

PUBLIC FINANCE MANAGEMENT SEMINAR

Public Procurement & Asset Disposal Act 2015

What's Public Procurement?

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



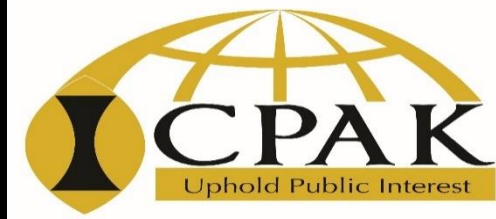
What's Public Procurement?

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



What's Public Procurement?



And 300 bn express way??



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



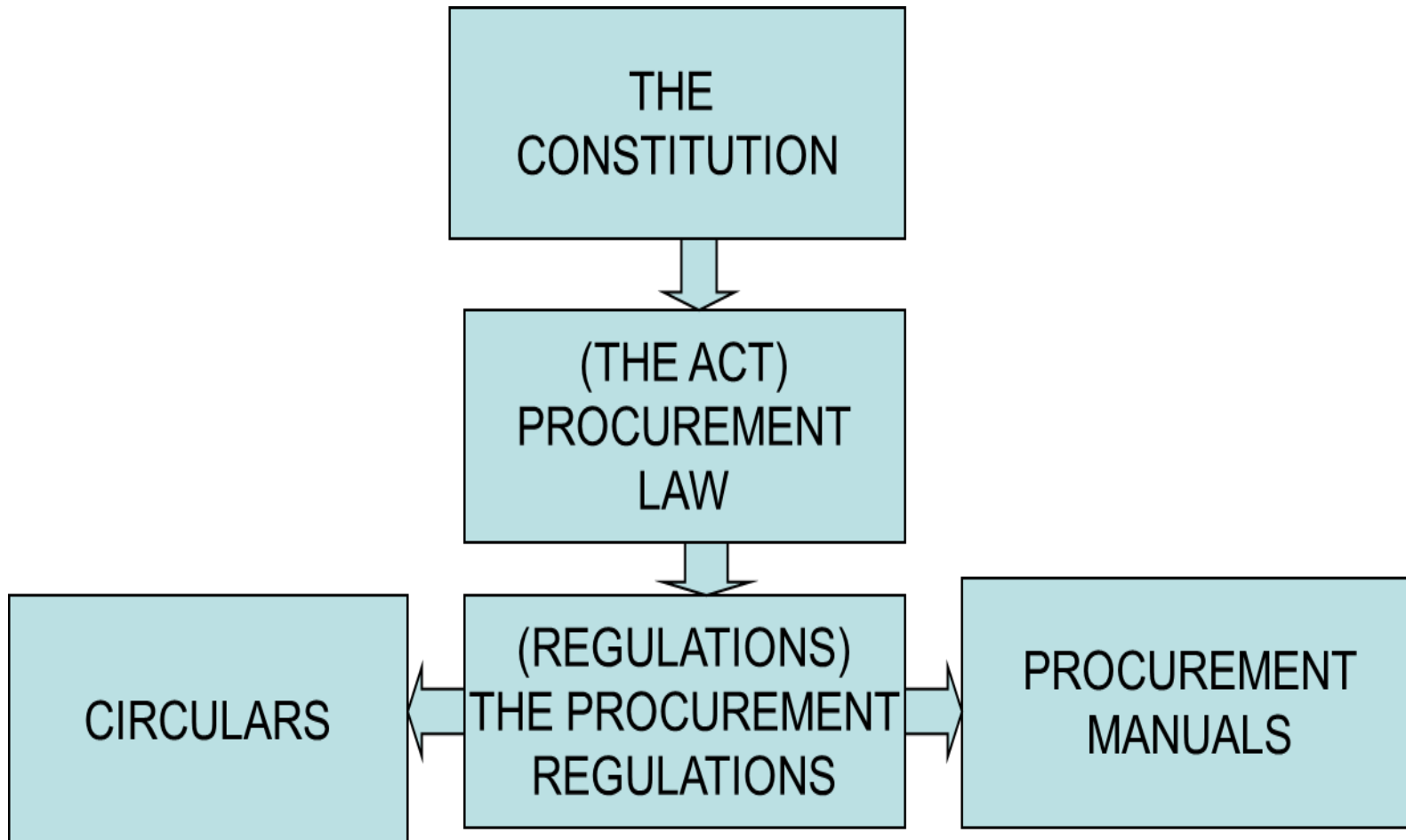
- In the past decades, the public **procurement** system in **Kenya** has undergone significant developments.
- From being a system with no regulations in the 1960s, and a system regulated by Treasury Circulars in the 1970s, 1980s, 1990s, and 2001.
- The introduction of the Public **Procurement** and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- PPDA of 2005 was repealed and replaced with PPADA 2015 and became operational on 7th Jan. 2016.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

