have been delivered or
- d) completed on time ,or that any delay has been noted;

# Procurement Unit Responsibilities



- ❑ Head of PU shall render professional advice to the Accounting Officer - s47(2)
- ❑ Maintain and update lists of registered suppliers contractors & consultants – s57
- ❑ Provide Secretariat services to tender evaluation committee S46 (4)(c)
- ❑ Prepare, publish and distribute procurement opportunities & documents
- ❑ Propose membership of tender opening, evaluation, negotiation and disposal committees for appointment by Accounting Officer
- ❑ Prepare contract documents and procurement correspondence e.g. letters of notification, termination letters
- ❑ Maintain & archive procurement and disposal records
- ❑ Manage inventory (s161) *etc ..... (see regulation 8)*

# User Departments



- ❑ Prepare and submit departmental procurement plan thro' PU
- ❑ Initiation of procurement / disposal process – requisitioning
- ❑ Specification of requirements
- ❑ Maintain contract records
- ❑ Participate in Inspection & acceptance of good / services
- ❑ Participate in contract management
- ❑ Identification of items for disposal

# General Procurement and Asset Disposal Principles- Part VI



- 53- Procurement and Asset Disposal Planning
- 54- Procurement pricing and requirement not to split of contracts
- 55- Eligibility to Bid
- 56- Use of list of another state organ or public entity]
- 57- List of Registered Suppliers
- 59- Limitation on contracts with state and public officers
- 61- Tender Security
- 62- Declaration not to engage in Corruption
- 66- Corrupt, coercive, obstructive, collusive or fraudulent practice, conflicts of interest
- 68- Procurement Records

# Records Management



## ■ Documentary Records:

1. Records both in print or electronic format are essential for efficient and effective management of activities
2. Provide evidence in support of decisions and actions taken; and
3. Provide an audit trail for verification

Efficient records management is essential to ensure effective **storage, retrieval and use** with due regard to security, integrity and confidentiality.



# Filing/ & Records Management System



Ensure that complete documentation is maintained in respect of all procurement activities, contracts and agreements entered into.

To avoid:

1. A duplicate sequence number for any requirement.
2. Partial and incomplete records being held by several different departments and individuals;
3. Un-authorised access to records; and
4. Failure to take necessary action at the right time.

# Procurement Unit records Management include



- Original Request from the Originating Officer / Minutes
- Correspondence with Originating officer
- Correspondences with Suppliers / (post order only)
- Internal correspondence with Procurement Unit
- Requests for Expressions of Interest
- Shortlist or Advertisement
- Tender documents and specifications/ Terms of Reference
- Tenders, Quotations or Pro-Forma Invoices received
- Tender Opening records

# Procurement Unit records Management include...contd



- Record of Tender Securities and release
- Evaluation Report
- Submission to Tender Committee & relevant Minutes of decisions
- Notice of Contract Award and publication
- Contract / Purchase Order & Acknowledgement of receipt
- Delivery Documentation
- Inspection and Acceptance Reports
- After sales warranty and performance claims

# Procurement Unit records Management include...contd



- Copy Invoices or Certificates
- Copy of Payment Vouchers
- An explanation if the procurement proceedings were terminated
- Record of Retentions and Release
- Performance security and release.

## **Regulation 34(1) directs that the following documents to be treated as part of procurement records:**



- Feasibility studies and surveys carried out or accepted by the procuring entity for preparation of the tender documents and reports;
- Receipts for sale of tender documents;
- Requests for, and clarifications issued by the PE; and
- Any negotiations records and end of activity reports.
- S45 requires a PE keep records for each procurement for at least six (6) years.

