

Assessment of the Procurement System in Kenya

Public Procurement Oversight Authority

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Abbreviations

ACECA	Anti-Corruption and Economic Crimes Act
ARB	Appeals Review Board
BLI	Baseline Indicator
CPI	Compliance and Performance Indicator
DAC	Development Assistance Committee
FY	Financial Year
GDB	Gross Domestic Product
IAG	Internal Auditor General
IMF	International Monetary Fund
KACC	Kenya Anti-Corruption Commission
KES	Kenya Schillings
MoPW	Ministry of Public Works
KENAO	Kenya National Audit Office
NARC	National Rainbow Coalition
OECD	Organisation for Economic Cooperation and Development
PAA	Public Audit Act
PE	Procuring Entity
PFMA	Public Financial Management Act
POEA	Public Officers Ethics Act
PPD	Public Procurement Directorate
PPDA	Public Procurement and Disposal Act
PPOA	Public Procurement Oversight Authority
PPOAB	Public Procurement Oversight Advisory Board
PRGF	Poverty Reduction and Growth Facility
STD	Standard Tender Document

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1. Introduction

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 and 1990s, the introduction of the Public Procurement and Disposal Act (PPDA) of 2005 and the Procurement Regulations of 2006 has introduced new standards for public procurement in Kenya.

In line with the country's public procurement reform agenda, Kenya in 2006 committed itself to become one of the 22 countries participating in the pilot testing a new Methodology for Assessment of National Procurement Systems (version 4) developed by the OECD-DAC Joint Venture for Procurement.

The core objectives of the assessment are to:

- Establish a common base for development through a well documented and broadly accepted understanding of key issues of the public procurement system.
- Create a baseline against which future progress can be measured.
- Serve as a benchmarking tool which may be used for comparison between systems and countries.
- Field test Version 4 of the assessment methodology with a view to proposing improvements to the methodology.

The findings presented in this report are based on data collected jointly by the independent consultancy Rambøll Management (DK) and the Public Procurement Oversight Authority (PPOA). The assessment team was comprised of designated staff members of the PPOA and consultants Ms. Mette Søs Lassen, Ms. Marie Louise Refsgaard and Ms. Karin Attström from Rambøll Management. The pilot assessment was supported by the Danish Ministry of Foreign Affairs.

This report presents the findings of the pilot assessment, and thus reflects the state of the Kenyan procurement system at the time of assessment.¹ The report is structured as follows:

In chapter 2, Kenya's country background and reform context is briefly introduced. Chapter 3 presents the assessment design and the key methodological considerations and choices guiding the assessment. In chapter 4, the main findings of the assessment are presented. And finally, chapter 5 presents a set of recommendations for how the identified weaknesses of the procurement system may be addressed through capacity development initiatives.

¹ The data collection was carried out in the period from May 2007 to August 2007

2. Country background and context

2.1 Government

The Republic of Kenya is headed by a president (chief of state, head of government, commander in chief of armed forces), who appoints the vice president and cabinet members from among those elected to the National Assembly. The unicameral National Assembly consists of 210 members elected to a term of 5 years from single-member constituencies, plus 12 members nominated by political parties on a proportional representation basis. The president, the attorney general and the speaker are ex-officio members of the National Assembly. The judiciary is headed by a High Court, consisting of a Chief Justice and High Court judges and judges of Kenya's Court of Appeal, all appointed by the president. Local administration is divided among 69 rural districts, each headed by a commissioner appointed by the president. The government has proposed 37 more districts, but these are not yet ratified by Parliament. The districts are joined to form seven rural provinces. Nairobi has special provincial status. The Ministry of State in charge of Provincial Administration and Internal Security supervises the administration of districts and provinces.

2.2 Economy

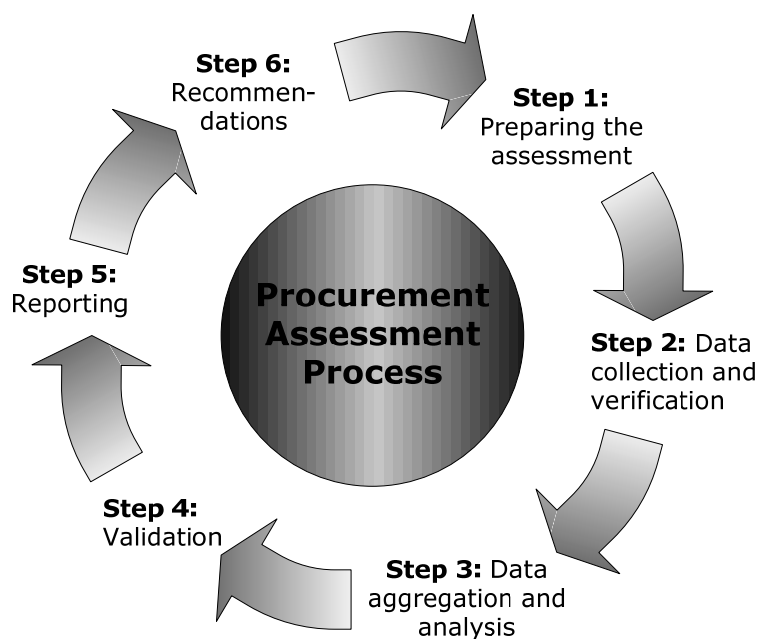
With a GDP of \$22.79 billion (2006 estimate), a gross national income per capita (2006) of \$455 and an annual growth rate (2006) of 6.1%, Kenya's economy is recovering from its poor performance in the past two decades. Under the leadership of President Kibaki, who took over on December 30, 2002, the Government of Kenya began an ambitious economic reform programme and resumed its cooperation with the World Bank and the IMF. The National Rainbow Coalition (NARC) government enacted the Anti-Corruption and Economic Crimes Act (ACECA) and Public Officers Ethics Act (POEA) in May 2003 aimed at fighting graft in public offices. Other reforms, especially in the judiciary and in the field of public procurement led to the unlocking of donor aid and a renewed hope of economic revival.

In November 2003, following the signing into law of key anti-corruption legislation and other reforms by the new government, donors reengaged as the IMF approved a three-year \$250 million Poverty Reduction and Growth Facility and donors committed \$4.2 billion in support over four years. In December 2004, the IMF approved Kenya's Poverty Reduction and Growth Facility (PRGF) arrangement equivalent to \$252.8 million to support the government's economic and governance reforms. Accelerating growth to achieve Kenya's potential and reduce the poverty that afflicts more than 56% of its population will require continued de-regulation of business, improved delivery of government services, addressing structural reforms, massive investment in new infrastructure (especially roads), and improved economic governance generally.

