

**DEVELOPMENT PARTNERS AND GOVERNANCE OF PUBLIC  
PROCUREMENT IN KENYA: ENHANCING DEMOCRACY IN THE  
ADMINISTRATION OF AID**

---

---

J. M. Migai Akech (JSD, NYU School of Law)  
Lecturer, Faculty of Law  
University of Nairobi  
P. O. Box 30197  
Nairobi 00100, Kenya  
Tel. 254-0721-456-791  
migai@yahoo.com

Paper Prepared for the “Global Administrative Law: National and International  
Accountability Mechanisms for Global Regulatory Governance” Conference, NYU  
School of Law, Institute for International Law and Justice, April 22-23, 2005.

**TABLE OF CONTENTS**

ABSTRACT.....	3
I. INTRODUCTION .....	4
II. DEMOCRACY AND THE ADMINISTRATION OF DEVELOPMENT ASSISTANCE .....	9
III. PUBLIC PROCUREMENT REFORMS IN KENYA .....	16
A. <i>The Political Economy of Public Procurement</i> .....	16
B. <i>Procurement Reforms: Gains, Promises and Impediments</i> .....	20
i. The Prerequisites of a Sound Public Procurement System .....	21
ii. The Gains of the Exchequer and Audit (Public Procurement) Regulations .....	23
iii. Administrative Review of Procurement Decisions .....	28
iv. Impediments to the Realization of a Sound Public Procurement System.....	33
IV. THE GJLOS REFORM PROGRAM AND ITS PROCUREMENT REGIME .....	36
A. <i>Efficiency, Democracy and the Institutional Structures of the GJLOS Reform Program</i> .....	36
i. The Nature of the GJLOS Reform Program .....	36
ii. Assessing the Effectiveness and Accountability of the GJLOS Program.....	40
B. <i>The Procurement Regime of the GJLOS Program</i> .....	43
V. CONCLUSION .....	46

## ABSTRACT

This paper reviews the procurement regime of Kenya's first Sector Wide Approach Aid Program, that is, the Ministry of Justice and Constitutional Affairs' Governance, Justice, Law and Order Sector (GJLOS) Reform Program in the context of on-going public procurement reform efforts. It advances two principal arguments. First, GJLOS's procurement regime is inefficient and unlikely to be effective since it creates administrative structures that are not only unwieldy but also run parallel to the national system. It should therefore be harmonized with the national system. Second, this procurement regime is not sufficiently democratic as it is not accountable to the Kenyan people and does not facilitate the meaningful participation of key stakeholders. In the interests of accountability, the private firm entrusted with the task of administering this procurement regime should in particular be subject to the jurisdiction of the national public procurement regulatory authority since it is exercising a public function.

The paper therefore takes a bottom-up approach to the development of institutional mechanisms for holding to account the domestic implementation of international regulatory decision-making. As a first step towards ensuring adequate responses to the need for global governance, developing countries in particular should enhance the effectiveness of their administrative law frameworks. The need for the harmonization of the procurement regime of the GJLOS Reform Program with the national system should be seen in this context.

Part II provides the paper's conceptual framework and looks at Sector Wide Approaches (SWAps) in the context of administrative law. It argues that SWAps constitute a form of trans-governmental regulation and should be subject to national administrative law frameworks since they are not sufficiently accountable to national constituencies. Part III examines the nature of Kenya's public procurement system and reviews the experience with the reforms undertaken thus far. Part IV examines the GJLOS Reform Program and its procurement regime and makes a case for its integration with the national system, which is now fairly democratic thanks to the reform efforts. This Part also argues for the establishment of a legal framework for the administration of aid. Part V concludes.

## I. INTRODUCTION

Public procurement often constitutes the largest domestic market in developing countries.<sup>1</sup> Depending on how it is managed, the public procurement system can thus contribute to the economic development of these countries.<sup>2</sup> Indeed, public procurement is the principal means through which governments meet developmental needs such as the provision of physical infrastructure and the supply of essential medicines.<sup>3</sup> Again, many governments use public procurement to support the development of domestic industries, overcome regional economic imbalances, and support minority or disadvantaged communities. Because the deployment of the public procurement system to pursue these developmental goals entails governmental exercise of enormous discretion, public procurement is often an extremely controversial subject matter. This is especially the case in developing countries where “the ability to exercise discretion in the award of government contracts has been a source of valued political patronage” and procurement has been “a means for the illicit transfer of funds from governmental to private hands.”<sup>4</sup>

Another important attribute of public procurement in developing countries is that a considerable part of it is financed by the so called development partners, as part of either bilateral or multilateral development assistance.<sup>5</sup> It is estimated that the global pool of development assistance now averages \$60 billion annually.<sup>6</sup> But a significant proportion

---

<sup>1</sup> Wayne A. Wittig, *Building Value through Public Procurement: A Focus on Africa* 3 (2002) (Available at [www...](#)); Bernard M. Hoekman, *Introduction and Overview*, in *LAW AND POLICY IN PUBLIC PURCHASING: THE WTO AGREEMENT ON GOVERNMENT PROCUREMENT* 1 (Bernard M. Hoekman & Ptros C. Mavroidis, eds., Ann Arbor: University of Michigan Press, 1997) [*Hereinafter* *LAW AND POLICY IN PUBLIC PURCHASING*] (Noting that “Depending on the economic system of a nation, central government purchases of goods and services typically account for some 10 per cent of gross domestic product (GDP).”)

<sup>2</sup> Sue Arrowsmith, *National and International Perspectives on the Regulation of Public Procurement: Harmony or Conflict?*, in *PUBLIC PROCUREMENT: GLOBAL REVOLUTION* 3 at 5 (Sue Arrowsmith & Arwel Davies, eds, London: Kluwer Law International, 1998).

<sup>3</sup> See, e.g., Vinod Rege, *Transparency in Government Procurement: Issues of Concern and Interest to Developing Countries*, 35 *J. WORLD TRADE* 489 at 496.

<sup>4</sup> Patrick A. Low et al, *Government Procurement in Services*, in *LAW AND POLICY IN PUBLIC PURCHASING*, supra note \_\_, 225-226.

<sup>5</sup> Thus, for instance, the World Bank estimates that 64% of public procurement in Mali is finance by foreign resources. See World Bank, *Analytical Report on Procurement Procedures in Mali* (1998).

<sup>6</sup> United Kingdom, *Eliminating World Poverty: Making Globalization Work for the Poor*, White Paper on International Development, Para. 283 (2000) [*Hereinafter* *UK White Paper*].

of it remains tied to the procurement of goods and services from the donor countries,<sup>7</sup> leading many commentators to question whether developing countries are the real beneficiaries of development assistance.

For a long time, there has been a concern that it is the donors who benefit from their aid at the expense of the intended beneficiaries in the developing world due to the common policy of tied-aid. Thus Graham Hancock noted in 1989 that in virtually every aid-giving country, a substantial proportion of development assistance funds is typically spent on the purchase of goods and services from that country.<sup>8</sup> Hancock also highlighted a practice among the donors of using funds allocated for development assistance to help their exporters to secure contracts in developing countries. At that time, for instance, the United Kingdom had an Aid-Trade Provision (ATP) Program, which was a joint creature of the then Overseas Development Administration (ODA) and the Department of Trade and Industry (DTI).<sup>9</sup> Under the ATP program, the amount of aid to be given to a developing country would be based “almost exclusively” on DTI’s estimate of the size of subsidy needed by a British firm to win a contract in the aid project in question. Thus development assistance also had as an objective the provision of subsidies, albeit hidden, to firms in donor countries.<sup>10</sup> [What does GPA say about this?]

In Hancock’s estimation, these practices were not confined to bilateral arrangements and were common among multilateral donors as well. In his view, the World Bank at the time spent \$7 out of every \$10 it received on goods and services from the industrialized countries.<sup>11</sup> Further, he thought that potential suppliers of goods and services from these countries had better access to procurement information than those from the developing countries.<sup>12</sup>

Some things have changed since Hancock wrote. First, donor countries have made significant efforts to improve the effectiveness of aid, mostly by abandoning stand-alone projects in favor of “Sector Wide Approaches” (SWAs) to development assistance. These efforts were informed by a number of experiences. Among other things, it was

---

<sup>7</sup> Id at Para. 284.

<sup>8</sup> GRAHAM HANCOCK, LORDS OF POVERTY 156 (London: Macmillan, 1989).

<sup>9</sup> Id at 157.

<sup>10</sup> Id at 161.

<sup>11</sup> Id at 159 (Observing further that “All in all, multilateral agencies provide huge volumes of lucrative work for contractors in the industrialised countries.”)

increasingly realized that aid conditionalities rarely persuaded developing country governments to reform their policies. Even more importantly, it was realized that these governments were often “overwhelmed by the sheer number of donors and donor projects, with the result that public expenditure [became] an unplanned aggregation of donor projects lacking a coherent framework of policies, priorities and service standards.”<sup>13</sup>

It was therefore thought that it would perhaps be better if development partners provided direct budgetary support to sector wide reform programs initiated by developing country governments. Since these governments would own such programs, it was thought that they would be more committed to their realization. Further, by harmonizing their procedures through the instrument of SWAps, the development partners would considerably ease the administrative burden imposed on developing countries by “appropriations in aid,” that is, financial support for stand-alone projects.

Second, a number of industrialized countries such as the United Kingdom and Sweden have since sought to untie their aid and promote local procurement.<sup>14</sup> The United Kingdom now argues that tying aid to the purchase of goods and services from the donor country reduces the value of that aid by around 25 per cent.<sup>15</sup> Further, it argues that tied aid is “grossly inefficient” since it leads to developing countries being supplied with incompatible pieces of equipment provided by different development agencies, each with separate requirements for spares and back-up.<sup>16</sup> Thirdly, it argues that tied aid encourages a donor driven approach to development and “signals that development agencies’ major concern is not development, but their national contracts.”<sup>17</sup>

---

<sup>12</sup> Id at 160.

<sup>13</sup> Mick Foster, *New Approaches to Development Co-operation: What Can We Learn From Experience With Implementing Sector Wide Approaches?*, Overseas Development Institute (ODI) Working Paper 140 17 (2000).

<sup>14</sup> The OECD has been spearheading these efforts to enhance the effectiveness of aid in general and the untying of aid in particular. The process has culminated in the adoption of the *Paris Declaration on Aid Effectiveness: Ownership, Harmonisation, Alignment, Results and Mutual Accountability* of March 2, 2005. [Hereinafter *Paris Declaration on Aid Effectiveness*].

<sup>15</sup> *UK White Paper*, supra note \_\_ at para 320.

<sup>16</sup> Id at para 321 (Giving the example that “a country committed to reform the effectiveness of its health sector is required to divide up procurement to fit the differing requirements of perhaps half a dozen development agencies rather than procure the most cost-effective supplies available.”)

<sup>17</sup> Id at para 322.

But countries such as the United States, Japan, Germany and Canada continue to tie their aid. In the case of the United States, for example, the Foreign Assistance Act<sup>18</sup> mandates a preference for American firms to carry out American foreign aid programs. As a general rule, the product must be purchased in the United States unless a source of origin waiver is approved by the United States Agency for International Development (USAID).

While SWAps promise to bring an end to the practice of tying aid, they invariably seek to bypass national public procurement systems on the ground that the latter are ineffective and corrupt. On the one hand, they are right to do so since these systems in many cases merely facilitate the use of public procurement as a resource for political patronage and for the unjust enrichment of corrupt public officials. But on the other hand, if the development of local public procurement capacity is instrumental for the effectiveness of aid, then the case for the maintenance of parallel procurement regimes ceases to be persuasive. This is especially the case where, as in Kenya, considerable efforts have been made to reform the national procurement system. The maintenance of parallel procurement systems is not only inefficient, but also provides avenues for corruption since the lines of accountability are attenuated. At the very least, there is therefore a case for the harmonization of these parallel systems.