# Professional Opinion



- ❑ Must capture the evaluation report as secretariat comments
- ❑ Head of PU must review the evaluation report - comment on all aspects of the evaluation of a tender.
- ❑ Must be based on the review of the evaluation report
- ❑ Must be conclusive
- ❑ Must be signed by head of PU

# Methods of Procurement 92



- a) Open tender;
- b) two-stage tendering;
- c) design competition;
- d) restricted tendering;
- e) direct procurement;
- f) request for quotations;
- g) electronic reverse auction;
- h) low value procurement;
- i) force account;
- j) competitive negotiations;
- k) request for proposals;
- l) framework agreements;

# Open Tender



- National – 14 days
- International – 21 days



# Restricted Tendering



- Is the tendering process by direct invitation to a shortlist of pre-qualified, pre-registered or known contractors, and is subject to a specific prior approval by the Tender Committee:
- It is an appropriate method of procurement, and is only permitted to be used, where:
- The requirement is of a specialized nature or has requirements of public safety, or public security which make an open competitive tender impossible;
- Urgent – open tender not practical
- Open tender has failed to bring an award of contract.

# Direct Procurement



- Single Source (Direct) Procurement: A method of procurement in which the PE determines not to use competitive procurement on grounds of urgency or some other legal principle and negotiates a contract with a single supplier or contractor.
- Direct procurement from a contractor without competition is subject to a specific written approval being granted by the Tender Committee upon the submission of reasons for the method.
- Appropriate when:
- Purchase is urgently needed for remedial works, provided this is restricted to the minimum requirement to meet the urgent need until a procurement by other methods can be fulfilled; or
- The works can only be provided by one source for physical, technical or policy reasons e.g. requiring the use of proprietary techniques that are obtainable only from one source.

# General Penalty & Sanctions S 117



## General penalty and sanctions

A person convicted of an offence under this Act for which no penalty is provided shall be liable upon conviction—

- a) if the person is a natural person, to a fine not exceeding **four million shillings or to imprisonment for a term not exceeding ten years** or to both;
- b) if the person is a body corporate, to a fine not exceeding **ten million shillings**.

# Inventory Control, Stores & Asset Mgt



- ❑ Only goods/works/services which have been inspected and accepted are recorded in the inventory of a PE
- ❑ Inventory management should prevent loss/ wastage & ensure continuity in supply
- ❑ An inventory management system must be established
- ❑ All inventory, stores & assets received must be taken on charge prior to usage – for accountability
- ❑ Quarterly inspection of stores , quarterly and annual stock taking by head of PU
- ❑ Issuance of items must be based on a requisition from user

# General Requirements to Note....



- ❑ All communication must be in writing
- ❑ All approvals /authorizations relating to procurement must be in writing
- ❑ There must be a separate, complete file for each procurement / contract
- ❑ Procurement / contact file is complete only if it contains all the documents/ records and correspondence relating to that procurement / contract
- ❑ Procurement records must be maintained for 6 years, then archived
- ❑ Retrospective procurement approvals are prohibited except for urgent needs
- ❑ Delegation of responsibility by AO or head of PU must be in writing
- ❑ Responsibility for each procurement & disposal approval rests with AO & individual officers involved

# Where Corruption Creeps in Procurement



Procurement stage	Potential sources of corruption
Announcements	No central public place for announcements. Imprecise specifications. No bulk purchases.
Eligibility to bid	Imprecise criteria. Inability to demonstrate track record.
Tendering	Unpublished or imprecise procedures for each type of tendering and for choice of tendering.
Evaluation/Award	Role of intangible factors and influences.
Appeals/reviews	Time for appeal. Uncertain legal standards.

# Areas Commonly Breached by PE



- ☐ Use of direct procurement
- ☐ Use of restricted Tender
- ☐ Use of RFQ
- ☐ Use of Low value procurements
- ☐ Evaluation of bids
- ☐ Notification of bidders
- ☐ Termination of Procurement proceedings
- ☐ Variation of contracts – focus on works & services
- ☐ Payment - for non delivered goods / services
- ☐ Disposal – focus on motor vehicles

# Conclusion



- ❑ Public procurement can form vital tool for improving service delivery;
- ❑ Public procurement laws and regulations need to be reformed to comply with the provisions of the Constitution and best practice;
- ❑ Adequate opening up of Public Procurement has the benefit of enhancing value of procurement through benefits of:
  - ❑ Increased competition; and
  - ❑ Enhanced compliance on accounts of increased public scrutiny.
- ❑ Private sector potential is massive and untapped – Government facilitation of Private Sector participation in terms of enforcement of procurement laws key to effective engagement.



# Thank You!