3. Assessment methodology

3.1 Assessment design

The assessment of Kenya's national procurement system was carried out in six steps:



Throughout all six stages of the assessment, the OECD-DAC Methodology for Assessment of National Procurement Systems has been applied. This tool offers a detailed and operational assessment framework categorised under four pillars:

- Pillar I: Legislative and regulatory framework
- Pillar II: Institutional framework and management capacity
- Pillar III: Procurement operations and market practices
- Pillar IV: Integrity and transparency of the procurement system

The four pillars are sub-divided into 12 indicators and a total of 54 sub-indicators. Moreover, each sub-indicator consists of a double set of indicators:

- **Baseline Indicators (BLIs):** Measure the quality of the legal system, formal arrangements, and structures in place in a given area. In the case of Kenya, the assessment of BLI indicators was conducted mainly as a desk review of legal, strategic and policy documents in combination with interviews with a broad range of stakeholders (see details below). The assessment result for each indicator is summarised in a score between 0 and 3, three being the highest score.
- **Compliance and Performance Indicators (CPIs):** Measure the level of compliance and performance in practice achieved in the area. In accordance with the recommendations of the OECD-DAC framework, Kenya carried out their CPI assessment as a questionnaire

based self-assessment of PEs, both at the organisational level and at the level of individual procurement contracts (see more details below). This resulted in a set of statistics indicating key CPI trends.

For more details on the assessment framework, please refer to the OECD-DAC Methodology for Assessment of National Procurement Systems, Version 4, July 17, 2006.

The next sections describe some key methodological considerations associated with each of the six assessment stages.

3.2 Step 1: Preparing the assessment

The main activities in the assessment preparation included:

- Information meeting on the assessment for key stakeholders
- Sampling of PEs to participate in the CPI assessment
- Sampling of procurement contracts for the CPI assessment

Preceding the data collection, **information meetings** were held with key stakeholders identified by the PPOA. At the meetings, the overall objectives of the assessment were presented, and stakeholders were prepared for the assessment process. At the same time, a key purpose of this meeting was to ensure commitment to the assessment process at an early stage.

Due to time and resource constraints, it was decided to select a relatively small **sample of PEs** for the CPI assessment. The sampling was made based on procurement volume, hence limiting the sample to large spending entities. Furthermore it was considered important to include different types of institutions/organisations, so as to cover both national and local level procurement as well as parastatal organisations. With these criteria, the following ten PEs were chosen:

- East African Portland Cement Company LTD
- Ministry of Education
- Ministry of State for Public Service
- Ministry of Energy
- Ministry of Public Works
- City Council of Nairobi
- Kenya Power and Lighting Company
- Kenya Medical Supplies Agency
- University of Nairobi
- Municipal Council of Thika

In addition to the sampling of PEs, the assessment preparations also included a **sampling of procurement contracts** to be reviewed by the selected PEs during the assessment. Since the current legislation was enacted in the last financial year, it was decided that the contract sample should be taken from 2007 (by way of counting, starting from Jan 1, 2007), so as to reflect the implementation of the PPDA. The selection of procurement contracts was carried out according to a stratified approach, with the following distribution:

- 3 Open Tenders, No. 1, 2 and 3
- 3 Requests for Quotations, No. 2, 4 and 6
- 2 Restricted Tenders, No. 1 and 2
- 1 Direct Procurement, No. 1
- 1 Request for Proposal, No. 1

In accordance with this guideline for sampling, the ten selected PEs were thus each asked to identify a total of ten contracts for self-assessment.

3.3 Step 2: Data collection and verification

Following the preparatory step, the data collection for both BLIs and CPIs was initiated.

The **BLI assessment** was conducted during a week long mission in July 2007 by two international consultants from Rambøll Management (DK). All BLIs were scored based on information gathered through review of relevant documents and legislative texts in combination with interviews and consultations with relevant stakeholders.

The **CPI assessment** was conducted by PPOA staff during June and July 2007. The survey based self-assessment focused on a selected number of CPIs developed based on the OECD-DAC framework and taking into consideration their relevance to the current Kenyan context. Preceding the data collection, two questionnaires had been developed and disseminated by PPOA: One questionnaire relating to the general procurement setup in the ten selected PEs, and one questionnaire relating to the 100 sampled procurement contracts.

The table below provides an overview of the response rates for the two questionnaires:

Questionnaire	Disseminated	Completed	Response rate
General questionnaire	10	7	70%
Contract based questionnaire	100	77	77%

The PPOA staff reported that repeated requests for information were necessary, along with actual visits in order to gather information together with the PEs. In general it was perceived as difficult to find and aggregate the information, and it took considerable time and effort to answer the questionnaires, since most PEs do not have a unified structure for record keeping. There were also some signs that PEs were hesitant towards displaying flaws or areas of improvement.

To compensate for the methodological weaknesses relating to conducting the CPI assessment as a self-assessment (in terms of poor data reliability), the PPOA had planned to carry out **verification visits** to all ten PEs to review their assessment procedure. Due to time constraints, however, it was not possible to conduct a full scale verification of the information provided. Verification of the data and the results was mainly conducted on site in conjunction with the collection of the data, and later on in the assessment process through the validation workshop (see below).

It should be noted that the limited PE and contract sample, the low response rates and high number of partially completed questionnaires, and the limited data verification together give rise to serious reservations in the interpretation of the CPI data. For this reason, the findings of the assessment presented in the next chapter only makes limited use of the collected CPI data and only where clear trends stand out.

3.4 Step 3: Data aggregation and analysis

Following the data collection, all BLI and CPI data was aggregated and analysed by the team of consultants.

The BLI data collected through desk review and interviews was analysed according to the scoring criteria elaborated in the OECD-DAC assessment framework, and each sub-indicator assessed was allocated a score. A total of two sub-indicators² did not receive a score due to lack of data.

Similarly, the CPI questionnaire data was aggregated and descriptive statistics were generated.

3.5 Step 4: Validation

As a means of validating and interpreting the results of the assessment, a validation workshop was held in Nairobi on August 16, 2007.

The validation workshop gathered a broad range of stakeholders to the public procurement system, including representatives of the PPOA and the PEs who had taken part in the assessment as well as other relevant stakeholders such as the Kenya Anti Corruption Commission and the Kenya National Audit Office.

During the workshop the assessment methodology and the results were presented, followed by in-depth discussions among the participants on the reliability and validity of the presented data. Following these discussions, a plan for areas and prioritisation of future action was developed jointly by the participants.

In general the workshop confirmed the results of the assessment. However, some concerns were raised as to what extent it is possible to generalise the CPI assessment results, given the relatively limited sample of PEs and the stratification of cases under review. These concerns are reflected in this report.

3.6 Step 5: Reporting

Based on the validated assessment results, the present report summarising the assessment process and results has been drafted.

The report will be dispatched to all stakeholders and provide key inputs to the ongoing process of developing capacity development initiatives targeting the public procurement system.

In addition, the report will be submitted to the OECD-DAC JV for Procurement Secretariat to ensure that the lessons learnt from the Kenyan experience are fully utilised in the further improvement of the OECD-DAC assessment tool.

3.7 Step 6: Recommendations

Based on the assessment results and the validation process, a number of recommendations for future actions and the prioritisation of these have been developed. The recommendations are summarised in Chapter 5 of this report.

