

DIVERSITY, EQUALITY, AND INCLUSION: A CASE FOR PUBLIC PROCUREMENT BID DISPUTES MANAGEMENT IN AN EMERGING MARKET

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Abstract

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Bid disputes arise when aggrieved bidders appeal decisions of procuring entities. It is through procurement appeals that issues of discrimination, inequality, and exclusion are challenged (Canayaz et al., 2022). However, the marginalized groups of youth, women, people living with disabilities, and micro, small and medium enterprises (MSMEs) rarely pursue this avenue of procurement justice. This is despite public procurement growing into an important avenue for helping governments achieve various development objectives (Organisation for Economic Co-operation and Development [OECD], 2013). The objective of this study was to assess diversity, equality, and inclusion (DEI) in the management of bid disputes in Kenya. Content analysis of all the bid dispute cases that were heard and determined by the Public Procurement Administrative Review Board (PPARB) between 2011 and 2020 was conducted. In addition, requests for review procedures and guiding laws were reviewed. Descriptive data analysis supported by deductive reasoning was thereafter conducted. It was established that the procurement appeals system in Kenya does not favor the disadvantaged categories of youth, women, people living with disabilities, and MSMEs thus promoting discrimination, inequality, and exclusion. In addition to contributing to the body of knowledge, this research proposes policy direction regarding the management of public procurement bid disputes in Kenya with a special focus on DEI.

Keywords: Public Procurement, Bid Disputes, Public Procurement Administrative Review Board, Equality, Diversity, Inclusion, Appeals, Sustainable Economies, DEI

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1. INTRODUCTION

Traditionally, public procurement was viewed from the simple perspective of a mere means of providing goods, works, and services to citizens. However,

over time the stature of public procurement has grown to become a critical means of helping governments achieve political, economic, social, technological, environmental, and even legal policy objectives. Historically, public procurement was

characterized by inequalities, discrimination, and exclusion to the disadvantage of minority groups among others of women, youth, people living with disabilities, and micro, small and medium enterprises (MSMEs) (Bolton, 2006; Thiankolu, 2019). Challenges and discrimination facing MSMEs were attributed to inadequate financial resources and inadequate knowledge (Dube & Zvitambo, 2019).

So important is public procurement that it has been entrenched in some constitutions as a means of correcting historical injustices. For example, public procurement was used as a means of addressing inequalities in post-apartheid South Africa (Bolton, 2006). In Kenya, Article 227 of the Constitution of Kenya 2010 has been dedicated to the procurement of public goods and services. Acknowledging past inequalities, the Constitution of Kenya 2010 provided for the protection and advancement of persons, categories of persons, or groups previously disadvantaged by unfair competition or discrimination.

Taking cognizance that public procurement operates in a highly competitive environment that is prone to disputes between procuring entities and bidders, the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Public Procurement made provisions for aggrieved bidders to challenge decisions of procuring entities before an independent body. Most developing countries have adopted this model law (Arrowsmith, 2004). However, getting justice before these independent review bodies often comes at a cost that is out of reach for the vulnerable groups thus propagating inequality, discrimination, and exclusion in public procurement.

This study sought to assess diversity, equality, and inclusion (DEI) in the management of bid disputes in Kenya. The findings of this study are not only useful to Kenya but also to other countries that have based their procurement reforms on the UNCITRAL Model Law on Public Procurement. These countries are Afghanistan, Armenia, Azerbaijan, Belarus, Egypt, Ghana, India, Jamaica, Kazakhstan, Kenya, Kyrgyzstan, Lebanon, Mexico, Mongolia, Myanmar, Russian Federation, Rwanda, Tajikistan, Thailand, Trinidad and Tobago, Tunisia, Uganda, Ukraine, United Republic of Tanzania, Uzbekistan, and Zambia. It is also worth noting that the African Development Bank, Asian Development Bank, European Bank for Reconstruction and Development, Inter-American Development Bank, Organisation for Economic Co-operation and Development (OECD), and the World Bank also use the model law as the yardstick for procurement reforms in the countries they operate (UNCITRAL, 2023).

