

PROCUREMENT STUDY 2024



**PUBLIC PROCUREMENT STUDY TO PROMOTE MARKET
ACCESS FOR LOCALLY PRODUCED GOODS IN KENYA**

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ABBREVIATIONS

AfCFTA	African Continental Free Trade Area
AGPO	Access to Government Procurement Opportunities
CEC	County Executive Committee
COMESA	Common Market for Eastern and Southern Africa
EAC	East African Community
EXW	Ex Works
FY	Financial Year
GDP	Gross Domestic Product
GOK	Government of Kenya
ITT	Instructions to Tenderers
KAM	Kenya Association of Manufacturers
LOE	Level of Effort
MDA	Ministries, Departments and Agencies
MITI	Ministry of Investments, Trade and Industry
MSE	Medium and Small Enterprise
MSME	Micro, Small and Medium Enterprises
PPADA	Public Procurement and Asset Disposal Act
PPADR	Public Procurement and Asset Disposal Regulations
PPD	Public Procurement Department
PIIP	Public Procurement Information Portal
PPRA	Public Procurement Regulatory Authority
PS	Principal Secretary
PWD	Persons with Disabilities
RFQ	Request for Quotation
SCM	Supply Chain Management
SME	Small and Medium Enterprise
WTO	World Trade Organization

FOREWORD



Kenya has an ambitious plan to transform the manufacturing sector. This is through the Manufacturing 20BY30 Strategy that seeks to increase manufacturing sector contribution to GDP from 7.8% in 2022 to 20% by 2023.

For the manufacturing sector to grow, access to local, regional and international markets is crucial. The over-dependency of the Kenyan economy on imported goods has over the years exacerbated the country's trade deficit. It has also slowed down employment growth and the pace of industrialization and denied the country an opportunity to enhance its competitiveness.

As one of the critical markets for local industries, the domestic market plays a crucial role in socio-economic development as it provides the primary arena where economic activities take place. A robust domestic market is critical in driving economic growth as it signals a strong economy with high consumer spending and business investment supported by effective policies.

As such, all players including service providers, manufacturers, consumers and government, must join hands in inculcating in the minds of all Kenyan citizens, patriotism and preference for Kenyan goods and services as a means of supporting the domestic economy.

The manufacturing sector aims to produce enough to satisfy the domestic market and surplus for sale in foreign markets. However, market access for locally manufactured products has been a challenge whether from government or private consumers. The Buy Kenya Build Kenya (BKBK) strategy has been a great initiative towards increasing the consumption of locally manufactured goods in the country, more so with a focus on public procurement. However, domestic producers find difficulties accessing government procurement opportunities because: they are often unable to compete with foreign suppliers; are generally perceived to be producers of inferior products compared to imports from developed countries; are unable to compete both in terms of price and quality from foreign goods; and they lack policy support to guide promotion of domestic consumption.

The Constitution seeks to ensure that the government's procurement system is mindful of the need to maximize on local opportunities to provide market access to enterprises in the country for sustainable growth as well as be cognizant of disfranchised groups in the trade environment such as women, youth, and persons with disabilities.

It is for this reason that we commissioned this study to assess Kenya's Public Procurement Legal Framework and System in promoting market access for locally produced goods. This includes measures such as preference and reservations for locally produced goods, and the access to government procurement opportunities (AGPO) program. We envision that the findings and recommendations herein will support the national and county governments in enhancing the government's procurement system and increasing market access for locally made goods.

Local industries have the potential and substantial capacity to serve the local market if only such opportunity is provided. This will be a sure way to grow local industries, create massive employment along the value chains and ultimately, led to the realization of the country's socio-economic goals.

Tobias Alando
KAM Ag. Chief Executive Officer

EXECUTIVE SUMMARY

It is estimated that public procurement accounts for an average of 13-20% of the GDP of countries globally, with an estimated US\$9.5 trillion in global expenditure.¹ In 2020, the public procurement in Kenya was estimated to account for 26% of the GDP.¹ In recognition of the importance of public procurement, the government through the National Treasury is in the process of implementing a new eGovernment Procurement System, which will greatly improve the efficiency and practice of public procurement.

Public procuring entities reported 23,367 contracts concluded in FY2023/24, valued at KES 210,841,823,518, of which KES 8,526,269,453, that is 4%, were reserved for disadvantaged groups based on the reported data. Of the total contracts by value, the largest proportion at 43% were for non-consulting services, 39% works, and 17% goods, while consulting services were only 1%.