² The two indicators are indicator 8(c) and indicator 12(d).

It should be noted that the focus of the OECD-DAC assessment is descriptive rather than explanatory. In other words, while the assessment results provide a snapshot of the present situation, it does not fully shed light on the factors explaining this situation. Additional in-depth analysis of the identified weaknesses will therefore be needed to fully develop appropriate capacity development initiatives.

4. Findings of the assessment

This chapter presents the key findings of the assessment. It provides a brief overview of the findings, and details key trends and issues identified within each of the four pillars of the assessment framework.

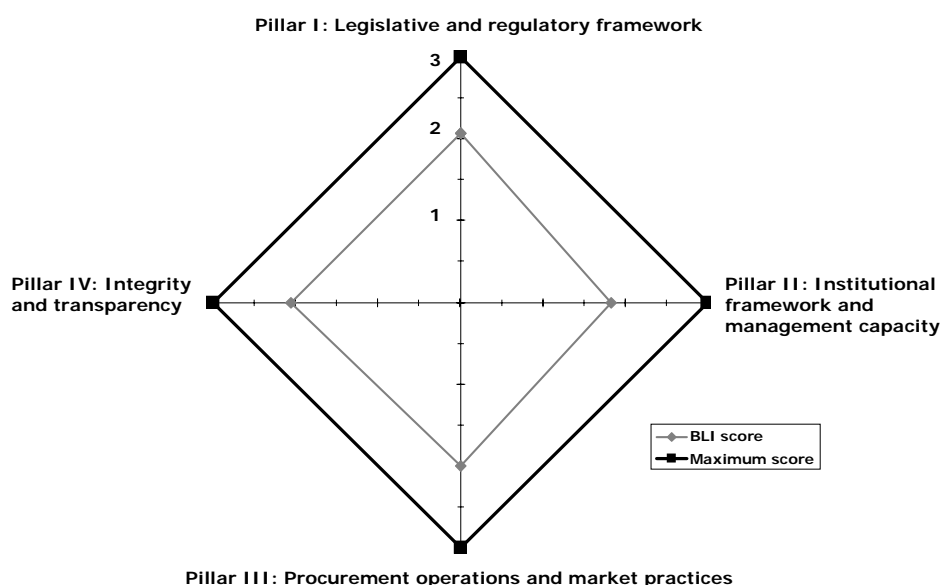
While the logic of the OECD-DAC framework is followed throughout the chapter, not all indicators are dealt with here. For a full assessment of all BLI and CPI indicators, please refer to Annex 1.

4.1 Overview of findings³

As described in the previous chapter, 52 out of the 54 BLI sub-indicators have been given a score between 0 and 3 based on the overall assessment of the public procurement system in Kenya.

Out of a maximum aggregated score of 158, the aggregated score achieved by Kenya according to the assessment is 104, equivalent to an overall BLI **achievement level of 66%** of the maximum score.

The overall result of the BLI assessment is illustrated in the graphic presentation below, which summarises the assessment results pillar by pillar.⁴



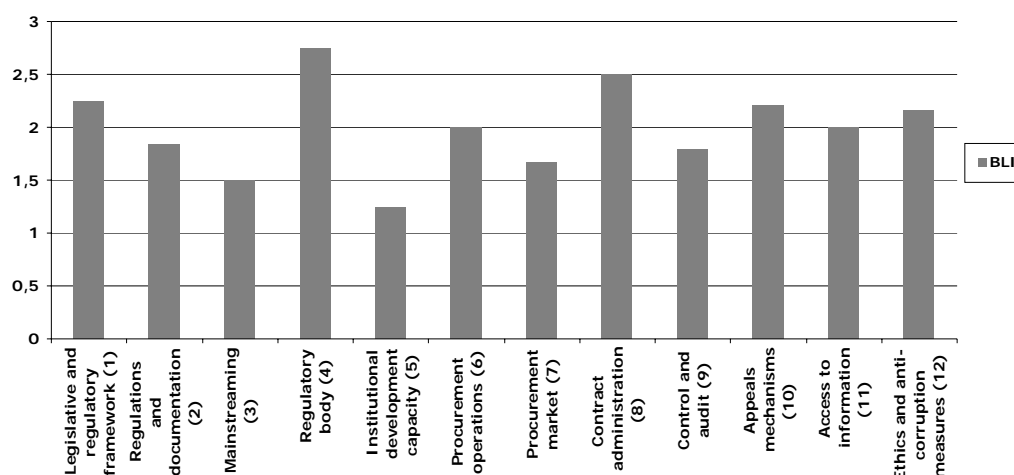
As depicted by the chart, Kenya's public procurement system is assessed to be slightly stronger on the legislative and regulatory framework (Pillar I) than on the other three pillars, while none of the pillars are assessed as coming close to the maximum score of 3, thus still leaving room for improvement in all four main areas. However, the average score of all four

³ As statistics for the CPI assessment can not be generated due to the qualitative nature of the data collected, this overview only presents the overall findings of the BLI assessment. The findings of the CPI assessment are presented alongside the BLI findings in the next sections.

⁴ The indicated scores for each pillar have been aggregated by a simple arithmetical average of sub-indicators under the pillar.

pillars exceeds the median of 1.5, indicating that a certain level of formal structure is in place in all major areas.

The strengths and weaknesses of the procurement system may be analysed in further detail by looking at the average BLI score for each of the 12 indicators:



As the bar chart illustrates, the introduction of a legal and regulatory procurement framework (indicator 1), the establishment of PPOA as an oversight body (indicator 4), the development of a framework for contract administration (indicator 8), and the new appeals mechanism (indicator 10) are among those aspects of the public procurement system rated most positively. In contrast, the existing institutional development capacity in PEs and among training providers (indicator 5), and the functioning of the procurement market (indicator 7), is assessed to be among the weakest aspects of the system.

The key findings under each pillar are detailed in the sections below. In order to bring to light the link between structural and compliance related strengths and weaknesses of the procurement system, the findings of the two parts of the assessment are presented in conjunction. For a separate assessment of BLIs respectively CPIs, refer to Annex 1.

4.2 Pillar I: Legislative and regulatory framework

Pillar I of the OECD-DAC assessment methodology assesses the existence, availability, quality and use of the legal and regulatory framework from the highest level (Act and Regulations) down to the more detailed operational procedures, guidelines, model tender documents, and standard conditions of contract.

The current public procurement framework in Kenya has recently been strengthened in a number of respects:

- **Sound legal framework in place:** With the enactment of the PPDA and Regulations, Kenya today has in place a sound and comprehensive legal framework for public procurement with a clear hierarchical distinction. The PPDA clearly establishes the procurement methods to be applied, advertising rules and time limits, the content of tender

documents and technical specifications, tender evaluation and award criteria, procedures for submission, receipt and opening of tenders, and the complaints system structure and sequence. The PPDA and Regulations cover goods, works and services for all procurement using national funds. Both documents are published and widely distributed within government.