An even greater concern is that SWAps are bypassing national frameworks for accountability. Development partners often argue that they are primarily accountable to their taxpayers and that it is up to the recipient governments to worry about accountability to the local electorate. Again, this argument is not entirely persuasive, given the weaknesses of the local accountability frameworks. Since the local electorate cannot directly demand accountability from the development partners, there is a strong case for reformed national frameworks to ensure the accountability of SWAps to the citizens of developing countries.

This paper reviews the procurement regime of Kenya's first SWAp, that is, the Ministry of Justice and Constitutional Affairs' Governance, Justice, Law and Order Sector (GJLOS) Reform Program in the context of on-going public procurement reform efforts. It advances two principal arguments. First, GJLOS's procurement regime is

---

<sup>18</sup> Citation for Foreign Assistance Act?

inefficient and unlikely to be effective since it creates administrative structures that are not only unwieldy but also run parallel to the national system. It should therefore be harmonized with the national system. Second, this procurement regime is not sufficiently democratic as it is not accountable to the Kenyan people and does not facilitate the meaningful participation of key stakeholders. In the interests of accountability, the private firm entrusted with the task of administering this procurement regime should in particular be subject to the jurisdiction of the national public procurement regulatory authority since it is exercising a public function.

The paper therefore takes a bottom-up approach to the development of institutional mechanisms for holding to account the domestic implementation of international regulatory decision-making.<sup>19</sup> As a first step towards ensuring adequate responses to the need for global governance, developing countries in particular should enhance the effectiveness of their administrative law frameworks. The need for the harmonization of the procurement regime of the GJLOS Reform Program with the national system should be seen in this context.

Part II provides the paper's conceptual framework and looks at SWAs in the context of administrative law. It argues that SWAs constitute a form of trans-governmental regulation and should be subject to national administrative law frameworks since they are not sufficiently accountable to national constituencies. Part III examines the nature of Kenya's public procurement system and reviews the experience with the reforms undertaken thus far. Part IV examines the GJLOS Reform Program and its procurement regime and makes a case for its integration with the national system, which is now fairly democratic thanks to the reform efforts. This Part also argues for the establishment of a legal framework for the administration of aid. Part V concludes.

---

<sup>19</sup> See Richard Stewart, *U.S. Administrative Law: A Resource for Global Administrative Law?*, NYU Institute for International Law and Justice (IILJ) Working Paper \_\_ 10 (2004) (Arguing that administrative law could respond to the need to discipline and hold to account international regulatory decision making and its domestic implementation in one of three ways. That is, “[w]e could either follow a bottom-up strategy, extending domestic administrative law to assert more effective control and review with respect to the supranational elements of domestic regulation, or a top-down strategy, developing a new international administrative law directly applicable to international regulatory regimes. Or, we might pursue both approaches at the same time, in the hope that they might support and reinforce the other.”)

## II. DEMOCRACY AND THE ADMINISTRATION OF DEVELOPMENT ASSISTANCE

There has been a proliferation of international regulatory mechanisms over the last decade or so, responding to the urgent need for global governance in an increasingly interdependent world.<sup>20</sup> Some of these global regulatory mechanisms, such as the World Trade Organization, are formally established by treaties; but others, such as the Basel Committee of national bank regulators, are largely informal intergovernmental networks of domestic regulatory officials and often incorporate private sector and civil society entities.<sup>21</sup> These regulatory mechanisms have developed out of the realization that the “consequences of globalized interdependency” in many areas of interaction such as trade and financial regulation “cannot be effectively addressed by separate national regulatory and administrative measures.”<sup>22</sup> This has resulted in a shift of many regulatory decisions from the national to the global level.<sup>23</sup>

Administrative law scholars are now concerned that this shift has created a democracy deficit, since the international regulatory mechanisms “are not directly subject to control by national governments or domestic legal systems or, in the case of treaty-based regimes, the states party to the treaty.”<sup>24</sup> Yet the international institutions and regimes that engage in global governance exercise immense powers and regulate vast sectors of economic and social life.<sup>25</sup> Thus their decisions increasingly and directly affect individuals and firms, in many cases without any intervening role for national government action.<sup>26</sup>

Alarmed that these global governance institutions and regimes enjoy too much de facto independence and discretion, administrative law scholars have called for the recognition of a “global administrative space” and the establishment of a “global

---

<sup>20</sup> Benedict Kingsbury, et al, *The Emergence of Global Administrative Law*, NYU Institute for International Law and Justice (IILJ) Working Paper \_\_ 1 (2004).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 4.

<sup>23</sup> *Id.* at 5.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 6.

<sup>26</sup> *Id.* at 11.

administrative law,” consisting of principles, procedures and review mechanisms to govern decision-making and regulatory rulemaking by these institutions and regimes.<sup>27</sup>

The emergence of the sector wide approach to the administration of development assistance should be examined against this background. A SWAp is a sector development program in which “all significant funding for the sector supports a single sector policy and expenditure programme, under government leadership, adopting common approaches across the sector, and progressing towards relying on Government procedures to disburse and account for all funds.”<sup>28</sup> Thus the central idea of SWAPs is that donor interventions should be consistent with the recipient government’s sectoral strategies and budgets that have been developed under the latter’s leadership.<sup>29</sup> At least in theory, emphasis is placed on shared accountability and multiple-partner collaboration under the umbrella of developing country leadership.<sup>30</sup> From a democracy viewpoint, SWAPs promise to shift the locus of accountability to the core institutions of developing countries.<sup>31</sup> The way SWAPs work is that a sector strategy is formulated and costed by various stakeholders, then matched to available finance through an iterative process and converted to a workplan, and finally formalized in agreements between the implementing agencies and the donors.<sup>32</sup>

SWAPs constitute an alternative to the traditional approach to the administration of development assistance, under which donors funded stand-alone projects. A widely shared concern was that the traditional approach was leading to fragmented accountability between donors and developing countries.<sup>33</sup> Because each donor-supported project had its own unique accountability regime, governments of heavily-aided developing countries quite literally faced hundreds of distinct accountability arrangements, and which were uncoordinated.<sup>34</sup> This fragmented, project-by-project

---

<sup>27</sup> Id at 13 (Noting that such a global administrative space is “distinct from the space of inter-state relations governed by international law and the domestic regulatory space governed by domestic administrative law, although encompassing elements of each.”)

<sup>28</sup> Foster, supra note \_\_ at 9.

<sup>29</sup> Schacter, supra note \_\_ at 2.

<sup>30</sup> Id at ii.

<sup>31</sup> Id at 4.

<sup>32</sup> Foster, supra note \_\_ at 19.

<sup>33</sup> Mark Schacter, *Sector Wide Approaches, Accountability and CIDA: Issues and Recommendations*, Paper prepared for the Policy Branch of the Canadian International Development Agency 14 (2001)(Available at [www.iog.ca](http://www.iog.ca)).

<sup>34</sup> Id.

approach to development assistance masked a vital accountability relationship, that is, the accountability of donors and recipient governments to the people of developing countries, who are the intended beneficiaries of aid.<sup>35</sup>

Under the traditional approach, the donors were mainly concerned with their own project management needs and reporting requirements.<sup>36</sup> All was well provided that each donor could account to its government about the performance of its portfolio of projects in developing countries and was able to point to particular achievements that had occurred in the developing countries as a direct result of its project support.<sup>37</sup> But since the main flow of accountability was outward – from the developing country to the donor – the citizens of developing countries were effectively excluded from the accountability framework.<sup>38</sup> This gave developing country governments a lot of lee way in the management of aid. Thus such governments had strong incentives to use development assistance funds in ways that favored “narrow elites and particular social, ethnic or economic classes.”<sup>39</sup> By shifting the locus of accountability from the donors to the recipient governments, the sector wide approach seeks to make it more difficult for aid administration to ignore the impact of governance in developing countries on development assistance.<sup>40</sup>

Nevertheless, the shift to SWAps has not been easy, given the strong incentives that donors have to stick to the traditional approach. First, donors want to attribute particular development results exclusively to their own inputs.<sup>41</sup> Indeed, their governments encourage them to do so as a way of extending their countries’ influence in the world. Second, because they control huge sums of money under the traditional approach, the principal agents of the donor agencies exercise immense power and influence in the developing countries.<sup>42</sup> It should be understandable if many of them are reluctant to cede such power and influence under the SWAp approach, which seeks to rely on the recipient governments’ procedures for the disbursement and accounting of aid monies.

---

<sup>35</sup> Id at i.

<sup>36</sup> Id at 4.

<sup>37</sup> Id.

<sup>38</sup> Id.

<sup>39</sup> Id at 20.

<sup>40</sup> Id at i.

<sup>41</sup> Id at ii.

Furthermore, the shift to SWAps signals an end to tied aid, meaning that donor countries will no longer be able to use development assistance funds to benefit their firms. But it will be difficult to bring tied aid to an end especially because in some cases, for instance the United States, it is mandated by domestic legislation. Again, some donor agencies are prohibited by domestic legislation from merging funds.<sup>43</sup> Thus the traditional approach will operate alongside SWAps for the foreseeable future. This makes for a fairly complicated accountability framework in the administration of development assistance. In many ways therefore, the process of democratizing aid administration, that is, making it accountable and participatory (especially from the perspective of the citizens of developing countries), has just begun.

Another key feature of the traditional approach was the attachment of conditionalities to the provision of budgetary support to developing countries, most notably under the Structural Adjustment Programs (SAPs). But this largely failed as an instrument for promoting sustainable policy reforms.<sup>44</sup> The policy of conditionality failed due to the lack of ownership of proposed policy reforms by developing countries and the inability of donors to enforce policy conditions. Thus many developing country governments made promises to institute policy reforms they had no intention of keeping, in the comfortable knowledge that donors had powerful incentives not to disrupt disbursement schedules.<sup>45</sup> Hence the hope that an approach that puts emphasis on local ownership of reform programs will yield better results.

Whether or not SWAps succeed in doing so depends a great deal on the extent to which they put emphasis on the accountability of donors and recipient governments to the people of developing countries, who are the intended beneficiaries of aid. Further, a great deal also depends on the extent to which the people of developing countries participate in the formulation and implementation of SWAps. From the viewpoint of global administrative law, SWAps constitute “regulatory networks” of governmental

---

<sup>42</sup> See, e.g., Foster, *supra* note \_\_ at 18 (Observing that “donors have involved themselves in everything from Governance to economic and social policy.”)

<sup>43</sup> Adrienne Brown, et al, *The Status of Sector Wide Approaches*, Overseas Development Institute (ODI) Working Paper 142 43 (2001).

<sup>44</sup> *Id* at 16.

<sup>45</sup> See, e.g., MERILEE S. GRINDLE, *CHALLENGING THE STATE: CRISIS AND INNOVATION IN LATIN AMERICA AND AFRICA* 102 (1996); Schacter, *supra* note \_\_ at 17 (Observing that “*No amount*

officials often incorporating some participation from the private sector and civil society groups, which determine how development assistance funds are utilized. And they make rules and decisions which affect individuals and firms. For instance, they determine who can participate in procurement involving the funds under their control. Because these funds constitute a core part of the development expenditures of developing countries where public procurement is the largest domestic market, SWAs effectively determine the fortunes of domestic firms. Hence the need to enhance their accountability, especially to local constituencies.

The need to enhance the accountability of SWAs also arises given the variations in their structures and administration. Indeed, SWAs have been appropriately described as a “process rather than a blueprint.”<sup>46</sup> In some cases developing country governments take leadership in setting out the vision and strategy for a sector and then seek donor support, while in other cases government agencies use their alliance with donors to drive through a sector policy and program, even where there is no strong public support. In yet other cases, donors simply develop their own strategies, which they then “sell” to the developing country governments.<sup>47</sup> In effect, SWAs have thus tended to be fairly informal networks of donors and influential developing country officials. Even more important, perhaps, is the fact that each of these models of reform strategy formulation has different implications for participation by local constituencies and the eventual success of the proposed reforms. Since success is best realized where reform strategies command the support of local constituencies, perhaps legislation could mandate the adoption of models that ensure effective participation from all stakeholders.