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



Public Procurement Provisions COK

2010



An Act of parliament to give effect to Article 227 of the Constitution, to provide procedures for efficient public procurement and for assets disposal by public entities, and for connected purposes.

Elements of public procurement

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

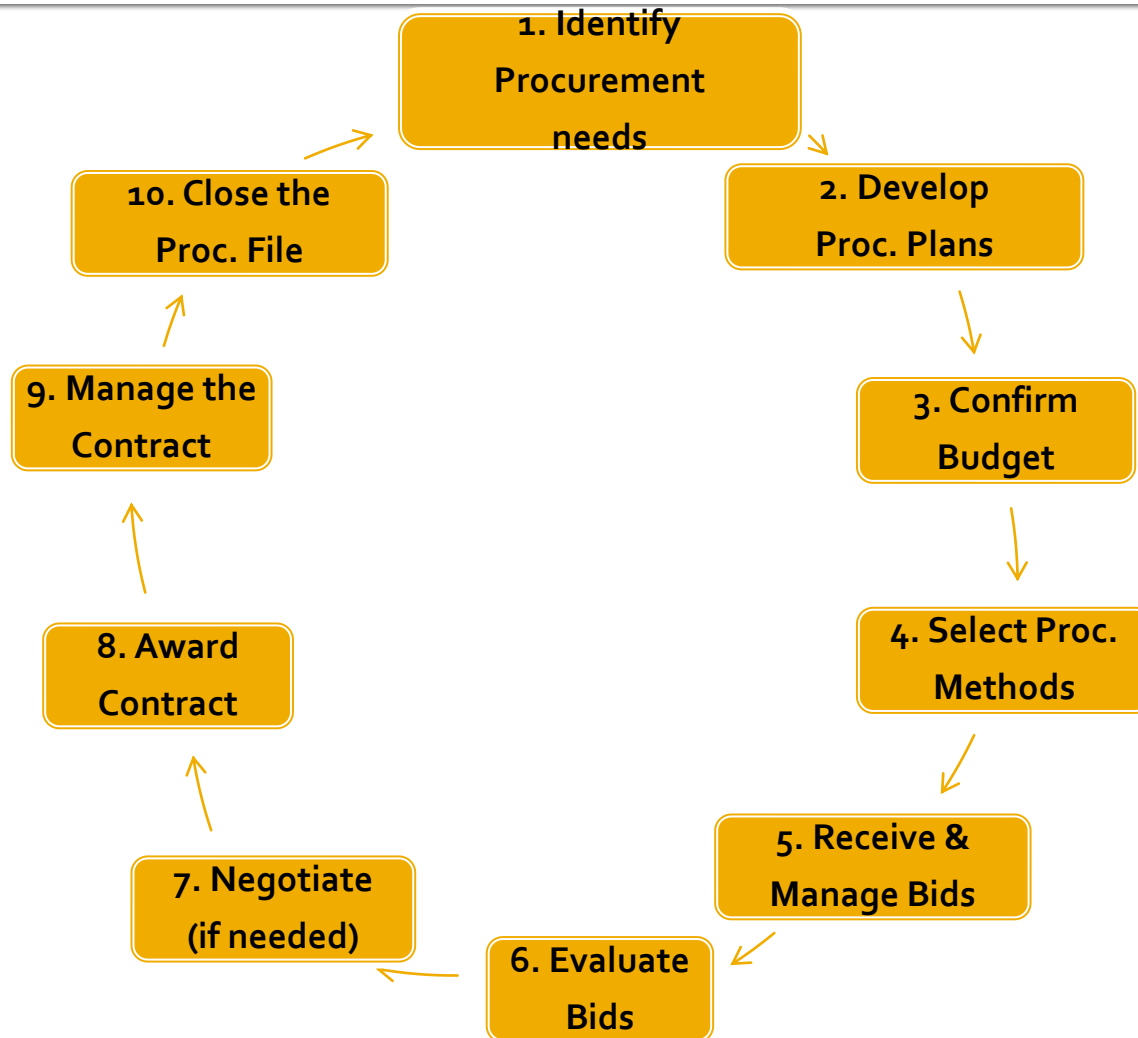
- ❖ fair, equitable, transparent, competitive & cost-effective - Art. 227(1)
- ❖ procurement & disposal law to provide - Art. 227(2):
 - ✓ Categories of preference
 - ✓ Protection of persons, groups previously disadvantaged by unfair competition or discrimination
 - ✓ Sanctions against suppliers who have not performed professionally, agreements or law
 - ✓ Sanctions against tax defaulters, corrupt & serious violators of employment laws & practices