- **Standard Tender Documents developed for goods, works and services:** The legal framework is complemented with a series of Standard Tender Documents (STDs) covering procurement of goods, works and services, and the responsibility for updating the STDs is clearly assigned to the PPOA. Evidence from the CPI survey furthermore suggests that the newly issued STDs have already reached a rather high level of dissemination. The surveyed PEs thus indicate that 66% of all procurements carried out are using STDs.

At the same time, the legislative and regulatory framework suffers from a number of weaknesses the most important ones being:

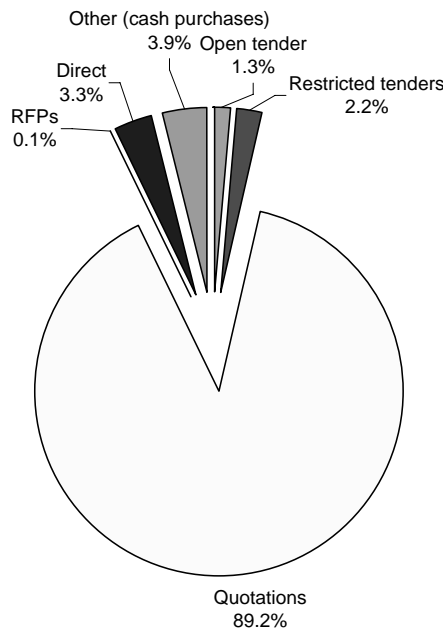
- **No procurement manual yet in place:** The PPOA has hired a consultant to develop a procurement manual with a view to providing better guidance to the PEs on how to undertake procurements in accordance with the PPDA and Regulations. At the time of writing, however, no manual is yet readily available and circulated. Once issued, the manual will constitute an important supplement to the legal framework, and it may also address some of the shortcomings of the current legal framework as described below.
- **Procedures for pre-qualification lack clarity:** Fair and transparent rules of participation are key elements of a sound procurement framework. Access to participation should be based solely on qualifications and preferably be determined on a pass/fail basis in order to avoid arbitrariness in the decision making process. In Kenya, the PPDA and the Regulations establish that PEs may apply pre-qualification procedure. In relation to the procedure for pre-qualification spelled out in the Regulations, it is determined that in selecting among those pre-qualified persons, who will be asked for quotation, the PE shall ensure a “fair and equal rotation”. However, the concept of “fair and equal rotation” is not adequately explained and illustrated, and may therefore result in misinterpretation among the PEs.
- **Inadequate procedures for registration of contractors:** Another issue related to qualification is that of the registration lists maintained by the Ministry of Public Works (MoPW). The MoPW has a mandate to register contractors and is maintaining registers categorising these depending on capacity and qualifications. Registration is mandatory for contractors wishing to work for the MoPW and other public entities. There is no specific legal framework guiding the registration committees of the MoPW, however, the committees have developed their own procedural guidelines. Notably, the Procedures for Registration and Upgrading of Building Contractors allow for temporary registration of foreign companies having already won a contract.
- **No procedures for using technical capacity as a key criterion:** While the STDs for selection of consultants provide for the opportunity to use technical capacity as a criterion in the selection, neither the PPDA nor the Regulations elaborates on this procedure. The lack of clear procedures causes some confusion as to when and how to apply technical capacity as a key criterion. This confusion may be eliminated by spelling out including procedural instructions in the guidelines to be developed.

- **Excessive thresholds for domestic preference:** The PPDA prescribe the use of preferences and reservations. One of the more remarkable elements of this provision is the excessive threshold of 50 million KES (approx. USD 745,700) for procurement of goods or services and 200 million KES (approx. USD 2,983,000) for procurements in respect of works, below which exclusive preference shall be given to citizens of Kenya.

As demonstrated above, although the newly established legal and regulatory framework has added significant strength to the public procurement system, weaknesses still exist within the framework.

More important, however, are the challenges facing the PEs when it comes to applying the framework in practice and complying with the new provisions and standards. In this regard, the CPI assessment for pillar 1 reveals considerable discrepancies between the legislative framework and the procurement function in the assessed procurement entities:

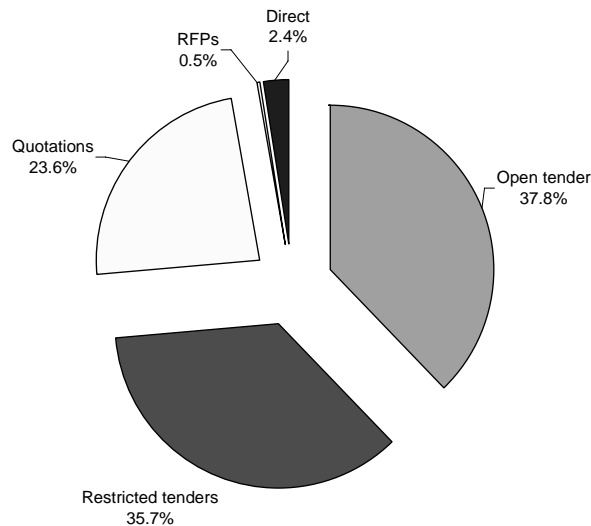
- **Excessive use of quotations:** According to the assessment, the seven PEs participating in the CPI survey undertook a total of 11,046 procurements during the assessment period. As illustrated below, 89.2% of these were quotations, whereas only 1.3% were open tenders.⁵



More nuances may be added to the above trend by looking at the volume of contracts spent under each procurement method. During the period of assessment, the seven PEs in total procured for ap-

⁵ It should be noted that one of the seven PEs accounts for above 80% of the quotations in the sample, thus distorting the aggregated data. Despite this, however, the data indicates that quotations make up the vast majority of procurements in all surveyed PEs.

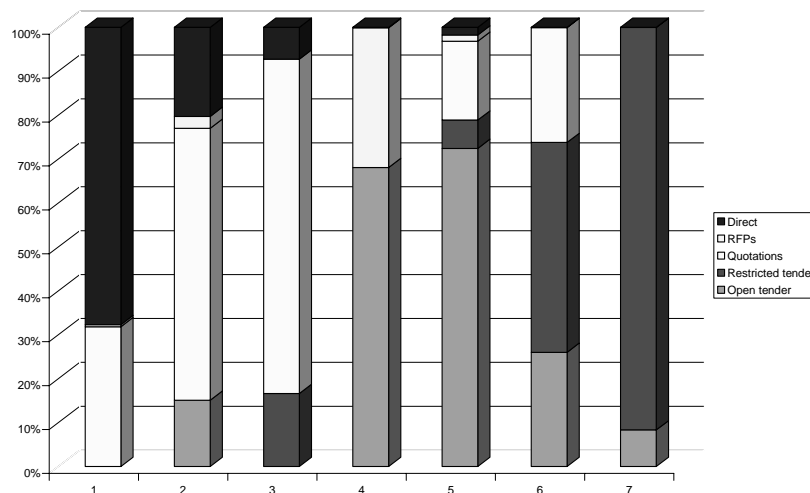
proximately 40 billion KES. Divided into method of procurement the following picture emerges⁶:



As illustrated, open tenders account for an almost equivalent though slightly higher proportion of the total procurement contract value than restricted tenders, followed by quotations, thus placing open tenders somewhat closer to its intended status as the default procurement method. Despite this modification, however, both the assessment data and the validation process still confirm the trend of PEs relying excessively on procurement through quotations. It is clear that the procurement functioning needs to be developed and considerable effort needs to be put into defining strategies for how to make open tendering the default method of procurement in the future.