As far as their management structures are concerned, SWAs in Africa have taken one of two forms.<sup>48</sup> Under the first form, SWAs are built on existing government management structures and responsibilities, and they are thus coterminous with the work of the relevant government ministries. An overall steering committee chaired by the relevant government minister is usually established. Its other members are

---

*of detailed, up-front specification of sector policy reforms can compensate for the absence of firm and sincere government commitment to and ownership of reform.” (Emphasis in original).*

<sup>46</sup> Brown, et al, supra note \_\_ at 7.

<sup>47</sup> Foster, supra note \_\_ at 19.

<sup>48</sup> The following description of the structural forms of SWAs is taken from Brown et al, supra note \_\_ at 25 et seq.

representatives from other relevant government ministries, such as finance, and donor representatives. An implementation committee, which meets more frequently than the steering committee is also established. The implementation committee is also made up by the representatives of government ministries and donors. Its task is to monitor the sector program and report to the steering committee. In some cases, working groups whose task is to attend to specific issues are also established.

Under the second form, parallel structures – comprising recipient government and donor representatives – are set up to plan and manage SWAp activities and the administration of funds.

In both cases, questions of participation and accountability arise since decisions are made by the recipient governments, their agencies and donor representatives. The management structures do not effectively incorporate private sector and civil society representatives. This should be a cause for concern, given the deficiency of institutional frameworks of accountability in many developing countries. This is especially the case in countries with Westminster-derived governmental arrangements such as Kenya.<sup>49</sup> Here, there is a genuine concern that one of the main instruments of governmental accountability – namely, the responsibility of ministers of state to parliament – is no longer able “to ensure democratic control of a large, active and increasingly complex executive branch of government.”<sup>50</sup> In the traditional Westminster understanding, accountability basically refers to parliamentary control. The idea is that “administrators [through ministers of state] should be continuously responsive to the concerns of members of parliament.”<sup>51</sup>

The Westminster conception of accountability is thus incomplete, to the extent that it envisages accountability as merely constituting “responsibility [to parliament] for acts of others.”<sup>52</sup> In any case, the responsiveness expected from administrators does not require

---

<sup>49</sup> The following discussion of the deficiencies of Westminster-derived governmental arrangements is drawn from J. M. Migai Akech, *Public Law and the Neoliberal Experiment in Kenya: What Should the Public Interest Become?*, JSD Dissertation, NYU School of Law 48 et seq (2004) (Unpublished).

<sup>50</sup> Bruce Stone, *Administrative Accountability in the ‘Westminster’ Democracies: Towards a New Conceptual Framework*, 8 GOVERNANCE 505 (1995).

<sup>51</sup> *Id* at 511.

<sup>52</sup> A.C.L. DAVIES, *ACCOUNTABILITY: A PUBLIC LAW ANALYSIS OF GOVERNMENT BY CONTRACT* 75 (2001).

active parliamentary supervision.<sup>53</sup> It is assumed that there is a reasonable likelihood that instances of maladministration will come to the attention of members of parliament.<sup>54</sup> But in view of the complexity of modern government, and the fact that the great bulk of the activities of government are carried out by bureaucracies, the effectiveness of the Westminster conception of accountability is doubtful.<sup>55</sup>

A broader conception of accountability that looks beyond ministerial responsibility is thus required. This is especially the case in the administration of development assistance, which tends to be characterized by secrecy. Members of Parliament in developing countries invariably have no clue about the administration of development assistance. Strongly institutionalized – that is statute-backed – mechanisms that enable the participation of citizens in the formulation and implementation of development assistance are thus required.

Within SWAps, there is also worrisome donor ambivalence over the use of recipient government procedures and structures. While the donors are quick to acknowledge that there are significant efficiency savings to be gained by relying on local systems, they are exceedingly reluctant to do so due to low confidence in local capacities and integrity.<sup>56</sup> As a result the local systems continue to be bypassed and continue to remain undeveloped, thereby limiting the success of SWAps. The fact that local capacities are undeveloped and lack integrity also continues to be cited by some donors to retain control over the administration of development assistance. The donors claim that this is only an interim measure, but since it weakens government systems the transition periods tend to be rather protracted.

Indeed, the latest effort by donors to improve the effectiveness of development assistance merely states that donors will use developing countries' "own institutions and

---

<sup>53</sup> Stone, *supra* note \_\_ at 511.

<sup>54</sup> *Id.*

<sup>55</sup> See Edward L. Rubin, *Getting Past Democracy*, 14, University of Pennsylvania Law school, Public Law and Legal Theory Research Paper Series, No. 1-4 (2000) (Arguing that "[Parliamentary] control is only partial; administrators make the vast majority of government decisions, including many of the most important ones, on their own. In short, the representatives are only partially responsive to the voters, due to the inherent limitations of the representative process, and their control over the government is only partial, due to the inherent limitations of the administrative process. Any control that the people themselves exercise over governmental operations is thus doubly attenuated by the intervening representatives and administrators and far removed from anything that could plausibly be described as self-government.")

<sup>56</sup> Foster, *supra* note \_\_ at 31; Schacter, *supra* note \_\_ at 16.

systems, where these provide assurance that aid will be used for agreed purposes.”<sup>57</sup> There is no firm commitment to ensure that they do. As we shall see,<sup>58</sup> the procurement of goods and services under Kenya’s GJLOS program provides a useful illustration of this phenomenon. Whereas donors support the reform of the national public procurement system in principle, they continue to insist on the use of their own procurement regimes in cases involving the use of their money. In order to enhance the usefulness of SWAps, therefore, measures that mandate reliance on developing country government procedures to disburse and account for aid funds are required.

The following part reviews public procurement reforms in Kenya. As we shall see, the reform efforts have achieved quite a lot in a relatively short time, especially with respect to enhancing the regulation of public procurement and establishing a functioning bidder protest mechanism.

### III. PUBLIC PROCUREMENT REFORMS IN KENYA

#### A. *The Political Economy of Public Procurement*

The bulk of corrupt practices in Kenya have occurred in public procurement. The explanation for this state of affairs is to be found in the political dynamics of the state and its role in the economy.<sup>59</sup> Public procurement constitutes the principal instrument for exercising political patronage, a practice that is especially prevalent in Kenya and other African countries since “there are very few means of economic advancement outside of the state.”<sup>60</sup> The way political patronage works is that governments, which tend to be unpopular, ensure that only their narrowly-drawn and often ethnic constituencies have access to public resources, such as lucrative public procurement contracts. Public resources are therefore a means through which these governments can “purchase” legitimacy and remain in power. In Kenya, for instance, about *sixty per cent* of

---

<sup>57</sup> *Paris Declaration on Aid Effectiveness*, supra note \_\_ at para 17.

<sup>58</sup> See Part IV, infra.

<sup>59</sup> See J. M. Migai Akech, supra note \_\_ at 78-151.

<sup>60</sup> Jeffrey Herbst, *The Politics of Privatization in Africa*, in *THE POLITICAL ECONOMY OF PUBLIC SECTOR REFORM AND PRIVATIZATION* 234 at 240 (Ezra N. Suleman and John Waterbury, eds, Boulder: Westview Press, 1990)

government revenue is spent on procurement<sup>61</sup> and one can therefore understand why public procurement has been at the center of corruption.

Corruption in public procurement in Kenya has been facilitated by opaque and unaccountable regulations. Until the early 1970s, public procurement in Kenya was largely undertaken by the British firm Crown Agents, since local supplies were inadequate and most of the needs of the new government could only be met from external sources.<sup>62</sup> Thereafter, the government established supplies offices within its ministries and departments, and appointed supplies officers to take charge of procurement.<sup>63</sup> These supplies offices procured for their ministries and departments. At the same time, the government established a Central Tender Board, which was in charge of procurements beyond a certain amount. The Ministry of Finance was given overall responsibility for regulating public procurement. In exercising this responsibility, it issued regulations and guidelines in the form of circulars to the ministries and other public agencies from time to time. Thus far, there is no uniform law governing public procurement in Kenya.

The principal regulations in this regard are the Ministry of Finance's *Government Financial Regulations and Procedures* (hereinafter *Financial Regulations*), which deals with administration of government finances. Chapter 17 of these regulations dealt with procurement and tendering. It established the Central Tender Board (CTB) as an inter-ministerial body, comprising members appointed by the permanent secretaries of the ministries they represented.<sup>64</sup> The CTB was chaired by a person appointed by the permanent secretary to the Ministry of Finance. It was responsible for procurement of goods and services valued at Kshs. 2,000,000 and above. Under the regulations, the Ministerial Tender Boards (MTBs) were responsible for procurement of goods and services whose value was below Kshs. 2,000,000.

Some government departments, such as the Department of Defence, were also allowed to have their own tender boards, which operated on the ceilings and powers of

---

<sup>61</sup> Ministry of Finance, *Proceedings of the 1<sup>st</sup> National Public Procurement Consultative Meeting*, Safari Park Hotel, Nairobi, 13-15 May, 2004 at 10 [*Hereinafter Proceedings of Procurement Consultative Meeting*]. ). It is estimated that public procurement in Kenya amounts to about 10% of the country's Gross Domestic Product (GDP). See Walter Odhiambo and Paul Kamau, *Public Procurement: Lessons from Kenya, Tanzania and Uganda*, OECD Working Paper No.208 13 (2003).

<sup>62</sup> Odhiambo and Kamau, *supra* note \_\_ at 16.

<sup>63</sup> *Id.*

<sup>64</sup> Permanent secretaries are the principal executive and accounting officers in government ministries.

the MTBs. District Tender Boards (DTBs) were also established to cater for procurement at the lower levels of government administration. DTBs were also inter-ministerial and were made up by the representatives of government ministries in the districts. They had the same powers as MTBs. In addition, the *Financial Regulations* applied to the tender boards of local authorities, public enterprises, public universities and other institutions of learning and cooperative societies.

The *Financial Regulations* also provided for an appeals process. Appeals against the decisions of the DTBs lay to the CTB, those against the MTBs lay to the relevant permanent secretaries, while appeals against the CTB and Department of Defence tender board lay to the permanent secretary to the Ministry of Finance.

On the other hand, the Ministry of Finance (or Treasury) issued circulars from time to time setting out the details of public procurement procedures and policies. For example, these circulars raised the procurement thresholds and reviewed adjudication procedures. They also dealt with matters of policy. Thus Treasury Circular No. 1 of 1998 sought to give incentives to local firms to participate in government procurement by conferring a preferential bias of ten per cent where the tendering firms were controlled by indigenous Kenyans.<sup>65</sup>

The above procurement system had several deficiencies. First, there were no sanctions against government officers who breached them and the system was thus vulnerable to abuse.<sup>66</sup> Indeed, the Government Contracts Act provides that “public officers” cannot be sued personally upon any contracts which they make in that capacity.”<sup>67</sup> The incentive for public officers to engage in corrupt procurement deals is thus quite strong. Second, procurement policies and procedures were scattered in various government documents. Thus, for example, it was difficult to comprehend the Financial Regulations without the benefit of the Treasury circulars.<sup>68</sup> Again, vague procurement

---

<sup>65</sup> Ministry of Finance and Planning, *Report on the Diagnostic Survey, Findings and Recommendations on the Kenya Public Procurement Systems* 43 (1999)[*Hereinafter Report on Kenya Public Procurement Systems*]

<sup>66</sup> *Id* at 41.

<sup>67</sup> Government Contracts Act, Chapter 25, Laws of Kenya, §6(1). I am grateful to Otiende Amollo for pointing this anomaly.

<sup>68</sup> *Report on Kenya Public Procurement Systems*, *supra* note \_\_\_ at 41.

procedures and policies meant that the system could easily be abused or manipulated by unscrupulous public officers.<sup>69</sup>

Common corrupt practices in public procurement thus included public officers – often under the influence of powerful politicians and businessmen – only inviting preferred firms, favoring certain firms at the short-listing stage, designing tender documents to favor particular firms and releasing confidential information.<sup>70</sup> This state of affairs was exacerbated by the fact that the procurement system was manned by junior officers, who were therefore powerless to correct any anomalies and could easily be manipulated by their seniors and powerful politicians.<sup>71</sup> Corruption in public procurement was also facilitated by the lack of transparency in the system; the applicable procedures were invariably inaccessible to the public.