Aggrieved bidders in Kenya were first offered an opportunity to appeal decisions of procuring entities in 2001 when the Exchequer and Audit (Public Procurement) Regulations of 2001 were enacted. These regulations of 2001 established the Public Procurement Complaints Review and Appeals Board (PPCRAB). It was not until 2011 that deliberate efforts were made to support small and micro enterprises especially those owned by the disadvantaged groups of youth, women, and people living with disability. This was done through the Public Procurement and Disposal (Preference and Reservations) Regulations, 2011 which introduced

the Access to Government Procurement Opportunities (AGPO) program.

Tendering and asset disposal disputes in Kenya are currently heard and determined by the Public Procurement Administrative Review Board (PPARB) while PPP Petition Committee addresses those of public private partnerships (PPPs). The PPARB is tasked with ensuring reasonable access to its services across Kenya. Currently, PPARB services are not devolved yet procuring entities are spread across the country. For example, County Assemblies, County Governments, and entities affiliated with County Governments are spread across the 47 counties in Kenya. An aggrieved bidder is required to pay requisite fees and submit the requisite forms within 14 days indicating the breach that may result in the bidder suffering loss.

An applicant may progressively challenge the decision of the review board in the high court and the court of appeal. Judicial reviews deal with the process of making decisions and not with the merits of the decision. Procurement and asset disposal proceedings complaints that are not subject to administrative review are dealt with by the Public Procurement Regulatory Authority (PPRA). As compared to other jurisdictions, a disgruntled bidder in Kenya is not required to submit complaints to the procuring entity first and may directly lodge their request for review with PPARB upon establishing the basis to do so.

Although bid disputes presented before PPARB continue to rise, there has been no commensurate increase of bid disputes filed by the AGPO group to match their statutory thirty percent allocation of all government procurement spend. It is against this backdrop that this research sought to answer the research question:

RQ: Does the management of public procurement bid disputes in Kenya embrace, diversity, equality, and inclusion?

The question was answered by explorative research conducted through content analysis of secondary data. This data was then subjected to descriptive analysis and supported by deductive reasoning.

Many authors are in concurrence with the importance of procurement appeals in the administration of procurement justice (Attri et al., 2013; Arrowsmith, 2004; Gordon, 2013; Melese, 2020). However, only a few have attempted to focus on DEI in the administration of public procurement bid dispute management (Brooks et al., 2013; Dube & Zvitambo, 2019; Rawal, 2008). In addition, the body of knowledge in bid dispute management is limited locally and regionally (Engelbert & Reit, 2014; Thiankolu, 2019). It is for this reason that this study sought to not only assess the extent of DEI in bid dispute management but also bridge these gaps.

This study established that the marginalized groups of youth, women, people living with disabilities, and MSMEs could benefit more from the procurement appeals system if applicable fees were waived, review board services were devolved, and legal aid was offered. It is for this reason that this study proposes a policy review aimed at improving DEI in the management of bid disputes. The findings of this study will enrich public procurement theory.

In summary, the structure of this paper is organized as follows. Section 1 is the introduction. Section 2 reviews the literature. Section 3 presents the research methodology. Section 4 provides the research results and discussion. Section 5 contains conclusions and recommendations, limitations of the study, and suggestions for further research.

2. LITERATURE REVIEW

Disputes in public procurement are bound to happen at various stages in the procurement cycle. Bid disputes are a critical pre-contract control mechanism that accords aggrieved candidates in a procurement or disposal process an opportunity to challenge the decision of a procuring entity. Bid disputes are variously referred to as requests for review, procurement appeals, or bid protests. Considering that public procurement is often characterized by corruption, bid disputes have helped promote principles of public procurement among them competition, transparency, responsiveness, legality, integrity, fair dealing, value for money, effectiveness, consistency, accountability, and equitability. Denying an aggrieved bidder, a chance to appeal amounts to social injustice and by extension a catalyst for economic inequality (Troff, 2005; OECD, 2013).