- **Significant differences in PE procurement practices:** Another yet related trend revealed by the CPI assessment is that large discrepancies and differences exist between the procurement practices applied in different PEs. The following chart illustrates this trend by looking at the total contract volume procured through different procurement methods by each of the seven PEs participating in the CPI survey:

⁶ The original data on this variable indicates that the single most applied procurement method has been restricted tenders, accounting for above 70% of the total procurement value. However, a closer look into the data reveals that two large restricted tenders account for this overweight. The chart presents the adjusted trend emerging when these tenders are taken out of the aggregation.



As for the previous trend, the discrepancies between the procurement practices of different PEs bear witness to the need for further institutionalisation and clarification of the new legal framework and its provisions among the PEs.

4.3 Pillar II: Institutional framework and management capacity

This pillar assesses how the procurement system as defined by the legal and regulatory framework in Kenya is operating through the institutions and management systems and practices forming part of the overall public sector governance.

The findings of the assessment point to the following key assets of the institutional framework and management capacity in Kenya:

- Legal framework supports integration of procurement planning in the budget formulation process:** The legal framework provides thorough guidance on procurement planning, linking the planning process up with the budgeting process, hence providing an important first step towards actual integration of procurement planning in the budgeting process. According to the legal framework, all procurement shall be within the approved budget of the PE and shall be planned by the PE concerned through an annual procurement plan. The annual procurement planning shall be integrated with applicable budget processes and based on indicative or approved budgets. In addition, the legal framework specifies that sufficient funds must be set aside before a procurement is initiated.
- PPOA has been established as the authoritative public procurement oversight body:** The PPDA established the Public Procurement Oversight Authority (PPOA), and the Board of the Authority was appointed in September 2007. The legal framework defines clearly the responsibilities of the PPOA, which include: to ensure that procurement procedures are complied with; to monitor the public procurement system and recommend improvements; to assist in the implementation and operation of the procurement system; and to initiate public procurement policy and amendments to the PPDA. At present the PPOA is largely staffed with personnel seconded from other government departments – especially the MoF. It has, however, begun operation and is also moving to new premises outside of

the Treasury. This will be an important sign of the Authority's independence from the MoF.

- **Procedures for performance contracting and performance evaluation are in place:** One of the features most needed – but often lacking – in procurement systems is a mechanism providing structured incentives for sound and efficient procurement among the system's key players. In Kenya, such a system has been put in place covering both the organisational and the individual level through a dual system of Performance Contracting (measuring organisational performance) and a Performance Appraisal System (measuring individual performance). The *Performance Contracts* currently cover all parts of the central government as well as a number of pilot state corporations and local authorities. Within all areas, including procurement, the Performance Contracts are based on processes of performance target setting, performance planning, and performance monitoring and reporting. The *Performance Appraisal system* is applicable to all categories of staff in the Public Service and provides for work planning and setting of performance targets, assessment of staff competencies and values assessment, performance appraisal and completion of a Performance Appraisal Report Form targeting the responsibilities and job functions of the individual officer.

As for pillar I, however, pillar II also has a number of weaknesses addressed below:

- **Procurement planning is not carried out systematically:** Although procedures supporting systematic procurement planning have been established, data from the CPI survey indicates that these are far from always being complied with. While it has not been possible to assess the percentage of contracts which are not part of procurement plans, the low share of procurements conducted through open tendering (see pillar I) clearly indicates that a large part of procurements are undertaken on an ad hoc basis, by quotations and direct procurements, thus suggesting a lack of procurement planning in the PEs and operational units.
- **Existing laws and procedures do not support timely procurement, contract execution and payment:** Budget law and financial management procedures are currently not supporting timely procurement, in that there are no established procedures. There are no legal provisions, procedures or guidelines on the time limits for appropriation of funds, the processing of invoices and payments. It was suggested by some that with the forthcoming introduction and roll-out of the procurement component of the Integrated Financial Management Information System (IFMIS), procedures would be introduced. However, at present no such procedures are in place. With multiple complaints from the private sector – the supply side to the procurement system – the drawbacks of this default becomes obvious.
- **Lack of feedback mechanism:** The PPDA contains a clear requirement that procurements may not be initiated before appropriation of funds. Though, for the budgetary and financial management system to be able to operate in unison, it remains important that information of major expenditures, e.g. large construction contracts, is fed back into the PFM system. However, the current procurement system does not provide for systematic feedback into the financial management and budgetary system on the completion of all major contracts. IFMIS has this feature, but it is currently not applied, thus producing adverse effects on the budgeting and budget execution processes.

- **Low stakeholder awareness of web-based procurement information system:** The PPOA is well aware of the benefits of digitalisation of the procurement system. Among planned initiatives is the introduction of e-procurement, which will be supported by USAID. As part of an e-procurement drive, the PPOA already is in the process of developing a web-based system for collecting and disseminating procurement information, including tender invitations, requests for proposals, and contract award information for all central government contracts above 5,000,000 KES. As the system has not yet been launched, awareness of the website among stakeholders (including the PEs) is at present very restricted, in practice resulting in limited availability of procurement information on the web.
- **System for collecting and monitoring procurement statistics not fully utilised:** As noted earlier, the government is currently implementing an electronic Integrated Financial Management Information System (IFMIS), which includes a procurement module recently rolled out in 24 ministries. The system enables users to collect and monitor procurement information and statistics at all stages of the procurement process. Being only recently implemented, however, the tool is not being broadly used for analysis of information by the PEs, and the reliability of data collected through IFMIS yet remains untested. The fact that IFMIS only targets the central government level presents an additional weakness in terms of collection and monitoring of procurement statistics.
- **Competence development needs are not adequately addressed:** Inadequate competence levels are often cited as the most important blockage for further improvements in the procurement system. There are, however, great disparities across government. Some ministries have highly professional units and procure for large amounts on a yearly basis, whereas others are in dire need of assistance. It is also expected that once local government procurement is further assessed, extensive needs for competence development will be identified. The PPOA has a mandate to ensure capacity development initiatives across government (central and local). At the time of writing, though, no complete training and capacity development strategy is in place, although initial sensitisation sessions for government and private sector participants have been held. The PPOA is currently in the process of developing a comprehensive capacity building strategy, including training programmes. A strategic element will be to link up with already established training institutions across the country.