To make matters worse, Kenyan law does not prohibit public officials from participating in private enterprise.<sup>72</sup> Indeed, the civil service is by far the most important launching pad for businessmen in Kenya as it gives senior government officials and politicians access to public resources, such as lucrative public procurement contracts. The participation of public officials in private enterprise has thus been a key source of corruption in public procurement, since the rules established to guard against conflicts of interest have invariably been breached.<sup>73</sup>

Further, there was no provision for dissatisfied bidders or the general public to appeal against the procurement decisions of the various tender boards where, for instance, there were irregularities in the process. The system only allowed for appeals by accounting officers (usually permanent secretaries) in the relevant government ministries, departments and agencies.<sup>74</sup> And there was no role for the judicial system as the decisions of the administrative appeal bodies were deemed final.<sup>75</sup>

---

<sup>69</sup> Odhiambo and Kamau, *supra* note \_\_ at 16.

<sup>70</sup> Odhiambo and Kamau, *supra* note \_\_ at 36; *Report on Kenya Public Procurement Systems*, *supra* note \_\_ at 138 (Observing that “There is rampant lack of observance of procurement ethics by the procurement officials.”).

<sup>71</sup> See Murithi Mutiga, *Going Public*, SUNDAY STANDARD, April 3, 2005 at 17 (Kenya).

<sup>72</sup> A commission established by the Kenyatta government in the early 1970s endorsed public officials’ participation in private enterprise provided there was no conflict “between their duty to the state and their private interests.” See REPUBLIC OF KENYA, REPORT OF THE NDEGWA COMMISSION, 1971.

<sup>73</sup> **Ndwiga Case**

<sup>74</sup> *Report on Kenya Public Procurement Systems*, *supra* note \_\_ at 79-80.

<sup>75</sup> *Id* at 80.

Quite apart from deficiencies related to transparency and accountability, the system was also inefficient. It was characterized by overspending, which has been attributed to poor planning and packaging of procurement contracts by accounting officers and their failure to check on existing inventory and lack of supervision and monitoring of project implementation.<sup>76</sup> Cases where goods and works inferior to the specifications were accepted by the government were thus quite common. Indeed, in some cases no goods or works were delivered at all. And in yet other instances, contracts were varied upwards from the originally quoted price, often with the connivance of senior government officers. Thus a building constructed by the National Health Insurance Fund cost more than twice the originally quoted price.<sup>77</sup> Lead times were also exceedingly long. Thus the Minister for Trade has recently reported that it took his ministry nine months to buy a shredder.<sup>78</sup>

These deficiencies have contributed to huge losses in public procurement. Transparency International thus estimates that Kenya has lost some Kshs.475 billion to shady procurement deals in the last seven years.<sup>79</sup> The need for reform thus became urgent, as the local business community complained that inefficiencies in public procurement were contributing to an unsuitable business environment.<sup>80</sup> For instance, these inefficiencies led to poor physical infrastructure and inefficient services. At the same time, the donor community also began to make the reform of the public procurement system a condition for lending as part of the structural adjustment process. Led by the World Bank, these donors in particular sought to “harmonise the national procurement system with international procurement guidelines, in order to make the processes more transparent and *to devolve procurement to local entities*.”<sup>81</sup>

The following section reviews the record of the reform process. It urges that sufficient progress towards the attainment of a sound public procurement system has been made for SWAPs to accelerate the devolution of procurement to national entities.

### *B. Procurement Reforms: Gains, Promises and Impediments*

---

<sup>76</sup> *Report on Kenya Public Procurement Systems*, supra note \_\_ at 140-143.

<sup>77</sup> Mutiga, supra note \_\_.

<sup>78</sup> *Kituyi Seeks Review of Procurement Law*, EAST AFRICAN STANDARD, October 28, 2004 (Kenya).

<sup>79</sup> *Transparency International Report February 2005*

<sup>80</sup> Odhiambo and Kamau, supra note \_\_ at 17.

i. The Prerequisites of a Sound Public Procurement System

A sound public procurement system should emphasize four principles, namely competition, publicity, use of commercial criteria and transparency.<sup>82</sup> The principle of competition means that contracts should be awarded by holding a competition between a number of contractors to establish which can offer the most favorable terms for delivering government's requirements.<sup>83</sup> Competition not only ensures that government obtains value for money but is also important in maintaining the integrity of public procurement, "since [it] is an effective means of achieving the transparency which prevents abuse of discretion."<sup>84</sup> From an economy perspective, competition ensures that government obtains goods and services that are appropriate to its requirements from contractors with the requisite financial and technical capability on the best possible terms.<sup>85</sup>

There is a danger, however, that rules established to promote competition in public procurement may be counterproductive. Thus government agencies that purchase complex equipment do not often get what they need.<sup>86</sup> Because of open competition rules, governments are for example forbidden from consulting potential suppliers informally before contracting in order to tell them what they really need. Were governments allowed to do so, it would be easier for the potential suppliers to work with corrupt government officials to rig specifications to produce a contract for a particular supplier.<sup>87</sup> Thus public law values that emphasize transparency and accountability may result in governments not obtaining value for money. By contrast, the normal practice in private industry, which is not constrained by considerations of transparency, is "to have

---

<sup>81</sup> Id (Emphasis supplied).

<sup>82</sup> Sue Arrowsmith, *National and International Perspectives on the Regulation of Public Procurement: Harmony or Conflict?*, in PUBLIC PROCUREMENT: GLOBAL REVOLUTION 3 at 15 (Sue Arrowsmith and Arwel Davies, eds, London: Kluwer Law International, 1998).

<sup>83</sup> Id.

<sup>84</sup> Id.

<sup>85</sup> Id at 7.

<sup>86</sup> Jerry Marshaw, *The Fear of Discretion in Government Procurement*, 8 YALE J. on REG. 511 (1991) (book review).

<sup>87</sup> Id at 513.

continuous liaison between buyers and sellers.”<sup>88</sup> Proposals that have been offered to limit the counterproductive effects of open competition in public procurement include a requirement of written decisions justifying procurement decisions, making of procurement decisions through multiple-member evaluation panels, peer control in the decision making process and subsequent oversight of decision rationales, and recording or ex parte or informal contacts.<sup>89</sup>

The principle of publicity complements that of competition by ensuring that suppliers who might be able to win contracts are able to find out about those contracts and put themselves forward.<sup>90</sup> In an ideal setting, public procurement systems should therefore “include obligations for specifications to be drawn up so as not to artificially exclude certain products; rules requiring authorities to reject non-responsive bids (those which do not conform with the specifications or fail to meet other fundamental requirements); and minimum time limits for potential bidders to respond to contracting opportunities.”<sup>91</sup>

The requirement to use commercial criteria in making procurement decisions involves basing decisions on the ability of firms to undertake the contract and consideration of bids on commercial criteria such as price, product and quality.<sup>92</sup> Thus it is often the case that the lowest bidder does not win the contract. Indeed, non-commercial criteria – such as industrial and social policies – are often controlling. Thus governments may limit contract awards to disadvantaged ethnic groups.

Because commercial criteria are not always controlling, the principle of transparency is crucial. Transparency here means that procurement procedures should consist of clear rules and mechanisms for verifying that those rules are followed.<sup>93</sup> An ideal public procurement system should therefore have sufficiently publicized rules of procedure which structure and circumscribe the discretion of procurement entities.<sup>94</sup> Further, it should ensure that the procurement entities’ compliance with the applicable rules can be verified by providing for the publication of the results of contract awards, the keeping of

---

<sup>88</sup> Id (Observing that “When purchasing computer equipment in particular, private firms [in the United States] view the vendor’s advice as crucial to the development of sensible specifications of their own requirements.”)

<sup>89</sup> Id at 515.

<sup>90</sup> Arrowsmith, *supra* note \_\_ at 16.

<sup>91</sup> Id.

<sup>92</sup> Id at 17.

<sup>93</sup> Id at 18.

detailed records of decisions and the furnishing of reasons to participating firms.<sup>95</sup> It should also have mechanisms for scrutinizing the decisions of procurement entities to ensure that they comply with legal norms.<sup>96</sup> Such mechanisms include subjecting procurement decisions to oversight by a regulatory body and providing a quasi-judicial forum to which unsuccessful bidders can obtain the review of procurement decisions.

From the foregoing account of the characteristics of a sound public procurement system, a question arises as to whether and the extent to which the reforms in Kenya have embraced the four principles.

ii. The Gains of the Exchequer and Audit (Public Procurement) Regulations

Following the recommendations of a team of consultants,<sup>97</sup> the KANU government enacted the Exchequer and Audit (Public Procurement) Regulations (hereinafter Procurement Regulations) in 2001. The team of consultants recommended the establishment of legal framework for public procurements. Because the team realized that it would take a long time for such a law to be enacted due to lack of support in government circles for a stringent procurement system,<sup>98</sup> it recommended the promulgation of procurement regulations under the Exchequer and Audit Act, which empowers the Minister for Finance to manage the Consolidated Fund and regulate all matters relating to the government's financial affairs.<sup>99</sup> In particular, the Exchequer and Audit Act empowers the minister to make regulations governing public procurement.<sup>100</sup>

---

<sup>94</sup> Id at 19.

<sup>95</sup> Id.

<sup>96</sup> Id.

<sup>97</sup> *Report on Kenya Public Procurement Systems*, supra note \_\_\_ at 150-163.

<sup>98</sup> Interview with Akich Okola (who was a member of the team of consultants), January 24, 2005.

<sup>99</sup> The Exchequer and Audit Act, Chapter 412, Laws of Kenya.

<sup>100</sup> Exchequer and Audit Act, §5A.

The Procurement Regulations,<sup>101</sup> which are based on the UNCITRAL Model law,<sup>102</sup> embrace the principles of sound public procurement in significant respects. Their declared purpose is “to promote economy and efficiency in public procurements and to ensure that public procurement procedures are conducted in a fair, transparent and non-discriminatory manner thereby contributing towards the creation of a sound business climate in Kenya.”<sup>103</sup> The Regulations apply to all “public entities,” which include government ministries, government departments such as the Central Bank of Kenya, administrative districts, state corporations, public universities and other public institutions of learning, local authorities and cooperative societies. An attempt has therefore been made to apply uniform procedures and regulations to all public entities. The Regulations thus supersede all previous government circulars and other instruments dealing with public procurement.<sup>104</sup> As an exception to this general rule, however, the Regulations do not apply where the Minister for Finance decides, in consultation with the head of the procuring entity, that “it is in the interest of national security or national defence to use a different procedure.”<sup>105</sup>

The Regulations seek to streamline the procurement process by establishing the Public Procurement Directorate (PPD) as “the central organ for policy formulation, implementation, human resource development and oversight of the public procurement process.”<sup>106</sup> The PPD thus takes over general responsibility for public procurement from the Minister for Finance. But the PPD is established as a department of the Ministry of Finance, and is therefore answerable to the Minister for Finance. It should also be noted that the Director of the PPD is appointed by the Minister for Finance. The PPD’s functions include monitoring the overall functioning of the public procurement process and advising the minister, preparing procurement manuals, advising and assisting

---

<sup>101</sup> The Exchequer and Audit (Public Procurement) Regulations, 2001, Legal Notice No. 51 of 2001 [*Hereinafter* Procurement Regulations]. These regulations were amended by Legal Notice No. 161 of 2002, which reviews the times allowed for the submission of tenders, the compositions of tender committees and procurement thresholds.

<sup>102</sup> The United Nations Commission on International Trade Law (UNCITRAL) Model Law on Procurement of Goods, Construction and Services, Official Records of the United Nations General Assembly, Forty-Ninth Session, Supplement No. 17 (A/49/17).

<sup>103</sup> Procurement Regulations, §4.

<sup>104</sup> Procurement Regulations, §47.

<sup>105</sup> Procurement Regulations, §3(2).