Bid disputes in public procurement and their resolution are shaped by various factors. The independence of the body reviewing a bidding dispute and the possibility of dire consequences facing bid protestors influence the number of appeals launched. Aggrieved bidders are hesitant if they sense that their request for review is likely to deny them future business opportunities (Canayaz et al., 2022; Nagle & Lasky, 2010). In addition, the OECD (2013) observed that publicizing the review body's decisions helps in setting consistent precedents and in knowledge management by key stakeholders. The composition of membership to a review body is critical in shaping bid disputes in public procurement. The expertise of a review body determines the confidence of protesters and consequently, if protesters would appeal the decision of a review body. Request for review decisions delivered by experts are likely to be fairer, quicker, and cost-effective and are more likely to set precedents than those delivered by non-experts (Baker, 1996; The World Bank, 2016).

The comprehensiveness of post-award debriefings impacts profoundly on the number of bid disputes. Thorough debriefings help bidders make informed decisions on whether to file a complaint or not. A properly debriefed bidder would be hesitant to launch an appeal where the basis of the appeal is a mistake rather than an intentional breach of law (Arena et al., 2018; OECD, 2013; Maser & Thompson, 2010). The size of an organization determines the rate of sustaining a protest (Arena et al., 2018; OECD, 2013). Maser and Thompson (2010) observed that smaller companies generate most of the protests although the rate of sustaining such protests is higher for larger firms who can afford legal representation.

In the past, the number and resolution rate of public procurement bid disputes were also influenced by other factors such as availability of

alternative dispute resolution (ADR), the value and period of contracts under consideration, the type and complexity of procurement, availability of evidence, number of review tiers where a bidding dispute can escalate to, remedies available, cost, proximity to the review board and time taken to deliver a decision (Alshahrani, 2017; Arena et al., 2018; Maser & Thompson, 2010; OECD, 2013; The World Bank, 2016). Corruption has also been cited as one of the major contributors to bid disputes. The possibility of an aggrieved bidder requesting for review is one of the deterrents of fraud in public procurement (Kovacic, 1995). Kirm et al. (2019) opined that procuring entities often tend to favor bidders with whom they have had past successful engagements and by doing so attract disputes from other bidders who get disadvantaged.

At the core of the rule of law is access to justice in different platforms like courts, procurement administrative review bodies, and alternative dispute resolution mechanisms. Access to justice promotes access to all other rights. Ironically, the vulnerable groups who need access to justice most are the ones who face the most hindrances. Different jurisdictions have unique practices and circumstances that hinder access to justice for the vulnerable. It is for this reason that Yeung (2019) emphasized the need for building a sustainable development mindset by promoting the growth of management and employees' intelligence in understanding their business through economic, social, and environmental lenses. Local, regional, continental and global laws, resolutions, and economic blueprints contextualize access to justice and opportunities by vulnerable groups through respective judicial or quasi-judicial bodies (OECD, 2013; Rhode, 2008).

Africa's economic blueprint, agenda 2063, envisions transformed, inclusive and sustainable economies. The United Nations Sustainable Development Goals (SDGs), on the other hand, advocate for DEI. SDG 16 seeks to promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels. SDG 5 promotes gender equality while SDG 10 advocates for reduced inequalities. Grove and Clouse (2018) while studying current sustainability issues and trends emphasized the need for organizations to pay attention to sustainability trends. Current sustainability trends advocate for among other things DEI in political, economic, and social spheres of life.

It has been reported that one in six people worldwide has experienced discrimination in some form, with the youth, people with disabilities, and women bearing the brunt of it. To reduce inequality, there is a need to invest in marginalized groups by equitably distributing resources, skilling, re-skilling, developing capacity, promoting social protection, deliberately combating discrimination, and promoting cross-border cooperation for fair trade and financial systems (United Nations, 2023). Policy reforms, which this research proposes, are, therefore, needed to eliminate inequalities through national policies, budgets, and institutions.