4.4 Pillar III: Procurement operations and market practices

Having assessed the legal/regulatory and institutional systems guiding public procurement, this third pillar looks at how these systems operate at the level of the implementing procuring entities as well as on the procurement market in Kenya.

Based on the assessment findings, the following strengths have been identified:

- **Procurement decision making authority is fully delegated:** The current legal framework provides for a fully decentralised procurement process, leaving the full responsibility of undertaking procurements to the tender committee and procurement unit at the level of the individual PE. This decentralisation of decision making authority represents a milestone in the reform process towards a sound and

efficient procurement system, and hence a key asset to Kenya's procurement system.

- **Steps have been taken towards developing a professional procurement workforce:** While the procurement profession still suffers from lack of adequate procurement competencies (see pillar II), important steps have been taken in recent years to establish a sound basis for a professionalised procurement discipline. One example of such a step is the introduction of the Revised Scheme of Service for Supply Chain Management Personnel issued by the Office of the President in which clear provisions for the qualifications, skills and experience required for appointment of procurement professionals at various levels are made. This Scheme is systematically applied in the selective recruitment of procurement staff led by the Public Service Commission. In another area, procurement training programmes at BSc and MSc levels – primarily targeting the public sector recruitment – are now offered by a number of public and private institutions. This long-term training supply is broadly considered to match the needs of the public sector, and the course content is regularly updated based on demand and feedback from the public servants enrolled on the courses. The frequency of courses is also reported to be sufficient, the main barrier being high admission fees often payable by the students out of their own pockets.
- **Dialogue between government and private sector is considered open and constructive:** The main forum for government and private sector interaction on procurement is the Public Procurement Oversight Advisory Board consisting of nine members appointed by a range of private sector institutions (first appointment took place in September 2007). Likewise, for the purpose of joint consultations, an annual consultative meeting between the public and the private sector is held in accordance with the PPDA. Private sector representatives interviewed for the assessment also expressed explicit satisfaction with the ongoing dialogue on present procurement issues, e.g. the drafting of the PPDA and Regulations which private sector organisations were invited to comment on. Thus, the private sector asserted their influence directly on the current version of the legislation.

Among the most predominant weaknesses related to procurement operations and market practices are:

- **The available expertise at PE level does not meet the need for specialised procurement knowledge:** Despite the abovementioned steps taken towards developing a professional procurement workforce, the overall lack of procurement knowledge remains a major weakness to the efficiency of procurement operations. It should be noted that the need for additional (or any) procurement expertise varies between different types of procuring entities, with major procurers often possessing the necessary competence levels, while local level PEs often have little or no access to internal procurement expertise. Massive upgrading of qualifications through training as well as an increase in the supply of specialised graduates will be required to fill this gap. In addition, procurement staff retention strategies will be needed in the future to address the severe brain-drain of procurement capacities reportedly taking place in these years.
- **Short-term procurement training is in short supply:** The PPOA is currently not offering training programmes, although a series of sensitisation sessions targeting both public and private sector participants have been held. Many stakeholders report that this type of

information programmes is in short supply. In light of the low availability of procurement expertise at PE level (see above), the lack of short-term procurement training constitutes a key obstacle to the continued professionalisation of PEs' procurement practices.

- **PE recordkeeping practices remain poor:** While the legal framework establishes norms for the safekeeping of records and documents related to procurement transactions and contract management, compliance levels in this area remain low. The findings of the CPI survey indicate that 11% of the procurement contracts surveyed did not have complete records. In practice, however, the percentage of incomplete records is assessed to be somewhat higher, which the high ratio of only partly completed questionnaires (above 50% of the submitted questionnaires lacked data on areas such as advertisement procedure followed, tender evaluation and award criteria applied, public opening or existence of contract completion reports) in the survey bears witness to. Similarly, during the validation workshop participants discussed whether the actual percentage should not be higher, since their experience was that record keeping is an area in need of considerable improvements. The validation workshop furthermore showed a clear demand for additional guidelines for record keeping in order to create a coherent system for filing and keeping records.
- **Low procurement capacity among private sector players:** At the time of writing the supply of training programmes for private sector participants is very limited, and there is no established government programme to help build procurement capacity for private companies, although work is currently being undertaken to increase partnership approaches. The limited private sector training supply remains a major constraint to the unfolding of the procurement market potential, as many private bidders lack adequate procurement knowledge to take part in procurements. This conclusion is supported by the CPI survey, which showed that among the assessed procurement cases, 37% of the suppliers who received the tender specifications did not submit a tender. Of the submitted tenders 29% were rejected in the preliminary evaluation and 45% in the technical evaluation. The validation workshop broadly confirmed this trend and attributed it to the fact that suppliers often do not fully understand procurement requirements. This particularly appears to be true for the vast number of SMEs operating in Kenya.
- **Collateral and registration practices constrain private sector market access:** According to the private sector representatives interviewed, there are generally few major constraints inhibiting private sector access to the procurement market. One exception mentioned was the difficulties faced by SMEs in obtaining adequate credit – a constraint made worse by common delays in contract payments, which makes it difficult for smaller businesses to honour their obligations towards their creditors, thus resulting in adverse effects on the future ability to obtain credit. Another major weakness relates to the registration for competition for large-scale government contracts. The current thresholds result in a situation where only a small number of firms can bid for major government contracts. E.g. only 4.7% of the Contractors on the Register of Approved Building Contractors (June, 2007 edition) are listed in the top category (category A), thus allowing them to compete for the large-scale building contracts. It was noted that in recent years the government has improved the business climate, e.g. by reducing the time and number of licences required to register a company (now down to one licence) and in that local authorities have also changed their by-laws and require-

ments. The competition framework is currently under review with a commission under the MoF.

4.5 Pillar IV: Integrity and transparency of the public procurement system

The integrity and transparency of a public procurement system rely on a number of control mechanisms, including an effective control and audit system, an efficient appeals mechanism, a comprehensive information sharing system enabling civil society and interested stakeholders to conduct social audit, and effective ethics and anti-corruption measures. Without such control mechanisms, flaws in the procurement system may not be detected and addressed. The fourth pillar of the assessment therefore measures the existence of adequate control systems and the practices related to these.

The assessment identified a number of factors, which have contributed positively to strengthening the control systems of Kenya's procurement system in recent years:

- **Sound internal audit mechanism established and complied with:** The Internal Auditor General (IAG) is responsible for the internal audit function across government, including in the area of procurement. The work of the IAG is governed by the Public Financial Management Act of 2003 (PFMA), to which Regulations have still to be issued. However, the IAG applies its Internal Audit Manual of 2005. The IAG undertakes internal control in all public entities, excluding parastatals, which are controlled by the State Corporations Inspectorate reporting directly to the Office of the President. Internal audit is carried out on an on-going basis throughout the FY and in accordance with the required annual work plan, thus providing the basis for a sound internal audit mechanism. According to the IAG, internal audit recommendations are generally complied with as they are directly linked to the budget performance report.
- **A well-functioning and independent complaints review and appeals mechanism has been established:** The complaints review system is clearly described in the PPDA and Regulations and provides precise conditions and timeframes as well as clear enforcement mechanisms. The Appeals Review Board (ARB) constitutes the first avenue of complaints, and the PPDA provides for ARB decisions which are based on information relevant to the case, which are balanced and unbiased, which are subject to judicial review, and provide for relevant remedies. Judicial review is conducted by the High Court. ARB decisions can be further appealed within the regular court system. The establishment of this well-functioning and independent appeals mechanism is a key achievement in ensuring a functioning and credible procurement system.