<sup>106</sup> Procurement Regulations, §7.

procurement entities in undertaking procurement, inspecting the records of procurement entities and training procurement officers.<sup>107</sup>

The Regulations abolish the Central Tender Board and the resulting procurement system is thus decentralized, although there is now an authority (the PPD) which is supposed to regulate its operations. Basically, each public entity constitutes a procurement entity, and is required to establish a tender committee.<sup>108</sup> The Regulations also seek to promote collective decision-making by requiring procurement entities to take decisions “in a corporate manner, so that internal units concerned shall have a say in the decision making process, and any decision by the accounting officer... shall be taken in a structured manner.”<sup>109</sup> Provided that the PPD is given sufficient autonomy and enforcement powers, the decentralized system should ensure the establishment of an efficient and accountable public procurement system.

In order to facilitate the realization of the goal of promoting economy and efficiency in public procurement, the Regulations establish “open tendering” as the preferred procurement procedure.<sup>110</sup> Different rules apply, depending on whether the tender in question is national or international. In the case of national tendering, the time allowed for the submission of tenders is at least twenty eight days.<sup>111</sup> Open international tendering is to be used “whenever in open national tendering an effective competition cannot be obtained unless foreign firms are invited to tender.”<sup>112</sup> Here, the time allowed for the submission of tenders shall be at least forty two days.<sup>113</sup> In either case, the Regulations require the procurement entities to use standard documents, which “shall contain sufficient information to enable competition among the tenderers to take place on the basis of complete, neutral and objective terms.”<sup>114</sup> This information must include the criteria for the evaluation of tenders and award of contracts. Further, whereas

---

<sup>107</sup> Procurement Regulations, §6(4).

<sup>108</sup> The First Schedule of the Procurement Regulations (as amended) set out guidelines for the establishment of tender committees. *See* Legal Notice No. 161 of 2002.

<sup>109</sup> Procurement Regulations, §6(2).

<sup>110</sup> Procurement Regulations, §17.

<sup>111</sup> Legal Notice No. 161 of 2002.

<sup>112</sup> Procurement Regulations, §38(1).

<sup>113</sup> Legal Notice No. 161 of 2002.

<sup>114</sup> Procurement Regulations, §24(2). *See also* §14(1), which requires specifications to give correct and complete descriptions of the objects of procurement for the “purpose of creating conditions of fair and open competition between all candidates.”

procurement entities are allowed to modify tender documents, they must promptly communicate any modifications to all candidates who have purchased tender documents.<sup>115</sup>

The Regulations provide for other procurement methods, namely restricted tendering, direct procurement, request for proposals, and request for quotations.<sup>116</sup> The Regulations establish thresholds for each of the procurement methods and require that where methods other than open tendering are used, “the procuring entity shall give and record its reasons for the choice of that other procedure, and shall prior to the choice of that other procurement method, obtain the approval in writing of the respective tender committee.”<sup>117</sup> The Regulations also prohibit the splitting up of procurement requirements so as to avoid any particular procurement procedure.<sup>118</sup>

Apart from establishing minimum time limits for potential bidders to respond to contracting opportunities, the Regulations have other provisions that also promote the principle of publicity. First, the Regulations provide that specifications should be designed “in terms of performance rather than design or descriptive characteristics” and be based on international standards or recognized national standards.<sup>119</sup> The objective is to ensure that some products are not artificially excluded. Secondly, the Regulations require that candidates should not be excluded from participating in public procurement “on the basis of nationality, race or any other criterion not having to do with their qualifications.”<sup>120</sup> The Regulations also mandate the advertisement of tenders in newspapers of national circulation in the case of open national tendering, and in newspapers of “sufficient circulation to attract foreign competition” in the case of open international tendering. Where other procurement methods are used, the Regulations require that selection shall be made in a non-discriminatory manner.

As far as the use of commercial criteria in the evaluation of tenders is concerned, the Regulations provide that the successful tender shall be “the tender with the lowest evaluated tender price” or “the lowest evaluated tender ascertained on the basis of factors

---

<sup>115</sup> Procurement Regulations, §26.

<sup>116</sup> See Part VI, Procurement Regulations.

<sup>117</sup> Procurement Regulations, §17(2).

<sup>118</sup> Procurement Regulations, §17(5).

<sup>119</sup> Procurement Regulations, §14(3).

<sup>120</sup> Procurement Regulations, §11.

affecting the economic value of the tender which have been specified in the tender documents.”<sup>121</sup> In the latter case, the factors affecting the economic value of the tender must be objective and quantifiable. Thus while the Regulations accommodate the use of non-commercial criteria, it seeks to ensure that this is done in an objective and not arbitrary manner. The Regulations also require that candidates possess “the necessary professional and technical qualifications and competence and financial resources to perform the contract.”<sup>122</sup>

Perhaps the most important achievement of the Regulations is their rules on transparency. The fundamental problem with the previous public procurement system was the fact that it was not open to public scrutiny. The Regulations now require that all procurement regulations and instructions of the Minister of Finance must be “promptly made accessible to the public.”<sup>123</sup> Further, procurement entities are now required to maintain records of their proceedings, which records they must upon request avail to candidates who participated in those proceedings.<sup>124</sup> Tenders are now to be opened in a transparent manner. The Regulations require that tenders should be opened by a committee of at least three officers of the procuring entity in the presence of the bidders.<sup>125</sup> Further, the procuring entity is required to prepare an evaluation report, containing a summary of the examination and evaluation of tenders. It also provides that the tender evaluation process shall be confidential. In this regard, it prohibits bidders from making unsolicited communication or giving or promising inducements to the procuring entity.<sup>126</sup> Finally, at the same time that it is notifying the successful bidder, the Regulations require the procuring entity to notify the unsuccessful bidders.<sup>127</sup> The notification of award to the successful bidder constitutes the formation of a contract.

---

<sup>121</sup> Procurement Regulations, §30(8).

<sup>122</sup> Procurement Regulations, §13.

<sup>123</sup> Procurement Regulations, §9.

<sup>124</sup> Procurement Regulations, §10(2). It should be noted, however, that the procurement entities prohibited from disclosing information if doing so “would be contrary to law, would impede law enforcement... would prejudice legitimate commercial interests of the parties, would inhibit fair competition, or would not be in the public interest.” Procurement Regulations, §10(2)(a).

<sup>125</sup> Procurement Regulations, §30.

<sup>126</sup> Procurement Regulations, §§16, 31.

<sup>127</sup> Procurement Regulations, §33.

### iii. Administrative Review of Procurement Decisions

The Regulations also provide for the administrative review of procurement decisions, which forms a critical part of the efforts to ensure transparency in the procurement process. Pursuant to the Regulations, the Minister has established a “Public Procurement Complaints, Review and Appeals Board” (PPCRAB) to adjudicate complaints submitted by “any candidate who claims to have suffered, or to risk suffering, loss or damage due to a breach of a duty imposed on the procuring entity” by the Regulations.<sup>128</sup> The members of PPCRAB are appointed by the Minister, and include a chairperson from the private sector, permanent secretaries in the ministries of Finance and the Office of the President, the Solicitor General representing the Attorney-General’s office, and members nominated by particular private sector organizations. In addition, PPCRAB is allowed to co-opt two members, one of whom must be an expert in procurement. The Director of PPD serves as the Board’s secretary.

The Board’s rules of procedure require aggrieved bidders to submit requests for administrative review to the PPD, stating the reasons for the complaint. The PPD has power to dismiss complaints. But where it does not do so, it is required to promptly give notice of the complaint to the procuring entity and interested candidates, and call a meeting of the Board within twenty-one days.<sup>129</sup> The Board is then required to give a decision within thirty days from the date of the said notice and must state the reasons for its decision.<sup>130</sup> The remedies that the Board may grant include declaring the legal rules or principles governing the subject-matter of the complaint, prohibit a procuring entity from acting unlawfully, require a procuring entity to act lawfully, annul an unlawful act or decision of a procuring entity, revise such decisions or substitute its own decisions for such decisions, or terminate the procurement proceedings.<sup>131</sup> Nevertheless, the Board is precluded from entertaining any complaints once a procuring entity has concluded and

---

<sup>128</sup> Procurement Regulations, §§40(1), 41(1).

<sup>129</sup> Procurement Regulations, §42(3).

<sup>130</sup> Procurement Regulations, §42(6).

<sup>131</sup> Procurement Regulations, §42(5).

signed a contract with the successful bidder.<sup>132</sup> Parties dissatisfied with the Board's decision may seek judicial review in the High Court.<sup>133</sup>

Whereas the above bidder protest mechanism established by the Regulations has a number of shortcomings, it has contributed immensely to the restoration of credibility to the public procurement system. The Board has handled well over one hundred cases since its inception.<sup>134</sup> Both local and foreign firms actively participate in its proceedings, and have given it good reviews.<sup>135</sup> Indeed, the Board is unique in many respects, compared to Kenya's other regulatory and administrative bodies. Above all, the Board has stopped a considerable number of corrupt and irregular procurements, as the following cases demonstrate.<sup>136</sup>

A perennial problem that has bedeviled the procurement system is ministerial interference with the tender process. While the Regulations do not give government ministers, other than the Minister for Finance, any role in the procurement process, they have nevertheless intervened and influenced the award of tenders. Many government ministers simply have no regard for stipulated laws and regulations and often use their residual powers to pursue their own interests. Indeed, where ministers want to manipulate the procurement process, they use their powers to demand for information from the procuring entity, which they then publish and use to cancel tenders, and then turn around to claim that the process has been compromised and needs to be restarted.<sup>137</sup>

In one such instance, the Minister for Communications sought to interfere with the Communications Commission of Kenya's tender for a licence to install and operate the country's second fixed telecommunications service.<sup>138</sup> The Minister used his powers to obtain confidential information on the tender and purported to terminate it. The Board determined that the Minister had breached the confidentiality of the procurement process

---

<sup>132</sup> Procurement Regulations, §40(3), 42(5)(e).

<sup>133</sup> Procurement Regulations, §42(7).

<sup>134</sup> *Proceedings of Procurement Consultative Meeting*, supra note \_\_ at 9.

<sup>135</sup> Interview with Akich Okola, supra note \_\_.

<sup>136</sup> *See Millions Saved in Bid to Curb Corrupt Tender Deals*, The East African Standard, July 11, 2004 (Observing that "Tenders worth a staggering Sh800 have been halted by [the PPCRAB] in the past eight months alone. The tenders... were dismissed for various reasons ranging from canvassing by bidders, leakage of technical information to favored competitors and procedural blunders by bidders.")

<sup>137</sup> Interview with Otiende Amollo, February 16, 2005.

<sup>138</sup> *CNC/ZTC/Kensim (Taifacom Limited) v. Communications Commission of Kenya, PPCRAB* Application No. 30/2004.

and interfered with the independence of the procuring entity. It held that the Minister had breached the principle of non-interference in the tender process by requesting and receiving confidential documents and making pronouncements thereon.<sup>139</sup>

Another interesting case is *Getrio Insurance Brokers Limited v. City Council of Nairobi*,<sup>140</sup> where the Board set aside the Minister for Local Government's decision granting a tender for insurance services contrary to the Regulations. Here, an evaluation committee recommended that the tender should be awarded to Consolidated Insurance Brokers Limited. But its recommendations were ignored by the procuring entity, which instead consulted the Minister for Local Government, who decided to grant the tender to another firm, Invesco Assurance Company Limited. The Board ruled that tender awards can only be made by duly constituted tender committees and ordered that the insurance services be re-tendered under the direction and supervision of the PPD.

These decisions of the Board may not bring to an end the problem of ministerial interference with the procurement process. Nevertheless they serve to expose instances where ministers exceed their powers and expose their misdeeds to public scrutiny.

Apart from exposing corrupt practices in the procurement process, the Board has also done a good job of ensuring that procuring entities adhere to the Regulations. Where a procurement entity has not followed the Regulations, the Board typically requires it to re-tender under the supervision of the PPD. In addition, the Board is developing very good case law on the Regulations.