The concept of social inclusion has yet to get a universal definition and application. There are various schools of thought with some arguing that it

is multidimensional while others claim that it is all about carefully understanding and carrying along the disadvantaged groups (Rawal, 2008). Silver (2015) opines that social exclusion and inclusion are dependent on context in the sense that it varies from one jurisdiction to another. In addition, social structures, histories, cultures, and institutions that influence the political, economic, social, environmental, and political dimensions of social exclusion vary from place to place. The context by extension defines access to resources and the distribution of opportunities and rights. Writing about social justice, Rawls (1971) promoted the following principles: the greatest equal liberty principle which is about rights and freedoms; the difference principle aimed at providing the greatest benefit to disadvantaged people, while advocating that equal conditions, opportunities, and all positions should be open to all; and the equal opportunity principle which is about the objective difference.

Public procurement reforms globally have in recent years been driven partly by the existing inefficiencies of the existing systems and partly by development organizations who give conditions before engaging in development partnerships. The focus has been shifting to socially responsible supply chain management (Sabat & Krishnamoorthy, 2020). A key reform in public procurement, which is an aspect of sustainable public procurement, has been the provision for bidders to challenge actions of procuring entities that are not compliant with set laws and regulations (UNCITRAL, 2014). However, institutional, economic, and structural factors have been cited as the broad hindrances to access to justice for the marginalized. In public procurement, geography, shortages in service delivery, social relations of place, digital constraints and cost have been attributed to a negative influence on DEI (Brooks et al., 2013).

While several studies have concurred that bid disputes management systems are an important cog in the social justice system and thus DEI, none of those reviewed has focused on the issues of ease of access to justice through the already set up judicial and quasi-judicial systems (OECD, 2013; Arena et al., 2018; Engelbert & Reit, 2014; Gordon, 2013; Halonen, 2017; Melese, 2020; Thiankolu, 2019). This is a gap that this study sought to address especially in the light of diversity of the stakeholders in the public procurement ecosystem, equality of rights, and inclusion of the marginalized AGPO group. This is particularly so because it is one thing to make provision and it is another to access justice.

3. RESEARCH METHODOLOGY

This study was a blend of both quantitative and qualitative research. A mixed-method explorative approach was employed. Content analysis of secondary data was conducted. This data was thereafter subjected to descriptive analysis supported by deductive reasoning. Consequently, the study adopted the pragmatism research philosophy because it best supports mixed-methods research. Biesta (2010) opined that pragmatism best suits mixed methods research. The target of this research was all the requests for review filed, heard, and determined by PPARB between 2011 and 2020. In addition, procurement appeals procedures and guiding laws were reviewed. Between 2011 and 2020, PPARB heard and determined 584 requests for review, of which 153 escalated to the High Court, 13 to the Court of Appeal, and two to the Supreme Court. PPARB publishes the decisions of PPARB on its website while the decisions of the decisions of the High Court and Court of Appeal are accessible from the website of the National Council for Law Reporting.

Coding schemes were used to collect secondary data. All appropriate and relevant data was entered into the coding schemes. Subsequently, summative and directed content analysis of the data was conducted from which themes and relationships were established. Themes were supported by descriptive data analysis to explain DEI in the management of bid disputes in Kenya. Information gathered was then tabulated and presented in simple tables.

As an alternative, interpretive structural modelling (ISM) and *Matrice d'Impacts Croisés Multiplication Appliquée à un Classement* (MICMAC) analysis could be conducted to develop a data-driven hierarchical structural framework of factors that influence DEI in the management of bid disputes in Kenya. The ISM identifies variables, defines how the variables are related, ranks them, and gives them direction. Through ISM, unclear mental abstracts are transformed into articulate models that define the issue under study (Attri et al., 2013).

4. RESULTS AND DISCUSSION

To establish how the AGPO group was represented in the review requests that were heard and determined between 2011 and 2020, a summary of cases and the extent of preference and reservation was prepared. The results of the analysis are shown in Table 1.

Table 1. Categories of tenders that bidders requested for review

Year	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	Total	Percent
Open international	8	5	0	10	9	8	13	7	5	17	82	14.04
Open national	38	59	7	32	43	30	67	35	35	109	455	77.91
Reserved for AGPO	0	0	0	3	3	0	1	0	0	9	16	2.74
Restricted	4	6	1	2	0	2	4	5	2	5	31	5.31
Total	50	70	8	47	55	40	85	47	42	140	584	100

Source: PPARB (n.d.).