On the other hand, Kenya's control systems are also characterised by certain weaknesses, the most important ones being:

- **Poor enforcement and follow-up on external audit recommendations:** External audit is carried out on an annual basis by the Kenya National Audit Office (KENAO), which derives its mandate from the Constitution and is further governed by the Public Audit Act of 2003 (PAA). The KENAO conducts financial audit, systems audit and performance audit. Procurement is included in the latter. Unfortunately, implementation of KENAO recommendations remains flawed and lengthy. The KENAO reports to the Public Accounts Com-

mittee of the Parliament, and the Parliament then develops a set of recommendations. These are in turn passed on to the Treasury, which issues a Memorandum, which is the instrument upon which implementation of KENAO recommendations is based. The last set of recommendations adopted by Parliament related to the KENAO report for the FY 97/98.

- **Procurement audits are non-existing:** While both the IAG and the KENAO undertake audit of procurement, none of these institutions are able or see it as their clear-cut mandate to conduct procurement audits. Thus, at present, procurement audits are not being conducted. The PPDA provides the PPOA with the mandate to inspect and audit procurement contracts, and includes in the functions of the PPOA to monitor the public procurement system and report on the overall functioning. However, the PPDA does not confine any specific responsibility or right on the PPOA to conduct regular procurement audits, hence leaving the system with a serious gap.
- **Lack of procurement proficiency among auditors:** Both internal and external auditors are trained in procurement as part of their regular in-house training. However, they are not procurement experts, and currently procurement specialists are not called in to form part of the control and audit teams. In effect, the audits conducted are reportedly not always adequately sensitive to procurement related issues.
- **Limited access to ARB decisions:** While review of complaints generally takes place within the legally established time frames, access to PPRCB decisions is limited. Although complaint review decisions are available at the PPOA/ARB premises, they are thus currently not published in any official gazette nor on the PPOA website or any other government websites. In practice, this makes it very difficult for interested parties (or anyone else) to access the ARB decisions and seriously limits transparency of the ARB.
- **Limited public access to procurement information:** In order to promote public access to procurement information, the PPOA has established a website (www.ppoa.go.ke) with the intention of publishing a broad range of information about the procurement system, including legal and policy documents, procurement statistics, and procurement plans, notices and contract awards. At the time of writing, however, the only data available on the website is information on contracts awarded. The PPOA expects to upgrade and launch the website in the near future. As public access to all relevant procurement information is a cornerstone to the development of a transparent procurement system, this should be a key priority to the PPOA.
- **No Code of Ethics addressing procurement related issues:** While the Public Officers Ethics Act does provide a general Code of Ethics for Public Officials, this Code does not include specific provisions for those officials involved in public financial management, including procurement. Instead, the PPDA mandates the PPOA to issue a specific Code of Ethics for procurement officials. Such a Code has not yet been issued.

5. Recommendations for capacity development

The weaknesses of Kenya's public procurement system presented in the previous chapter each suggest a need for enhancing Kenya's procurement capacity.

To address these needs a comprehensive understanding of the underlying explanatory factors is required. While the present assessment has significantly contributed to such an understanding, further in-depth analysis is in some areas required to ensure that capacity needs are addressed in an adequate and sustainable manner.

Although therefore not exhaustive, this chapter presents a set of recommendations for how current capacity needs in the procurement system may be addressed. The capacity development initiatives proposed broadly fall within six overall areas:

- Procurement capacity at PE level
- Incentive structures
- Procurement information
- Procurement capacity in the private sector
- Stakeholder dialogue and coordination
- Further studies

Below, each of these areas is addressed in turn. Each heading includes capacity development responses to one or more capacity needs identified during the assessment, regardless of pillar. For an overview of the direct link between each identified capacity need and the associated proposed action, please refer to Annex 1.

5.1 Enhanced procurement capacity at PE level

A major conclusion of the assessment was that procurement staff in many PEs are suffering from a general lack of information about the legal framework, principles, procedures and processes of procurement. In particular, the assessment findings suggest that a need exists for additional:

- Written guidelines
- Training and sensitisation
- Ad hoc advice

The responsibility of providing procurement related advice to PEs lies with the PPOA who will need to invest significant efforts in enhancing the procurement capacity of PEs in the years to come.

Both written guidelines and sensitisation activities should aim at creating a general awareness of the legal framework and institutional setup guiding procurement in Kenya (including the PPOA's own important role), as well as the main principles of sound, fair, transparent and efficient procurement. In line with the assessment conclusions, it is in addition recommended that rules and procedures relating to certain subjects are given particular attention when developing procurement guidelines and sensitisation activities:

- Use of procurement methods
- Advertisement
- Use of registration lists
- Use of prequalification

- Tender evaluation and award criteria
- Use of technical capacity as a selection criterion when contracting for services
- Safekeeping of procurement records
- Procurement planning
- Appropriation of funds, processing of invoices and payments
- Preparation of completion reports

In addition to the development of procurement guidelines and sensitisation activities on these issues, and in order to cover the pressing need for ad hoc advice, it is recommended that the PPOA establishes a helpdesk which PEs are encouraged to use on a needs basis.

5.2 Improved incentive structures

While a system for Performance Contracting and Performance Assessment has already been established in Kenya, evidence from the assessment still suggests a need for further improved incentive structures in the procurement area.

In order to make the most of the existing systems, it is hence recommended that the established Performance Contracting and Performance Assessment System is carefully reviewed with a view to optimising these tools so that they support sound procurement practices through effective incentives. The following issues should be looked at when optimising the system:

- Do the Key Performance Indicators at individual and organisational level support sound procurement practices?
- Do Key Performance Indicators support sound procurement in areas of special concern according to this assessment (e.g. procurement planning and contract management)?
- Do clear links exist between individual performance management and organisational performance management?
- Is high performance followed up by adequate incentives and rewards?
- How is performance data used and stored?

Based on this review, a detailed optimisation plan should be developed and implemented.

5.3 Better access to procurement information

This report has demonstrated that access to procurement information remains a major weakness of Kenya's procurement system. Access to a variety of readily available and complete procurement information (from procurement plans, tender notices and contract awards to procurement statistics, legal and policy documents and studies) is vital to a well functioning procurement system for several reasons: It increases competition levels, provides for control by the audit system, enables civil society to conduct social audit, enhances the understanding of the procurement system, etc.

