

REGULATION OF PUBLIC PROCUREMENT – IMPACT ON PROCUREMENT OF INSURANCE SERVICES

**A PRESENTATION TO THE 15TH ANNUAL REGIONAL
CONFERENCE OF THE ASSOCIATION OF INSURANCE
BROKERS OF KENYA**

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INTRODUCTION

- ❑ The public procurement system operates in a defined legal and regulatory framework
- ❑ The Public procurement Legal and Regulatory Framework has evolved over the years in order to:
 - accommodate changes in the business environment,
 - on-board international best practices;
 - Address national development challenges.
- ❑ The Kenya Public Procurement Legal framework is largely modeled on Unicitral Model Public Procurement Law

INTRODUCTION

The legal & Regulatory framework that governs Public procurement comprise of:

- The Constitution of Kenya, 2010 – Article 227
- The Public Procurement & Asset Disposal Act, 2015
- The Public Procurement Regulations 2020
- The Public Finance Management Act, 2012
- Procurement Circulars
- Procurement Manuals
- Standard Tender Documents

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MANDATES OF PUBLIC PROCUREMENT REGULATORY BODIES

- ❑ Public procurement is regulated by five (5) institutions/bodies that are part of the overall public sector governance structure;
- ❑ These institutions/ bodies are created through an Act of parliament and have distinct mandates geared towards achieving an efficient and transparent public procurement system.

MANDATES OF PUBLIC PROCUREMENT REGULATORY BODIES

The Act assigns key mandates as follows:

**The National Treasury – Public Procurement Policy Development;
Initiate Legislation**

**Public Procurement Regulatory Authority – Ensure Compliance;
Monitor Performance**

Public Procurement Regulatory Board - Oversees the Management of PPRA; Debar errant bidders/ suppliers/ contractors.

Kenya Institute of Supplies Management – Enforce code of conduct and ethics for procurement professionals

Public Procurement Administrative Review Board - Hear and determine Public Procurement Appeals

ROLES OF PROCURING ENTITIES

- Need Identification
- Procurement Planning
- Specification of Requirements
- Preparation of Tender Documents
- Tender Processing
- Contract Award
- Contract Management
- Receipt/Acceptance of goods/services/works procured.

PRINCIPLES OF THE PUBLIC PROCUREMENT SYSTEM

Article 227 of the Constitution requires state organs to contract for goods and services through a system that is:

- Fair
- Equitable
- Transparent
- Competitive
- Cost Effective

The same principles are echoed in the PFM Act (S30 &S121) and are the foundation on which the PPADA, 2015 ARE built.

PRINCIPLES OF THE PUBLIC PROCUREMENT - APPLICATION

Fairness-:

- Use of standard tender documents (Section 70(2));
- Use of same evaluation criteria for all bidders in same tender.

Equity-:

- Allow competition among bidders of **similar** category / same strength;
- Apply permitted preference to even competition between domestic and foreign bidders;
- Provide similar information / instructions / specification to all bidders;

Transparency-:

- Use open tender method as opposed to restricted tender method;
- Advertise in open media / websites accessible to all prospective bidders;
- Provide information requested where permitted by law;
- Publish Tender Results / Contract awards.

PRINCIPLES OF THE PUBLIC PROCUREMENT - APPLICATION

Competition-:

- No use of brand names
- Use of broad standard specifications
- Use open Tender

Cost Effectiveness-:

- Consider total cost of ownership in evaluation
- Consider optimal combination of cost and quality
- Value for money analysis of product / service
- Market surveys
- Do not over-specify products / service

ELIGIBILITY TO BID – (S 55 of the Act)

- ❑ The Public Procurement Regulatory Framework define the Eligibility Criteria that suppliers, contractors, consultants and service providers must meet in order to bid for public contracts. To be eligible, a bidder must:
 - Have legal capacity to enter into a contract for procurement or asset disposal;
 - Not be insolvent, in receivership, bankrupt or in the process of being wound up;
 - if a member of a regulated profession, has satisfied all the professional requirements;

ELIGIBILITY TO BID – Cont'd

- the person and his or her sub-contractor, if any, is not debarred from participating in procurement;
- the person has fulfilled tax obligations;
- not been convicted of corrupt or fraudulent practices;
- not guilty of any serious violation of fair employment laws and practices.

RESPONSIVE TENDER

- ❑ A tender is **Responsive** if it conforms to **All** eligibility and **other mandatory requirements** in the Tender document (S. 79)
- ❑ The **other mandatory requirements** are mostly taken from the industry standards set by the regulator of the industry.