In *Siemens Limited v. Kenya Power & Lighting Company Limited*,<sup>141</sup> for instance, the Board was called upon to determine whether Regulation 30(1) of the Procurement Regulations mandate procuring entities to seek clarifications to assist them in the examination and evaluation of tenders. The Kenya Power & Lighting Company Limited (KPLC) had advertised a tender for the construction of overhead power lines and substations. Siemens Limited complained that KPLC did not seek a clarification of its

---

<sup>139</sup> Id at 26 (Observing that “In our view, for transparency or justice to be done, it must also be seen to be done. We have had occasion to look at the Kenya Communications Act, and do not find in it that the Minister has power to interfere in the tender process. His power is granted under the Act for purposes of safeguarding public policy and the core business of the procuring entity. It is not to be used to interfere with tenders of independent committees of the Procuring Entity which are protected by law from such interference.”)

<sup>140</sup> *Getrio Insurance Brokers Limited v. City Council of Nairobi*, PPCRAB Application No. 23/2003.

<sup>141</sup> *Siemens Limited v. Kenya Power & Lighting Company Limited*, PPCRAB Application No. 19/2004.

bid. The Board held that the procurement entity's right to seek clarification of bids under Regulation 30 is discretionary, and so KPLC was under no obligation to seek a clarification of Siemen's bid. But because KPLC only sought a clarification from the winning bidder after it had examined and evaluated the bids, the Board went on to hold that this was unfair and prejudicial to other bidders. It emphasized that Regulation 30 requires clarification to be made during the evaluation process for the purpose of assisting the procuring entity in examining and evaluating bids.

The Board also observed that KPLC's tender requirements had been unclear since many bids, including the successful one, were non-responsive with respect to many items. Accordingly, it determined that the entire tender evaluation process lacked objectivity, transparency and fairness and ordered KPLC to re-advertise the tender and "to ensure that the tender document contains clear and unambiguous specifications, specific score for responsiveness and clear evaluation criteria."<sup>142</sup> And in other cases, the Board has annulled tender awards where the procuring entity has not applied critical parameters in the evaluation of bids,<sup>143</sup> and also where the procuring entity has used evaluation criteria which are not contained in the tender documents.<sup>144</sup>

There are also cases where the Board has substituted its own decision for that of a procuring entity. Thus in *Wanjohi Consulting Engineers and Others v. Ministry of Roads, Public Works and Housing*,<sup>145</sup> the Board found that the procuring entity had erred in assuming that the winning bid was inclusive of local taxes. The Board compared the winning bid and that of the applicant while taking local taxes into account and concluded that the applicant's bid was the most advantageous. It annulled the procuring entity's decision and ordered it to award the contract to the applicant.

The provision that precludes the Board from entertaining complaints once a procurement entity has concluded a contract with the successful bidder may be encouraging corruption and should be rethought.<sup>146</sup> Presumably, the idea behind this

---

<sup>142</sup> The Board reached a similar conclusion in *Damen Shipyards Gorinchem v. Kenya Ferry Services*, PPCRAB Application No. 24/2004.

<sup>143</sup> See, e.g., *Kenya Railways v. Thermis Investments*, PPCRAB Application No.16/2004.

<sup>144</sup> See, e.g., *SGS Societe Generale de Surveillance v. Ministry of Finance*, PPCRAB Application No. 17/2003.

<sup>145</sup> *Wanjohi Consulting Engineers and Others V. Ministry of Roads, Public Works and Housing*, PPCRAB Application No. 18/2004.

<sup>146</sup> See Procurement Regulations, §40(3).

particular regulation was to prevent endless litigation and facilitate speedy conclusions of tender processes. But in practice, it is making it virtually impossible for the Board to stop irregular and corrupt tenders. The case of *Kabage & Mwirigi Insurance Brokers v. The National Social Security Fund* provides a good example.<sup>147</sup> The National Social Security Fund (NSSF) sought to tender for the provision of various insurance services. At some point during the tendering process, the Minister for Finance wrote to the NSSF proposing that the tenders be awarded to certain firms. Indeed, one of the parties awarded a tender had not even submitted a bid. The NSSF made its awards on June 30, 2003 and immediately thereafter notified the “successful” bidders, on the ground that its insurance covers were expiring that very day. But the unsuccessful bidders were not notified until seven days later, by which time the NSSF had signed contracts with the successful bidders.

The Board found that the tender process was fatally flawed and annulled the tender awards. The NSSF appealed to the Board on the ground that the applicant’s complaint should not have been entertained in the first place since contracts had come into force by the time the application was lodged. The Board noted that it is established as “an administrative review board” specifically mandated to deal with complaints submitted by bidders, not procuring entities. In its view, the review contemplated in the Regulations is a review of a procuring entity’s decision. Accordingly, the Board determined that it did not have the jurisdiction to entertain the NSSF’s application, reasoning that “upon the issuance of its decision in respect of an appeal or complaint, the Board becomes *functus officio*.”

Again in *Flambert Holdings Limited v. Ministry of Health*,<sup>148</sup> by the time the applicant lodged its complaint, the procuring entity had signed a contract with the successful bidder, who had substantially performed the contract. The procurement process in this case was irregular in several respects. There was no effective competition since one bidder was an agent of one of the other two, the tender specifications were ambiguous, the applicant was not given sufficient time to prepare its bid, and the bidders were not simultaneously notified of the award contrary to the Regulations. Despite these

---

<sup>147</sup> *Kabage & Mwirigi Insurance Brokers v. National Social Security Fund*, PPCRAB Application No. 21/2003.

<sup>148</sup> *Flambert Holdings Limited v. Ministry of Health*, PPCRAB Application No.25/2003.

irregularities, the Board dismissed the application on the ground that it is precluded from entertaining complaints where the procuring entity has concluded and signed a contract with the successful bidder.

iv. Impediments to the Realization of a Sound Public Procurement System

An obvious flaw of the new public procurement regime is that it does not have a firm legal basis. The Minister for Finance could simply bring the regime to an end by repealing the Regulations. At present, the Minister for Finance retains a lot of power that can be used to frustrate the reform efforts. In 2003, for instance, the Minister suspended all procurement officers and public tenders to allegedly purge the procurement system of corruption.<sup>149</sup> The Minister cited a report of the Controller and Auditor General that had found serious and widespread abuse by procurement officers resulting in a huge waste of public funds. Suspended officers included those of the PPD, so in effect the Minister brought the operations of the procurement system to a halt. According to procurement experts, the real reason behind these suspensions was to enable the Minister to assume control of public procurements.<sup>150</sup> The procurement system virtually broke down following this move by the Minister. For example, procurement decisions were now being made by permanent secretaries in total disregard of the Regulations. Fortunately, the Minister had not suspended the operations of the PPCRAB and it was able to stop many of the ensuing corrupt and irregular procurements.<sup>151</sup>

There is therefore an urgent need to enact a law on public procurement if the gains of the emerging regime are not to be lost. Several attempts have been made to enact such a law, but these have not succeeded largely because the Ministry of Finance is opposed to the creation of an independent authority as it wants to retain control of public procurement.<sup>152</sup>

---

<sup>149</sup> *State Suspends All Tenders*, DAILY NATION, May 29, 2003 (Kenya).

<sup>150</sup> Interview with Akich Okola, January 24, 2005.

<sup>151</sup> *Id.*

<sup>152</sup> *See, e.g.*, Geoffrey Irungu, *Treasury Not Happy with Procurement Bill*, DAILY NATION, November 11, 2003, at 7 (Kenya).

The latest such attempt is the Public Procurement and Disposal Bill of 2005, which is currently being debated in Parliament. The Bill seeks to create a Public Procurement Oversight Authority to replace the PPD.<sup>153</sup> The Authority is to be headed by a Director appointed by the President on approval by the President. The Bill prohibits the Director from seeking employment in any other work or business or holding any other public office during his tenure. The Bill also establishes an Advisory Body to advise the Authority and whose members are to be appointed by the Minister.<sup>154</sup> Further, the Bill establishes a Public Procurement Administrative Review Board to continue the work of the PPCRAB.<sup>155</sup>

The Bill is similar to the Regulations in many significant respects, although it seeks to make a number of useful changes. First, it provides that a procuring entity may engage the services of other persons to assist it in its work.<sup>156</sup> The government lacks capacity to design appropriate specifications and evaluate bids,<sup>157</sup> and should thus be able to take advantage of expertise available in the private sector. Secondly, the Bill gives the Director some much-needed powers. The Director will have power to inspect the records and accounts of procuring entities and contractors, order investigations of procurement proceedings and cancel contracts or terminate procurement proceedings pursuant to such investigations except where a matter is before the Review Board, and debar firms from participating in procurement proceedings.<sup>158</sup> The Bill also introduces stringent penalties for persons who inappropriately influence the evaluation of tenders, induce the employees or agents of procuring entities, misrepresent material facts, collude to inappropriately influence the tender process, or fail to disclose conflicts of interest.<sup>159</sup>

Another avenue for corruption is the exemption of national security and defense procurements from the Regulations.<sup>160</sup> Typically, the Minister for Finance resorts to this exemption even where the procurements strictly speaking have little or nothing to do with

---

<sup>153</sup> The Public Procurement and Disposal Bill, §8.

<sup>154</sup> The Public Procurement and Disposal Bill, §21.

<sup>155</sup> The Public Procurement and Disposal Bill, §25.

<sup>156</sup> The Public Procurement and Disposal Bill, §28. Such persons are to be deemed employees of the procuring entity.

<sup>157</sup> Interview with Caroli Omondi (former State Counsel, Attorney-General's Chambers), February 15, 2005.

<sup>158</sup> The Public Procurement and Disposal Bill, Parts VIII and IX.

<sup>159</sup> The Public Procurement and Disposal Bill, §§38-43.

<sup>160</sup> Procurement Regulations, §3(2).

national security or defense. The result is that the tendering process is then shielded from public scrutiny. Nevertheless, a number of corrupt security procurements have been exposed by the media.<sup>161</sup> By far the most controversial of these procurements is the Anglo Leasing Scandal, which involved the acquisition of tamper-proof passports by the Ministry of Home Affairs and the construction of forensic laboratories for the police force.<sup>162</sup> Again, the Bill seeks to seal this loophole by embracing security procurements. In the meantime, the government has established an inter-ministerial committee to oversee security procurements.<sup>163</sup>

The composition of the PPCRAB and its relationship with the PPD also needs review. Three permanent secretaries – namely, the Permanent Secretaries in the Ministry of Finance, Office of the President and the Solicitor-General – are members of the PPCRAB. Because these senior government officers sit on the boards of a number of government agencies and corporations, there is a potential for conflicts of interest.<sup>164</sup> In *Kabage & Mwirigi Insurance Brokers v. The National Social Security Fund*, for example, it is the Permanent Secretary in the Ministry of Finance who was being accused of influencing the procurement process to favor certain bidders yet he was sitting in

---

<sup>161</sup>The Ministry of Home Affairs had initially sought to acquire tamper-proof passports, and invited five firms to tender for their production. A technical committee of the Ministry of Finance, Immigrations Department and the Government Technology Services then disqualified all the bids, and recommended that the project be expanded to include other security facets in the issuance of new visas, passports and computerization of the immigration records, thereby blowing up the cost of the project beyond Treasury's means and necessitating external financing. At this point Anglo Leasing & Finance Limited, a firm purportedly with registered offices in the United Kingdom, enters into the picture and submits an unsolicited technical proposal for the supply and installation of an Immigration Security and Document Control System (ISDCS). Under the proposal, Anglo Leasing was to finance the project and supply the ISDCS through its subcontractor, Francois-Charles Obethur Fiduciare based in Paris. The Permanent Secretary in the Ministry of Home Affairs then wrote to the Ministry of Finance, informing it of the proposal and seeking to proceed with the procurement under security classification. A contract worth Kshs.2.7 Billion was subsequently signed between Anglo Leasing and the government, although no due diligence test was conducted on the firm. The Ministry of Finance then paid the firm a commitment fee of Kshs.95 million. The government then cancelled the contract once the scandal was exposed. The Government later sacked the permanent secretaries in the Ministries of Finance and Home Affairs. But the Ministers, who gave final approval for the projects, declined to resign. And the same firm was also awarded a contract worth Kshs. 4 billion for constructing forensic laboratories for the police force, without competitive tendering. *See, e.g., A Harvest of Corruption Scandals, THE EAST AFRICAN STANDARD, February 5, 2005*

<sup>162</sup> *How Tender Turned Into a Sh7b Embarrassment, THE EAST AFRICAN STANDARD, July 11, 2004.*

<sup>163</sup> *Kenyan President Orders Probe into Security Projects, BBC MONITORING INTERNATIONAL REPORTS, February 10, 2005 (Nexis file).*

<sup>164</sup> *Jaindi Kiseru, Curb Ministers' Appetite for Mischief, The DAILY NATION, November 12, 2003.*

judgment of his own decision.<sup>165</sup> Again, there is need for the PPCRAB to be granted autonomy from the PPD to facilitate a clear separation of regulatory and adjudicatory roles. Once that is done, the PPCRAB should also be granted jurisdiction to review the decisions of the PPD/Authority, in light of the immense powers that the later will have once the proposed bill is enacted.