To rectify the current situation, the following actions need to be taken:

- PPOA website should be fully developed.
- Procurement information (as a minimum including basic information about the legal and institutional setup of the procurement system and the PPOA, electronic versions of the Act and Regulations, manu-

als, studies, procurement notices and awards, ARB decisions, and basic procurement statistics) should be uploaded to the website.

- A system for easy and mandatory uploading of procurement plans, tender notices and contract awards by all PEs or similar should be established. Follow-up training of PEs may be needed to make this system operational.
- When the procurement module of IFMIS is functional, statistics derived from this should be uploaded at agreed intervals.

In order to ensure timely updating of the PPOA website, it is recommended that the responsibility for actively requesting, collecting and uploading procurement information is clearly assigned to a selected officer of the PPOA. The responsibility should be supported by clear incentives, e.g. by making it a Key Performance Indicator for the officer.

The development of the PPOA website should be followed up by continued awareness raising activities diffusing knowledge about the website through newspapers, training and workshops sessions, and other relevant means.

5.4 Enhanced procurement capacity in the private sector

The assessment findings indicate that capacity constraints do not only characterise staff undertaking procurements at PE level, but also the private sector offering their goods, works and services to the PEs. This particularly seems to be the case for smaller businesses which often have a poor understanding of the requirements of participation in the procurement process.

In light of the magnitude of this problem, it is recommended that a number of capacity development activities are initiated to better equip the private sector to participate in competition on the procurement market:

- **Private sector guidelines:** The challenges facing bidders in the procurement process suggest that a basic manual answering the most frequently asked questions among bidders and providing operational guidance on how to engage in procurement processes. The manual may include
 - A brief description of the STDs used for procurements in Kenya
 - An explanation of each section included in the STDs for different types of goods, works and services
 - Examples of how to deal with the most common challenges facing bidders during bid preparation
 - A check-list on what to keep in mind when completing each section of the STDs.
 - A glossary explaining the most commonly used procurement terms used in the STDs.
 - A reference to a helpdesk which may be consulted for further questions.

The guidelines should be developed by the PPOA but taking onboard input from private sector associations to ensure that the guidelines adequately address the specific needs of the sector, including SMEs.

- **Private sector helpdesk:** It is recommended that additional guidance to bidders and suppliers is given in the form of a formalised helpdesk function. Such a function would provide a much needed instant support option for bidders and suppliers to address frequently asked questions on for example how to respond to STDs, how to deal with perceived irregularities during the bidding or evaluation stages, etc. In line with the responsibilities of the PPOA provided for in the

PPDA, the helpdesk should be anchored with PPOA. Several channels of communication (website, e-mail, telephone hotline, etc.) may be considered, and separate efforts will be required to create awareness of the helpdesk in the private sector.

- **Sensitisation workshops:** It is recommended that the PPOA scales up its sensitisation and training activities targeting private sector representatives on the principles and functioning of the procurement market in general as well as on the subject of how to understand and respond to STDs and technical specifications, how to use the complaint mechanism, etc. The sensitisation activities should be shaped to fit the private bidders' perspective on the procurement process, be problem-based and offer tips and tricks, while avoiding legalistic and theoretical approaches to procurement.

5.5 Intensified partnership and coordination with related organisations

As demonstrated throughout this report, a vast range of the issues characterising public procurement in Kenya today can not be dealt with by the PPOA alone, but need to be tackled jointly by a range of different stakeholders, with participation of the PPOA. This is particularly true for capacity gaps found in areas in which procurement meets other core public functions, such as audit, public financial management, human resources and anti-corruption.

In such areas, it is recommended that the capacity gaps are addressed by strategies of intensified partnership and coordination between PPOA and organisations working in related fields.

The table below lists some key areas in which the PPOA needs to establish further dialogue with specific partner organisations with a view to developing joint solutions to procurement related problems:

Dialogue partners	Issues to be addressed
Kenya National Audit Office	<ul style="list-style-type: none"> ▪ Development of a joint strategy to improve enforcement and follow-up under the control framework (e.g. through awareness raising activities targeting Public Accounts Committees, etc.)
Internal Auditor General	<ul style="list-style-type: none"> ▪ Development of joint strategy for how to improve compliance with written standards for reporting to management.
Kenya National Audit Office Internal Auditor General Relevant training institutions	<ul style="list-style-type: none"> ▪ Development of joint strategy for improvement of auditors' procurement proficiency.
Kenya Anti-Corruption Commission	<ul style="list-style-type: none"> ▪ Formalised dialogue with a view to identifying strategies that can improve enforcement levels supporting the legal anti-corruption framework.
Public Procurement Directorate	<ul style="list-style-type: none"> ▪ Formalised dialogue on further development and division of work with regards to the scheme of service for procurement officers.

5.6 Further studies

As mentioned earlier in this chapter, some of the procurement issues identified through this assessment can not readily be transformed into recommendations for capacity development, but require further studies to ensure that capacity needs are addressed in an adequate and sustainable manner.

Studies may be carried out as external reviews or by the PPOA as part of the organisation's monitoring activities, and will require active participation (through interviews, focus groups, workshops, surveys, etc.) of all stakeholders relevant to the issue in question, e.g. PEs, private sector representatives, training institutions or other stakeholders.

The assessment findings suggest that studies are carried out to address at least the following issues:

- **Use of competitive procurement as default method:** The study should identify barriers and incentives for using competitive procurement, focusing both at the level of the individual procurement officer, the procurement unit, the public entity and the political level. Based on the conclusions of the study, a set of recommendations should be developed and incorporated into the capacity development strategy with a view to increasing compliance levels in this field.
- **Systemic constraints to market access:** A study should be conducted to systematically examine the various systemic constraints (particularly collateral and registration rules) inhibiting the private sectors' access to the procurement market. The study should explore the magnitude of different constraints, the reasons behind them, and possible actions to be taken in order to restrict the constraint. The study should involve representatives from a broad range of SMEs in order to fully uncover the market conditions facing smaller businesses.
- **Contract administration practices:** An in-depth study should be carried out to further examine the level of legal compliance among PEs with established contract administration procedures. A particular emphasis should be on the issue of late payments, including the magnitude of late payments, the reasons behind, and the effects of the problem. The study should also investigate how payments and completion reports for budget execution can be better interlinked. A set of recommendations for how contract administration practices may be improved should be formulated based on the study. These may include capacity development and training initiatives, linking the area of contract administration to performance assessments, etc.
- **Capacity levels within PPOA:** While the capacities existing within PPOA are only touched upon cursorily in this assessment, this should not be mistaken as a sign that the organisation is of little importance to the state of public procurement in Kenya. Quite on the contrary, a well-functioning, efficient and transparent organisation staffed with qualified staff members is a key precondition for continued success in procurement reforms. It is thus recommended that a full-scale capacity assessment of the individual, organisational and enabling environment capacities of PPOA be conducted in the near future, with a view to establishing strategic capacity development areas for the organisation in the coming years.