Six Objectives of Procurement



- ❑ Procure the **RIGHT ITEM**
- ❑ Procure the **RIGHT QUALITY** goods, works or services from a reliable supplier.
- ❑ In the **RIGHT QUANTITY** ensuring cost effectiveness and;
- ❑ Delivered at the **RIGHT TIME**;
- ❑ Delivered to the **RIGHT PLACE**; and
- ❑ Paying the **RIGHT PRICE** whilst achieving the lowest possible total cost.

Key Activities in a Procurement Cycle



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;
- 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

COUNTY GOVERNMENT RESPONSIBILITY PART III



- **A County Treasury** shall be the organ responsible for the implementation of public procurement and asset disposal policy in the county
- Set up the Procurement function which shall:
 - ✓ implement public procurement and asset disposal procedures;
 - ✓ coordinate administration of procurement and asset disposal contracts
 - ✓ coordinate consultations with county stakeholders of the public procurement and asset disposal system in liaison with the National Treasury and the Authority
 - ✓ advise the accounting officers of county government entities on public procurement and asset disposal matters;
 - ✓ co-ordinate county government monitoring and evaluation of the supply chain function of county gov'ts **including ensuring compliance**
 - ✓ promote preference and reservation schemes for **residents** of the county to ensure a minimum **of twenty percent** in public procurement at the county
 - ✓ Administer a scheme of service for county government procurement and supply chain management officers and capacity build

Internal Organization Part V

- 44—Responsibilities of the accounting officer.
- 45—Corporate decisions and segregation of responsibilities.
- 46—Evaluation Committee.
- 47—Procurement function. – **Staffed with Procurement professionals**
- 48—Inspection and acceptance committee.
- 49—Sector-specific procuring and disposal agencies.
- 50—Consortium buying.
- 51—Procuring agents or asset disposal agents.
- 52—Transfer of procuring responsibility to another public entity or procuring agent
- **Tender Committee is abolished**

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)

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

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

General procurement Principles Part VI

- ❑ Procurement Planning:
 - ✓ Annual plans aligned to budget. For multi year to be aligned with MTEF.
 - ✓ Annual Disposal of Assets Plan
 - ✓ Procurement to commence subject to availability of funds
- ❑ No Splitting of procurement except as prescribed
- ❑ Eligibility Criteria – **confirm membership status of professionals**
- ❑ List of Registered suppliers – **Use of list from professional associations**
- ❑ Limitation on contracts with state and public officers – **Only the Entity**
- ❑ Tender security – An amount not more than 2% of tender value
- ❑ Form of communications, electronic procurement and asset disposal. – **IFMIS**
- ❑ Inappropriate influence on evaluations,
- ❑ Confidentiality, particularly on evaluation
- ❑ Procurement records – **Six Years**
- ❑ Procurement approvals – **No retrospective approvals**