It was established that the majority of the review requests were filed by bidders who had participated in open tenders. Open national tenders were the majority at 77.91 percent followed by open

international tenders at 14.04 percent. Requests for reviews that had been filed by bidders who had participated in restricted tenders were 5.31 percent while those filed by bidders who had bid for

business reserved to the disadvantaged group of AGPO was 2.74 percent. This was a clear indication that the AGPO group was rarely appealing against the decisions of procuring entities. Canayaz et al. (2022) observed that there was a possibility that bidders who requested for review would face retaliation from procuring entities. Fear of

retaliation and loss of future business could have been one of the factors dissuading AGPO groups from requesting for review.

To establish the reasons why review requests had been filed, an analysis was conducted based on reasons that disgruntled bidders. The results of the analysis are shown in Table 2.

Table 2. Grounds for a request for review

Year	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	Total	Percent
Unfair evaluation	47	62	7	41	41	36	60	17	31	84	426	72.95
Shortcomings of the bidding document	0	0	0	0	3	0	3	0	1	8	15	2.57
Failure to comply with some aspects of the law	2	5	0	2	2	1	9	17	2	8	48	8.22
Wrongful termination/ Refusal to sign contract	1	2	1	4	7	3	12	11	6	27	74	12.67
Failure to comply with orders of the Board	0	1	0	0	2	0	1	2	2	13	21	3.60
Total	50	70	8	47	55	40	85	47	42	140	584	100

Source: PPARB (n.d.).

It was established that unfair evaluation of bids was the biggest cause for requests for review at 72.95 percent and the least cause at 2.57 percent was shortcomings of the bidding document. The rest of the causes were wrongful termination or refusal to sign a contract by the procuring entity at 12.67 percent, failure to comply with other aspects of the law at 8.22 percent, and failure to comply with orders already issued by the review board at 3.60 percent.

Of all the 16 cases filed by the AGPO group, the basis of appeal for 13 was about unfair evaluation, unfair termination of procurement proceedings, and refusal to sign contracts. It was established that 10 of the 16 cases were successful with only six being dismissed. It is possible, judging from experience where AGPO groups rarely appealed against decisions of public entities, procuring entities could have taken advantage to favor their preferred bidders anticipating no repercussions. Judging by the success rate of those who appealed, it is possible if issues of DEI are observed, more disadvantaged groups could seek procurement justice.

Regarding request for review procedures, it was established that filing of review requests was manual and the services of PPARB were not devolved. Only three cases of the 16 filed by the AGPO group were against county governments or entities owned by the county governments. In addition, the website of PPRA where PPARB services were accessed was not friendly to people living with disabilities. These reasons could explain why the number of requests for review by the AGPO group was few. Geography, shortages in service delivery, social relations of place, and digital constraints were attributed to a negative influence on DEI (Brooks et al., 2013).

Regarding fees payable for one to file a request for review, the 15th schedule of the Public Procurement and Asset Disposal Regulations (PPADR) of 2020 details that one requires an administrative fee of KSh 5,000, filing fees ranging from KSh 20,000 to KSh 250,000, up to KSh 20,000 for a request of an adjournment by a party to the board and KSh 5,000 for filing a preliminary objection. In addition, every request for review filed should be accompanied by

a refundable deposit valued at 15 percent of the applicant's tender sum that should be paid into a deposit account. Where the tender sum is not determinable at the time of filing of the request for review, the deposit should be KSh 200,000.

Within 21 days, the deposit submitted is refunded to the applicant upon receipt of the signed judgment or withdrawal of the application. According to regulation 222 of PPADR of 2020, should the applicant file a judicial review application, such an application must be accompanied by a refundable security fee valued at three percent of the applicant's tender sum subject to a maximum of KSh 10 million in a mode of payment determined by the High Court. This study established from the descriptive statistics that the costs awarded by PPARB ranged from KSh 50,000 to KSh 350,000. This is an indication of the costs involved in filing and defending review requests which are way inaccessible to the vulnerable group and thus negatively affecting DEI (Gordon, 2013; Melese, 2020; Brooks et al., 2013).