SUCCESSFUL TENDER

For a tender to be successful:-

- ❑ The bidder must be eligible
- ❑ The Bid be responsive
- ❑ The Tender must meet the minimum technical specifications /service standards
- ❑ The tender must have the most advantageous price (determined by the award criteria specified in the tender document).

WHO CAN BID FOR GOVERNMENT CONTRACT

A bid can be submitted by:

- The original product or service producer
- An Agent / Intermediary authorized by the product /service producer to submit bid on behalf of producer
- A consortium
- A joint Venture
- Sub-contracting arrangements

QN - What is the future of intermediaries in the era of Lean Supply Chains?

WHICH INSURANCE PRODUCTS ARE PROCURED BY GOVERNMENT AGENCIES

- Medical Insurance
- Motor Vehicle Insurance
- General Insurance
- Group Personal Accident Insurance
- Travel Insurance
- ??????
- ??????

WHO CAN SELL INSURANCE PRODUCTS TO GOVERNMENT

- Underwriters???
- Agents???
- Brokers???
- Any of the above can so long as they meet eligibility criteria; are responsive to all mandatory requirements and offer a technically and financially viable bid.

WHO CAN SELL INSURANCE PRODUCTS TO GOVERNMENT

In Judgement No.339 of 2019 (*Okiya Omtata Vs. Kenya Maritime Authority*) the High Court ruled that the procurement of insurance services to the exclusion of insurance brokers is unconstitutional.

What is PPRA doing to enforce this judgement across all public procuring entities?

WHO CAN SELL INSURANCE PRODUCTS TO GOVERNMENT

- ❑ The Regulatory Framework for Insurance Industry should spell out the roles and boundaries of the underwriters, Brokers and Agents
- ❑ Industry players must work together to answer this question and the answer to this question will resolve the apparent conflict between industry players
- ❑ As PPRA we are in consultation with IRA and the AG to provide a way forward on how government Agencies can adhere to the Court Ruling Tenders for insurance services.

ISSUES TO CONSIDER BEFORE FILLING IN YOUR BID

- Read & understand the bid document content/Requirements before filing; Clarity of bid documents
- Bidder's eligibility
- Validity of bid & bid security-normally 30 days beyond tender validity
- Specifications/ requirements/service levels, road conditions
- Check the evaluation criteria-should be objective, quantifiable, clear and unambiguous; Criteria applied in accordance with the procedure set out in tender document

ISSUES TO CONSIDER BEFORE FILLING IN YOUR BID - Cont'd

- Preference and Reservations scheme applicable to that tender.
- Currency acceptable
- Alternative bids-are they required
- Required number of copies of the bid
- Proper filling and signing of the form of tender by the Authorized person
- Proof of registration with relevant professional bodies
- The tender security/bond required amount

ISSUES TO CONSIDER BEFORE FILLING IN YOUR BID - Cont'd

- Proof of experience - & list previous assignments.
- Proof of financial standing & adequate access to bank credit
- Tax compliance certificate/exemption certificate from KRA
- Check your bid thoroughly to determine
 - ✓ Completeness
 - ✓ Substantial responsiveness
 - ✓ Correct submissions e.g. correct forms

ISSUES TO CONSIDER BEFORE FILLING IN YOUR BID - Cont'd

- Terms & Conditions of contract including payment terms including advance Payment
- Performance security/guarantee
- Force majeure
- Applicable Law and settlement of disputes

Some Tips For Making A Good Bid

- Accuracy
- Neatness/tidiness
- Elegance
- Brevity-quality of being brief in duration; Succinctness; conciseness
- Use diagrams where necessary
- Client focused

Some Tips For Making A Good Bid

- Staff profiles
- Serialization of pages of bid document consecutively & table of contents
- Focus on technical competence
- Retain a copy of your bid for future reference

Rights and Obligations of the Suppliers under the Law

- To participate in public procurement without discrimination
- Right to attend tender opening session if a candidate
- Right to be awarded tender if one meets requirements/lowest evaluated
- To seek clarifications and get response from PE, addendum, notice of extension of tender validity
- To be notified of the tender outcome; reasons why his/her bid was not successful
- Notification of termination of procurement proceedings

Rights and Obligations of the Suppliers under the Law

Rights:

- Release of Tender security if:- proceeding terminated; determines none of the bids are responsive; contract consummated
- To be represented by an advocate/ person of your choice in review under ARB
- Preference & reservations in tenderers (if they qualify)
- Expeditious access to tender documents
- Seek Judicial Review
- To modify or withdraw bid before deadline for submission

Rights and Obligations of the Suppliers under the Law

Rights:

- To get a copy of tender opening register upon request-S78(8) and records for the procurement after the contract has been awarded or the procuring proceedings have been terminated upon request-S. 68(3)
- Paid promptly or in accordance with the terms & conditions of the contract and be paid interest on over due payments if provided(S.140)

Rights and Obligations of the Suppliers under the Law

Obligations:

- Compliance to the Act & regulations-S. 72
- Abide by the code of ethics issued by the Authority & relevant professional body
- Include self-declaration that the bidder is not debarred; and shall not engage in any corrupt practice
- If required by PE, Submit requisite tender security
- Avoid unsolicited communications after bid submission deadline (**Insurance brokers are fond of this practice**)

Rights and Obligations of the Suppliers under the Law

- **Obligations:**
- Submit bid in in the manner prescribed in the tender notice
- Entering into contract if successful
- Provide clarification(s) to assist in evaluation if requested
- Extend tender and bid security/bond validity if instructed
- To obtain bid documents in the manner prescribed in the tender notice
- To adhere and follow bidding instructions e.g. proper filing of documents
- demonstrate that they are qualified for the tender award-S.31

Rights and Obligations of the Suppliers under the Law

Obligations:

- supply the right quantity and quality and deliver at the right time
- Maintain confidentiality
- Perform the obligations of the contracts
- Indemnity
- Avoid corruption, inappropriate influences (e.g. on evaluations) , collusive and fraudulent practices-S.38, 40, 41, 42.

ADMINISTRATIVE REVIEWS AND COMPLAINTS

- Aggrieved bidders may seek administrative review of PE's decisions from Review Board within 14 days of notification of award or date of occurrence of the alleged breach- S.167
- Application for Review is accompanied with a fee of at least **Kshs 25,000**.
- Hearing and determination of a case is within 21 days.
- Procurement proceeding stops until the case is determined.

ADMINISTRATIVE REVIEWS AND COMPLAINTS

Matters not subject to a review:

- the choice of a procurement method;
- a termination of a procurement or asset disposal proceedings in accordance with S. 62; and
- where a contract is signed in accordance with section 135
- Frivolous appeals leads to forfeiture of deposit.
- Suspension of proceedings upon request for review

PROHIBITIONS & OFFENCES

- Corrupt practice
- Fraudulent practices
- Collusive practices
- Conflict of interest
- Disclosure of confidential information
- Splitting of orders/procurements
- Procurement contracts with public servants
- Inappropriate influence of evaluations
- Obstruction
- Lying or misleading

PROHIBITIONS & OFFENCES

- Inappropriate influence of evaluations
- Obstruction
- Lying or misleading
- Undue influence on any member of the respective committees
- Sign a contract contrary to the requirements of this Act or Regulations
- knowingly withholding the notification of award to a successful and unsuccessful tenderer
- contravening a lawful order of the Authority or the Review Board.

PENALTIES/SANCTIONS

- Fine not exceeding **Kshs.4 million** or **imprisonment for term not exceeding 10 years** or **both for an individual.**
- If corporate body, fine not exceeding **Kshs.10 million.**
- Public officer shall be disqualified from public office.
- Private individual shall be debarred

NB: Protection from personal liability and indemnity if offence is committed in good faith

DEBARMENT

The Board shall debar a person from participating in procurement or asset disposal proceedings on the ground that the person;

- has committed an offence under the Act;
- has committed an offence relating to procurement under any other Act or Law of Kenya or any other jurisdiction;
- has breached a contract for a procurement by a public entity including poor performance
- has, in procurement or asset disposal proceedings, given false information about his or her qualifications;

DEBARMENT

- has defaulted on his or her tax obligations;
- has breached a code of ethics issued by the Authority pursuant to section 181 of the Act or the code of ethics of the relevant profession regulated by an Act of Parliament;
- is guilty of corrupt or fraudulent practices; or
- is guilty of a serious violation of fair employment laws and practices.

CONCLUSION

To do business with government, one must:

- Meet the eligibility criteria,
- Give a responsive bid
- Meet the Technical Specifications
- Give a bid that has a cost advantage over competitors.

END

Q & A