BASIC PROCUREMENT RULES Part VII

- 70—Standard tender documents.
- 71—Registration of suppliers.
- 72—Responsibility for complying with Act, - **Contractors/suppliers/consultants**
- 73—Initiation of procurement process – **User Department**
- 74—Invitation to tender -**Advertise in portal, website, county Newspaper**
- 75—Modifications to tender documents – **Addendums and extension of period**
- 76—Modification of bids. **By the Supplier and in Writing**
- 77—Submission and receipt of tenders.
- 78—Opening of tenders.
- 79—Responsiveness of tenders.
- 80—Evaluation of tenders.

Rules Cont....

- Clarifications.
- 82—No correction of errors. **Price on the Form of Tender is Final**
- 83—Post-qualification. – **Due Diligence**
- 84—Professional opinion. **To accompany the evaluation report**
- 85—Recommendation for contract awards.
- 86—Successful tender.
- 87—Notification of intention to enter into a contract.
- 88—Extension of tender validity period. **Only once for 30 days**
- 89—International tendering and competition.

Classified Procurement Part VIII

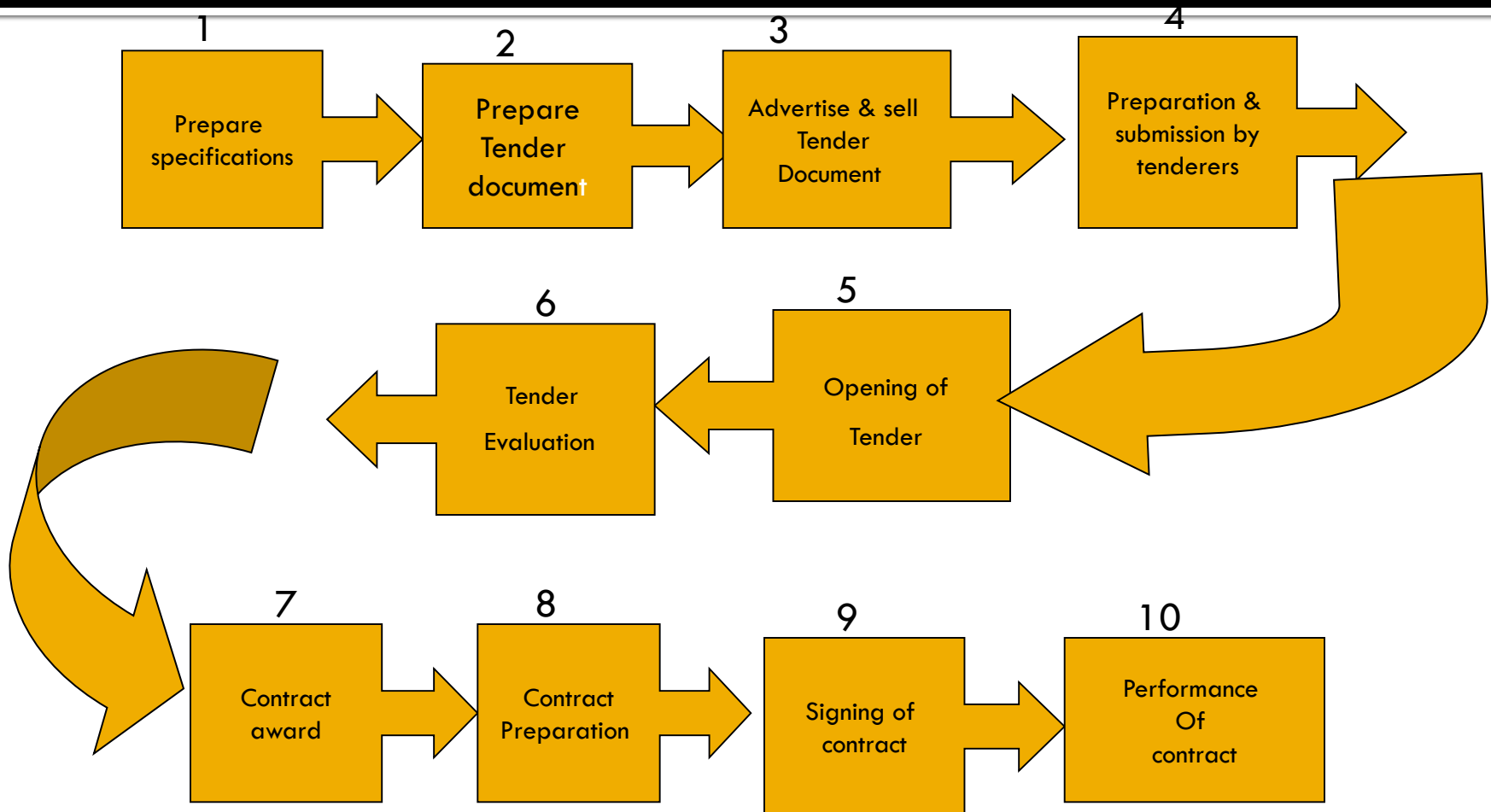
- National security organs and other procuring entities that deal with procurements of classified nature shall manage their procurements and disposals on the basis of a dual list maintained by the respective procuring entity as prescribed.