A further source of inefficiency and corruption lies in the development agreements' exception since it leads to the maintenance of parallel procurement regimes and attenuates the lines of accountability. The Procurement Regulations provide that "To the extent that these Regulations conflict with an obligation of the Government under or arising out of an agreement with one or more other States or with an International organization, the provisions of that agreement shall prevail."<sup>166</sup> The result is that in sector wide development assistance programs such as GJLOS in which procurement is undertaken by a private entity answerable only to donors, there is no accountability to local constituencies.

The following Part reviews the institutional structures of the GJLOS Reform Program and its procurement regime. As we shall see, this program raises serious concerns about efficiency and democracy in the administration of aid. In particular, there is a need to harmonize the procurement regime of the program with the public procurement system established by the Procurement Regulations.

#### IV. THE GJLOS REFORM PROGRAM AND ITS PROCUREMENT REGIME

##### *A. Efficiency, Democracy and the Institutional Structures of the GJLOS Reform Program*

###### i. The Nature of the JGLOS Reform Program

The principal objective of the Governance, Justice, Law and Order Sector (GJLOS) Reform Program is to strengthen the capacities of the institutions in the governance and

---

<sup>165</sup> Kabage & Mwirigi Insurance Brokers v. The National Social Security Fund, supra note \_\_.

<sup>166</sup> Procurement Regulations, §3(5). The Procurement Bill is even more explicit and provides at §6 that "If there is a conflict between this Act, the regulations or any directions of the authority and an agreement between the Government and one or more states or multilateral or bilateral intergovernmental organizations, the agreement shall prevail."

legal sector for “efficient, accountable and transparent administration of justice.”<sup>167</sup> The Program is quite broad, and brings together some *thirty* departments of the government drawn from the Ministry of Justice and Constitutional Affairs (MoJCA), Office of the President (Provincial Administration and National Security), the Ministry of Home Affairs, the Attorney General, and the Judiciary.<sup>168</sup> These departments of government work with an array of donor organizations and non-state actors drawn from the private sector and civil society.

The Program emerged in the environment of optimism that followed the inauguration of the NARC administration. The new government developed a comprehensive policy framework, *the Economic Recovery Strategy for Wealth and Employment Creation* (ERS),<sup>169</sup> in which it identified governance as one of the foundations for economic growth. Through the ERS, the NARC government sought to institute reforms in public administration, national security, and law and order. Among the new institutions it created to foster the required governance reforms were the MoJCA and the Department of Governance and Ethics in the Office of the President.<sup>170</sup> The enthusiasm of the Kenyan people was shared by the development partners, who quickly moved in to support the reform agenda of the new government. It is in this environment that the MoJCA and development partners conceived the GJLOS Program in November 2003. At inception, the participation of non-state actors in the Program was quite limited and unstructured.<sup>171</sup>

The Program was developed out of a realization that the institutions in the governance and legal sector need to address their inadequacies on a sector-wide basis if they are to be effective. In the administration of criminal justice, for instance, it was noted that the judiciary cannot function efficiently and effectively without the cooperation of the prosecution service, the police and the prisons department.<sup>172</sup> The development partners

---

<sup>167</sup> Republic of Kenya, Governance, Justice, Law and Order Sector Reform Programme, *Short Term Priorities Programme (STTP) Fiscal Year 2003/04* 11 (2003) [Hereinafter *STTP*].

<sup>168</sup> David Evaratt, et al, *Kenya: Governance, Justice, Law and Order Sector (GJLOS) Programme Review 6* (2004)[Hereinafter *Report of Advisory Team*].

<sup>169</sup> REPUBLIC OF KENYA, *ECONOMIC RECOVERY STRATEGY FOR WEALTH AND EMPLOYMENT CREATION 2003-2004* (2003).

<sup>170</sup> *Report of Advisory Team*, supra note \_\_ at 5.

<sup>171</sup> *Id* at 13-14.

<sup>172</sup> *STTP*, supra note \_\_ at 11.

introduced the idea of sector wide funding in order to support the government's integrated approach to reforms in the sector.<sup>173</sup>

The principal document governing the Program is a Memorandum of Understanding (MoU) between the Government of Kenya and the development partners. The MoU sets out the funding arrangements for the Program. It provides that most of the development partners will provide funding through a basket fund, the GJLOS Basket Fund, while others will do so on a bilateral basis.<sup>174</sup> While bilateral funding agreements take precedence over the MoU, the development partners undertake to “strive to establish funding agreements that are compatible with the provisions of [the] MoU” for the sake of harmonization.<sup>175</sup> Further, the MoU sets out the terms and procedures for the joint management, funding, monitoring and evaluation of the Program. Thus it provides for the appointment of a Financial Management Agent (FMA) to manage both the basket and non-basket funds, through a holding account in a commercial bank.<sup>176</sup> It also gives the Government overall responsibility and accountability for the implementation of the Program.<sup>177</sup>

A number of institutions have been established to assist the MoJCA to run the Program, namely the Inter-Agency Steering Committee (IASC), the Technical Coordination Committee (TCC) and its Management Committee, the Donors' Coordination Forum, the Thematic Groups and the Program Coordination Office (PCO). These institutions work together with the thirty or so government departments charged with the task of implementing the Program.

The IASC provides policy oversight and strategic leadership to the program, and is made up by senior government officers, namely the Vice President, Ministers in the MoJCA and Office of the President, the Attorney-General, the Chief Justice and the Permanent Secretary Governance and Ethics. The IASC was created to ensure that there

---

<sup>173</sup> *Report of Advisory Team*, supra note \_\_ at 17.

<sup>174</sup> GJLOS Memorandum of Understanding, §5. Eight development partners provide their funding through the Basket Fund. These are the governments and/or development agencies of Canada, Denmark, Finland, Germany, the Netherlands, Norway, the United Kingdom and Sweden. They have appointed the Swedish International Development Agency (SIDA) as the lead donor.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at §§D3, K1.

<sup>177</sup> *Id.* at §E1.

is sufficient political goodwill behind the program.<sup>178</sup> During the first year of the Program's existence, the IASC met only once.<sup>179</sup>

The task of the TCC is to provide guidance on Program implementation, coordinate implementation and ensure that implementation is in line with government policies. Its members are a Justice of the Court of Appeal as chair, permanent secretaries, heads of departments participating in the Program, and representatives of donors, private sector and civil society organizations. Because of its large size, it has a Management Committee to provide coordination and decision-making oversight. The Management Committee comprises Permanent Secretaries and heads of institutions given the task of leading the thematic groups. As of December 2004, the TCC had met twice while the Management Committee had met thrice.<sup>180</sup>

Given the deficiencies of the IASC, the TCC and the Management Committee, a Program Coordination Office (PCO) was created in the MoJCA to assume responsibility for the day-to-day management of the Program.<sup>181</sup> Further, the PCO implements the strategic decisions of the TCC.

There are also Thematic Groups (TGs) created around seven "Key Result Areas" to address "output-specific issues."<sup>182</sup> The TGs are convened by members of the TCC and are required to provide a forum for the discussion of issues and assist implementing government departments in developing work plans and implementation of activities. Members of the TGs are drawn from the implementing institutions, the PCO, the FMA, donors, the private sector and civil society.

In addition, the donors have established a Donors' Coordination Committee to provide opportunities for feedback on the implementation of the Program and consultations with the Government. This Committee meets every month. Tensions have been observed within the Donors' Committee, with non-basket fund donors being

---

<sup>178</sup> *Report of Advisory Team*, supra note \_\_ at 57.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 58.

<sup>181</sup> In some respects, the PCO was established as a response to complaints about the FMA. But while the PCO now performs some of the functions previously performed by the FMA, there is no clear demarcation of their roles.

<sup>182</sup> These Key Result Areas are: Ethics, integrity and anti-corruption; Democracy, human rights and rule of law; Justice Law and Order; Public Safety and Security; Constitutional Development; Legal Services; and Leadership and Management Development.

accused of cherry picking, that is, selecting high-profile program areas they regard as their own turf while leaving the basket fund to pay for the low-profile work.<sup>183</sup>

Quite clearly, the Program's institutional framework is rather unwieldy. A group of consultants hired to review the Program (Review Team) thus unsurprisingly found that "The absence of a clear programme management structure detailing linkages between organizations and their functions is causing confusion."<sup>184</sup>

ii. Assessing the Effectiveness and Accountability of the GJLOS Program

The trouble is that corruption tends to thrive rather well in environments characterized by institutional confusion. Further, institutional confusion facilitates neither program effectiveness nor accountability. There is therefore every reason for Kenyans to be concerned about the democratic character of the GJLOS Program. First, vast financial resources have been allocated to the Program. The Program is expected to last some five years and will cost about \$15 million, seventy five percent of which will be sourced from the development partners.<sup>185</sup>

Secondly, GJLOS constitutes Kenya's first SWAp and is considered by many in government and donor circles as a test case. The expectation is that it should be replicated in other sectoral reform programs.<sup>186</sup> Given that the development partners fund virtually the Government's entire development expenditure budget, the governance of the GJLOS Program considerably implicates the future administration of development assistance in Kenya, especially if donors achieve consensus on basket funding.<sup>187</sup> The experiences of the GJLOS Program illustrate the need for a national law on the administration of aid, establishing clear institutional and accountability frameworks, and also structuring the participation of all stakeholders. Such a law should also mandate the

---

<sup>183</sup> *Report of Advisory Team*, supra note \_\_ at 25

<sup>184</sup> *Id* at 59.

<sup>185</sup> STTP, supra note \_\_ at 36; Republic of Kenya, Ministry of Justice and Constitutional Affairs, Governance, Justice, Law and Order Sector (GJOS) Sector Reform Programme, *First Progress Report 6* (2004).

<sup>186</sup> *Report of Advisory Team*, supra note \_\_ at 12.

<sup>187</sup> *See* Government of Kenya, *Budget 2004/2005*. Development expenditures account for about 30% of the Government's annual budget.

government to keep an inventory of all development assistance agreements and facilitate public access thereto.

Thus far, a number of concerns have been raised about the effectiveness and democratic character of the GJLOS Program. As a SWAp, the effectiveness of the Program should be assessed by the extent to which it ensures government ownership and leadership, and strengthens the Government's capacities and efficiency. The Program is not doing well on both accounts. While the MoJCA has "increasingly exerted its authority," there are concerns that "donors have too much influence and only pay lip-service to the notion of government leadership" and are "too involved in the detail of GJLOS."<sup>188</sup> The evidence for such influence includes the frequent meetings between donors, the PCO and the FMA.<sup>189</sup> Thus donors, and not domestic constituencies, remain the main point of accountability.<sup>190</sup> Concerns have also been expressed that the development partners have undue influence over the PCO, which is arguably the Program's executive organ.<sup>191</sup>

Further, the Program has not been sufficiently mainstreamed into the government financial management processes. In particular, budgetary management and control problems have been noted because of the poor linkage between the Program and the Ministry of Finance, where GJLOS is "not well known or understood."<sup>192</sup> Indeed, officers of the Ministry of Finance acknowledge that they are yet to develop financial management approaches appropriate for SWAs.<sup>193</sup>

Perhaps the most important unfulfilled expectation relates to the Program's efforts to strengthen the Government's financial management and procurement capacities.<sup>194</sup> Because the Development Partners were convinced that the Government's financial management and procurement systems are cumbersome and corrupt, they insisted on the appointment of the FMA.<sup>195</sup> In effect, therefore, they created financial management and procurement structures that by-passed the national systems. With respect to financial

---

<sup>188</sup> *Report of Advisory Team*, supra note \_\_ at 17.