However, the implementation and operation of regulation 222 of the PPADR of 2020 was challenged in *Roads and Civil Engineering Contractors Association and Energy Sector Contractors Association vs The Attorney General and PPARB and Another, Nairobi H.C. Petition No. E226* (2020). The petition was among other things challenging the constitutionality of the said regulation which if implemented was to make review requests inaccessible to many aggrieved bidders. Worth noting is that the Public Procurement and Asset Disposal (Amendment) Act of 2022 introduced changes that gave the Secretary to PPARB powers to waive filing fees payable by candidates under reserved procurements for women, youth, persons with disabilities, and other disadvantaged groups.

Although aggrieved bidders can progressively appeal the decision of PPARB at the high court and that of the high court at the court of appeal, it was established from the results of the study that only two of the 16 cases filed by the AGPO group escalated to the high court. Both terminated at the High Court with one succeeding and the other being dismissed. In addition, it was established that in all the 16 cases filed by the AGPO group, bidders

had been represented by legal experts. Considering that it is not a requirement to be represented by a legal professional while filing requests for review with PPARB, this could be an indicator that filing procedures are not easy to understand and thus do not encourage self-representation which could be cheaper. Inaccessible justice for the vulnerable negatively impacts DEI (Brooks et al., 2013; Rhode, 2008).

5. CONCLUSION

The findings of this study and recommendations thereof offer useful policy direction that can enhance DEI in the management of bid disputes in public procurement. Public procurement enthusiasts and scholars will find this study useful as it boosts the literature on public procurement and offers recommendations for further research.

This paper revealed that only a handful of AGPO firms lodged review requests. Consequently, there is a need for a policy review to facilitate access to justice by vulnerable applicants. This is especially so because it was established that the fees and deposits currently required when filing a request for review hinder procurement appeals. It is not enough to make it optional for the Secretary to PPARB to waive filing fees payable by candidates under reserved procurements for women, youth, persons with disabilities, and other disadvantaged groups. The fees must be waived altogether.

It was further observed that procuring entities whose operations were out of the city of Nairobi, including county governments, were least involved in review requests. Appreciating the expansive nature of this country with procuring entities being distributed across 47 counties, there is a need for PPARB to devolve its services and implement an e-administrative review of tender disputes which will enhance access to justice more affordably and closer to the aggrieved. In addition, having acknowledged the challenges that face people living

with disabilities, accessibility to websites and literature regarding access to bid disputes justice must be in a form that caters to their special needs.

Unfair evaluation was cited as the basis of most requests for reviews. Evaluation committees were therefore responsible for most of the disputed procurement and disposal outcomes. There is a likelihood that AGPO groups were deliberately disadvantaged by procuring entities having known that charges and deposits are not affordable to many potential applicants falling in the categories of youth, women, people living with disabilities, and MSMEs. Therefore, there is a need to introduce stricter oversight during tender evaluations. Opening public procurement to civil society could enhance transparency and accountability.

The process of filing a request for review in Kenya is not that easy for a person without the basics of law. This was evident because most of those who filed review requests were represented by a legal practitioner. Therefore, there is a need for state and non-state actors to facilitate access to justice for the vulnerable by providing legal aid. This study has made key contributions to the field of academia as well as practical implications for research.

This study drew inferences from themes emanating from content analysis of bid disputes filed, heard, and determined by PPARB between 2011 and 2020 and through a review of procedures and laws that guide the management of bid disputes in Kenya. More details and insight could likely have been obtained through face-to-face interactions with bidders who filed review requests. In addition, there were likely disadvantaged bidders who fall in the category of youth, women, and people living with disability who had the intention of filing requests for review but were not able to because of varying reasons and are therefore suffering in silence. Future research could therefore benefit from conducting structured interviews with bidders in this category to gain an in-depth understanding of DEI in bid dispute management.

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