Methods of Procurement Part IX

■ 92 Methods:

- 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; and
- m) any other procurement method and procedure as Prescribed

STAGES IN OPEN TENDER PROCESS



Procurement of Consultancy Part X

- Use of Request for Proposal Method
- Use of **terms of reference** the expected **milestones** or performance benchmarks to be realized throughout the consultancy period and the related **timelines**.
- May Use Expression of Interest:
 - ✓ Advertise in tender portal, website and 1 paper of county- wide circulation
 - ✓ Shortlist a min of 6 offers, if less then 3 – **Check with Professional Association**
 - ✓ Issue RFP to the shortlisted offers
 - ✓ Quality and Cost Based Selection (QCBS) is the Preferred method of evaluation
 - ✓ Provide estimated budget or time
 - ✓ No contract variations except where the scope is varying but not to the extend of changing the terms of reference
 - ✓ No award of more than one contract of related assignment

Cont. . . .

- 134—Preparation of contracts
 - ✓ Contracts above Ksh. 5 Billion to be cleared by the AG. CS to brief cabinet
- 135—Creation of procurement contracts.
 - ✓ Written contracts after 14 days from date of award
- 139—Amendments or variations to contracts.
 - ✓ Request to be recommended by the Evaluation Committee to AO for approval
 - ✓ Variations to be considered after 12 months
 - ✓ Variation for Goods and services 15% and works 20%, cumulative not to exceed 25%
- 142—Performance Security – **Not more than 10% of contract value before signing**
- 146—Advance payment.
 - ✓ 20% of contract sum granted under exception circumstance, security to be provided
 - ✓ May be considered as a **LOAN** if not used for its intended purpose
- 150—Contract administration.
 - ✓ Head of Procurement/Technical dept. to issue certificate of Acceptance to the AO
- 151—Complex and specialized contract implementation team.
- 152—Contract monitoring - **Monthly Reports by Head of Procurement to the AO**
- 154—Contract close out. – **Head of procurement to issue Certificate or Technical Department in case of Complex Procurement**

Procurement of Contracts Part XI

- 134—Preparation of contracts
 - ✓ Contracts **above Ksh. 5 Billion** to be cleared by the AG. CS to brief cabinet - except Parliament and Judiciary
- 135—Creation of procurement contracts.
 - ✓ Written contracts after **14 days** from date of award
- 139—Amendments or variations to contracts.
 - ✓ Request to be recommended by the Evaluation Committee to AO for approval
 - ✓ Variations to be considered after **12 months**
 - ✓ Variation for Goods and services 15% and works 20%, cumulative not to exceed 25%
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Preferences & Reservations Part XII