<sup>189</sup> *Id* at 26.

<sup>190</sup> *Id* at 28.

<sup>191</sup> *Id* at 18.

<sup>192</sup> *Id* at 20-21.

<sup>193</sup> *Id* at 21.

<sup>194</sup> The procurement activities of the FMA are discussed in Part IV(B) *infra*.

<sup>195</sup> *Report of Advisory Team*, supra note \_\_ at 28. **KPMG, an accounting firm, was appointed as the FMA.**

management, whilst the FMA is contracted to improve the government's capacities, it appears that neither indicators nor a timetable for doing so were provided.<sup>196</sup> The Review Team thus "found no evidence of the FMA proactively identifying financial management capacity gaps and filling them."<sup>197</sup>

Furthermore, bypassing the government's financial management system is likely to weaken the Government's financial management capacity since disbursements take place outside of the governmental financial system.<sup>198</sup> A vicious cycle – in which the government's financial management system is by-passed and weakened thereby justifying the continued demand for an FMA – is thus formed.<sup>199</sup> It is, however, encouraging that a consensus seems to be emerging among the development partners towards moving to an arrangement under which the Program's finances are managed by the Ministry of Finance through a special account.<sup>200</sup>

The participation of non-state actors, namely private sector and civil society organizations (CSOs), has also been problematic. Their participation is not only unstructured, but there are also concerns that the Program may be crowding out CSOs.

At the time of conceptualizing the Program, the Government invited a select group of non-state actors to participate.<sup>201</sup> While the participation of private sector organizations has not been controversial, the absence of effective representation from small and medium term enterprises (SMEs) is notable. Thus the focal point for private sector organizations is the Kenya Private Sector Alliance (KEPSA), whose members are drawn from the high-end of the sector.

Conversely, the Government only invited participation from a number of CSOs it thought were implementing projects similar to those proposed under GJLOS and others who "had shown an interest in working with Government."<sup>202</sup> Because this select group of CSOs was thereby guaranteed access to the Program's resources, the Government was

---

<sup>196</sup> Id at 29.

<sup>197</sup> Id at 50.

<sup>198</sup> Id.

<sup>199</sup> Id.

<sup>200</sup> Id at 29. The Review Team also recommended that "the FMA in consultation with MoJCA and the Ministry of Finance develop a detailed and focused capacity building strategy, with timeframes, targets and measurable indicators." Id at 50.

<sup>201</sup> Id at 30.

<sup>202</sup> Id.

perceived by many as using the Program to dispense political patronage.<sup>203</sup> This was especially because many of these CSOs “had personal relationships with the new leadership in MoJCA and sector departments, many of whom came from civil society.”<sup>204</sup> In some cases also, CSO actors have been hired as consultants for the Program, but were apparently not sourced transparently.<sup>205</sup> Further, a number of CSO actors felt that only the select group of CSOs had access to information on the Program.<sup>206</sup>

This problem largely stems from the fact that the role that CSOs are supposed to play in the Program is not clear: are they partners, service providers or program monitors? The CSOs participating in the Program span this participation spectrum. Especially for the CSOs that seek to provide services, the modalities for accessing GJLOS funds need clarification. Indeed, a scenario in which the GJLOS funds CSOs directly is undesirable since it gives the MoJCA the resources with which to compromise the independence of CSOs and effectively crowd them out of the governance and legal sector.<sup>207</sup>

### *B. The Procurement Regime of the GJLOS Program*

The procurement regime of the GJLOS Program also raises serious questions of accountability and participation. According to the MoU, procurement arrangements under the Program are supposed to comply with the Government’s Procurement Regulations, but prior to the enactment of procurement legislation, the Program “will adopt procurement procedures of the FMA.”<sup>208</sup> Further, the MoU authorizes the FMA to appoint a Procurement Agent to help it with this work. Thus despite the elaborate and fairly democratic procurement system established by the Procurement Regulations, it was

---

<sup>203</sup> Id at 31 (Observing that “some CSOs are rumoured to have received substantial funds to participate in GJLOS... while others have been told by the FMA that no funds are available for civil society participation.”)

<sup>204</sup> Id.

<sup>205</sup> Conversation with Harun Ndubi, Executive Director, Kituo Cha Sheria, February 28, 2005.

<sup>206</sup> Interview with Millie Odhiambo, Executive Director, The Children Rights and Advisory Center (CRADLE), February 28, 2005.

<sup>207</sup> Conversation with Harun Ndubi, supra note \_\_.

<sup>208</sup> GJLOS Memorandum of Understanding, §G.

thought best to create a parallel procurement regime. Unfortunately, however, the parallel regime only seems to have served to lengthen the procurement process.<sup>209</sup>

In order to enable it carry out the task of procurement, the FMA (KPMG) developed a set of guidelines (hereinafter FMA Procurement Guidelines) in consultation with the donors and the Government. Although these Guidelines seek to embrace the principles of sound public procurement, they raise several issues.

In the first place, the Guidelines for all intents and purposes establish KPMG, a private firm, as a procuring entity. Thus it is the responsibility of KPMG to develop procurement plans after it has been furnished with approved work plans and to tender for goods and services.<sup>210</sup> According to the Guidelines, KPMG prepares and compiles the tender documents, although the implementing agencies are responsible for providing technical specifications.<sup>211</sup> Further, the FMA determines whether bids are responsive and coordinates the evaluation of responsive bids by establishing an evaluation panel.<sup>212</sup>

Quite apart from the fact that this arrangement concentrates responsibility for the procurement needs of some thirty government departments in one institution, it is also quite a troublesome from a public law viewpoint. Since it is managing public resources, the FMA is for all intents and purposes exercising a “public function.” Thus far, however, the FMA is only accountable to the Basket Fund Donors through their leader (SIDA), with which it has entered into a contract. In addition, since it has not been constituted as a “Procuring Entity” under the Procurement Regulations, the exercise of its procurement powers under the Program are removed from the purview of national accountability mechanisms. But since the exercise of these powers affect “vital interests” of the citizenry, it should accord with principles of good administration, such as participation, accountability and fairness.<sup>213</sup>

---

<sup>209</sup> *Report of Advisory Team*, supra note \_\_ at 49 (Reporting respondents as stating that 86% of the procurements by the FMA were not done on time). However, the FMA argues that it has improved the lead times and that its absorption rates of donor funds of about 50% are much better than the government’s 20-25%. Interview with Chris Ngovi, Fund Manager, KPMG, February 21, 2005.

<sup>210</sup> The GJLOS Procurement Guidelines 2004, §2.1 [*Hereinafter* FMA Procurement Guidelines].

<sup>211</sup> *Id.*, §4.5.1.

<sup>212</sup> *Id.*, §4.7.2. The members of the evaluation panel are the FMA Project Director, 2 FMA Procurement Advisors, FMA Fund Manager, FMA Capacity Building Advisor, FMA Financial Accountant, 3 government representatives, and a donor representative.

<sup>213</sup> See Alfred C. Aman, Jr., *The Limits of Globalization and the Future of Administrative Law: From Government to Governance*, 8 IND. J. GLOBAL LEG. STUD. 379 (2001).

In particular, the need for KPMG to do so arises because a number of concerns have been raised that it is exercising its powers arbitrarily. Thus there are allegations that being a predominantly accounting firm, KPMG does not have the requisite public procurement management capacity.<sup>214</sup> Further, concerns have been expressed that in some instances it has acted beyond its mandate by interfering with activities in work plans and suggesting ways of implementing them.<sup>215</sup> Thus where a child rights' CSO selected a venue for a workshop, KPMG insisted that it should be held at a different venue.<sup>216</sup>

Secondly, the Guidelines do not provide for a bidder protest mechanism. The Guidelines merely provide that "Applicants who feel they have been evaluated unfavourably, or were disadvantaged in evaluation either by error or due to an irregularity, may register a written complaint with the FMA within five working days from the date of notification of award."<sup>217</sup> The FMA is required to immediately inform SIDA of the complaint and respond to the complainant "within a reasonable time."

Further, the Guidelines provide for the automatic disqualification of bidders where they attempt to influence the outcome of the selection process. There are no provisions for bidders to contest such disqualification. In addition, the Guidelines provide for the suspension of "suppliers" from the FMA's supplier lists.<sup>218</sup> In this case, however, the FMA is required to give suppliers a hearing. Those aggrieved with the FMA's decision may appeal to SIDA.

In either case, there is no convincing reason why the decisions of the FMA should not be subjected to scrutiny by the PPCRAB, which has developed good jurisprudence on public procurements. Indeed, the procurement guidelines of development agencies such as SIDA typically provide that dissatisfied bidders "may have recourse to procedures established under the cooperation partner's national legislation."<sup>219</sup> In the case of GJLOS, however, it is not clear whether the envisaged procedures are those established by the Procurement Regulations or the GJLOS Procurement Guidelines.

---

<sup>214</sup> See, e.g. *Report of Advisory Team*, supra note \_\_ at 50 (Observing that "Respondents also noted that the FMA had not 'hit the ground running,' but had built their capacity as GJLOS unfolded.")

<sup>215</sup> Id.

<sup>216</sup> Interview with Millie Odhiambo, supra note.

<sup>217</sup> FMA Procurement Guidelines, §4.12.

<sup>218</sup> Id, Annex C.

From the foregoing account of the GJLOS Program, it is quite evident that it raises serious issues of democratic accountability. Given that the Program is considered a test case, there is need for a national legislative framework for the administration of development assistance that not only streamlines the institutional framework but also establishes clear mechanisms for participation by, and accountability to, local constituencies.

## V. CONCLUSION

The sector wide approach to development assistance should be encouraged and developed further, especially since it promises to enhance the accountability of aid administration to the citizens of developing countries. Nevertheless, the experience with SWAps thus far raises a number of concerns that should be addressed if the case of the GJLOS Program is anything to go by. There is a concern that donors continue to exert too much influence as they are too involved in the detail of the programs, which can only work to the detriment of the SWAp objective of ensuring governmental leadership and ownership of development assistance programs. Further, such donor influence means that the main flow of accountability will continue to be outward, that is from the developing countries and SWAP institutions to the development partners. In addition, development partners have not achieved sufficient consensus on the need to harmonize their accounting procedures and policies on whether or not to untie their aid. As we have seen, the policy of tied aid is not only inefficient but also works against the efforts of developing countries to gain a foothold in international trade.

By far the most significant concern is the ambivalence of the development partners over the use of recipient government administrative procedures and systems.<sup>220</sup> While they acknowledge the need to rely on national procedures and systems, they are

---

<sup>219</sup> SIDA Procurement Guidelines 2004, §3.19.

<sup>220</sup> This concern is not unique to Kenya. See, e.g., Jean Ruche and Eric Garandeau, *The Mali Donors' Public Procurement Procedures: Towards Harmonisation With the National Law*, Study Report for the OECD Development Assistance Committee, 6 (2000) (Observing that "some donors are apprehensive about the capacity of the developing countries to take on the full responsibility of managing public procurement. They believe that effectiveness and transparency concerns justify adopting specific procedures and management structures that can easily be controlled by the donors, at least during the transitional period.")

exceedingly reluctant to do so arguing that these procedures and systems are inefficient and corrupt. As a result, they create parallel structures which only end up undermining national systems. Even more worrisome, these parallel structures bypass national accountability mechanisms. In the case of the GJLOS Program, for instance, the body responsible for procuring goods and services is entirely unaccountable to national constituencies. There is thus a need for development partners to demonstrate some faith in national reform efforts, especially where, as in the case of Kenya's public procurement reforms, tremendous gains have made in efforts to ensure efficiency and accountability and only need to be consolidated. Last but not least, developing countries must establish clear and democratic legislative frameworks for the administration of aid, as these will not only ensure better and participatory engagement with the development partners, but also enhance accountability to their citizens.