- Reserve 30% of procurement in the Annual Procurement Plan to Youth Women and Persons with Disability. – **Submit to the Authority 60 days after start of FY**
- Ensure that payment is made to an A/c where the target group **is a signatory**
- Reporting every **Quarter** on contract awards under P & R Scheme

Preferences

- ✓ manufactured articles, materials or supplies wholly mined and produced in Kenya
- ✓ manufactured articles, materials and supplies partially mined or produced in Kenya or where applicable have been assembled in Kenya
- ✓ firms where Kenyans are shareholders.(51%) Evaluation of these firms to consider preferences on a graduating scale, as prescribed

Application of P & R

- ✓ Disadvantaged groups
- ✓ Micro, small and medium enterprises
- ✓ Identified regions

Mandatory requirement for International firms to **source 40%** of supplies from local contractors, and **transfer technology**, where applicable

Inventory Control, Asset & Store Management, & Distribution – Part XIII

- ❑ To avoid unprofitable lock-up of funds, stocks shall **be kept to the minimum necessary** for the efficient conduct of the procuring entities.
- ❑ The accounting officer of a procuring entity may employ **inventory management and control software** to assist it meet the objectives of sound supply chain management.
- ❑ An accounting officer of a procuring entity shall **set up an inventory management system** which shall be managed by the head of the procurement function, for the purpose of control and managing its inventory, stores and assets
- ❑ Head of procurement to carry out **quarterly & annual inspections** and stock taking and submit report to Accounting Officer
- ❑ Issuance of procured items is through a **requisition** to the Head of Procurement
- ❑ Stores, Inventory & Assets shall not be allowed to **deteriorate**

Disposal of Assets Part XIV

- 163—Disposal committee. – **As and when its necessary**
- 164—Disposal procedure. – **Annual Disposal of Assets Plans**
- 165—Methods of disposal. – **5 Methods**
- 166—Restriction on disposal to employees,

Disposal

165 - 1. (a) transfer to another public entity or part of a public entity, with or without financial adjustment;

(b) sale by public tender;

(c) sale by public auction;

(d) trade-in;

(e) waste disposal management; or

(f) as may be prescribed.

(2) Despite subsection (1) or any other provisions of this Act, radioactive or electronic waste shall be disposed of only to persons licensed to handle the respective waste under section 88 of the Environmental Management and Co-ordination Act, 1999.

Administrative Review Part XV

- 167 – Tenderer or Candidate may seek administrative review within **14 days** of notification of award or date of occurrence of breach.
- Request to be accompanied by a deposit of **not less than 10%** of contract cost
- Proceedings to be heard in the open
- 168 – PE to suspend proceedings upon notification of review
- Board to complete review within **21 days**
- An applicant may appeal the decision of Review Board to the High Court within **14 days** and Court of Appeal, after High court ruling **within 7 days** Rulings for both courts to be within **45 days**

Sanctions: Part XVI

- Obstruct or hinder a person carrying out a duty or function or exercising a power under this Act
- Unduly influence or exert pressure on any member of an opening committee evaluation committee and disposal committee
- A procuring entity may **lodge a complaint with the relevant professional body** for the institution of disciplinary proceedings against a contractor who is a member of a professional body and who contravenes the provisions of this Act
- The penalties imposed by a professional body pursuant to a complaint lodged by the PE shall apply in addition to any penalties that may be imposed under this Act.
- Protection from personal liability and indemnity
- Sanctions:
 - ✓ Ksh. 4 Million or 10 years or both
 - ✓ Corporate Ksh. 10 Million

Policy Operationalization and Review (Part XVII)

- ❑ National Treasury to shall convene consultative meetings at least annually fro proper functioning of Public Procurement and asset disposal system
- ❑ CS to make Regulations for proper functioning of this Act
- ❑ PPRA to develop a Code of Ethics to apply to every person on whom this act applies

Repeal, Transition & Savings Provision(XVIII)

- ❑ PPDA 2005 is Repealed
- ❑ Every office created by old law to remain unless cancelled, revoked, varied or abolished
- ❑ Review Board to continue until end of term

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.