It is against this background, with support from GIZ through the Strengthening Good Governance program, that the Kenya Association of Manufacturers commissioned this study to assess the public procurement legal framework and systems and make recommendations aimed at promoting market access for locally produced goods. The study is based on documents review, survey of procurement practitioners, analysis of current practices, and consultation with stakeholders.

Key Findings and Recommendations:

1. The meaning of local manufacturing is unclear in the context of public procurement and does not address the issue of percentage of local content that a product should have to be recognized as local.
2. The government and local manufacturers should develop an agreed definition of a locally manufactured product. The definition should be simple enough and easily applicable in procuring goods from local manufacturers by procuring entities.
3. The procurement plans indicate a reservation of a minimum of 30% of the budget for enterprises owned by women, youth, persons with disabilities (PWD) and other disadvantaged groups. The 30% reservation currently benefits enterprises owned by women, youth and PWD, but the “other disadvantaged groups” such as micro and small businesses have not clearly identified as such to benefit from reservations.
4. The definition of local supplier is confused with citizen contractor and the combination of shareholding for the purpose of applying margins of preference. There is also a challenge of confusing local supplier with local goods, mostly that awarding a local supplier is synonymous with supply of local goods, when in fact there is no direct correlation because suppliers import goods. There is need to differentiate between (a) reservation for local suppliers and (b) reservation for locally produced goods.
5. There is no centralized register of local manufacturers and their locally produced goods, from which procuring entities could conduct market survey to inform their procurement planning and subsequent procurement of the goods. Besides the registration of suppliers, there is need for a national electronic register of manufacturers with the category of locally produced goods.
6. About 66% of procurements by number are done using the request for quotation, while restricted tender method comprise 3.8% by value of the contracts. In both methods, the main source of names of suppliers invited to submit bids or quotations is the register of suppliers. There is need to have a central register of manufacturers, coupled with a revision in the procurement law, for public entities to invite for bids or quote to those in the electronic register of local manufacturers and local products.

¹ World Bank Group Global Public Procurement Database

7. A review of 120 tender documents for goods prepared in FY2022/23 reflect challenges in correct drafting of quality bidding documents. This risk will multiply once focus is shifted to customizing the tender documents to procure locally produced goods. There is need to add a variable to enable procuring entities to specify that a subject tender is for locally produced goods, where there is clear market research to show that there is critical mass of locally produced goods and suppliers to meet the requirements without creating a monopoly for the subject goods.
8. The standard tender document for goods has 100 pages, while the tendering forms that bidders should use to prepare and submit bids is only 24 pages, showing the tender documents were designed with efficiency to facilitate bidders to prepare bids. In practice, however, procuring entities demand that bidders fill in the information in the tendering forms and submit the whole tender document back as the bid. This practice leads to bulky bids submitted by bidders, increasing the cost of doing business and discouraging small businesses from public tendering due to its tediousness. The PPRA should issue a circular to procuring entities to direct them to adhere to this requirement in the tender documents so that the submission of bids will be easier, especially for small local businesses in Kenya.
9. Unlike foreign manufacturers, most local manufacturers rarely publish or publicize their product brochures, which means that Internet searches mostly return foreign product offerings, thereby reducing visibility of local products when procuring entities perform online market surveys. Without product brochures, local manufacturers are at a disadvantage in bidding and winning public tenders and other public procurement opportunities. Often, procurement officers tasked with the work of preparing tender documents confuse technical evaluation criteria of the offered product and the qualification criteria of the bidder.
10. About 31% of the tender documents did not have information about the supplier payment period. Whereas the payment period in the standard tender documents is 30 days, procuring entities modified this period to 45, 60, 90 or even 120 days in an attempt to delay payment of suppliers and reduce the chances of the aggrieved suppliers charging interest on delayed invoices.
11. An implementation action plan has been presented in Chapter 3 of the report.

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CHAPTER I: INTRODUCTION

I.1. Background

The Republic of Kenya operates under a devolved system of governance comprising of the National Government and 47 County Governments in line with the Constitution of Kenya. The National Government comprises of the Executive, Parliament and Judiciary; the County Government comprises of the County Executive and County Assembly. About 667 public procuring entities operate under these structures of government both at national and county level.

The real Gross Domestic Product (GDP) in Kenya expanded by 5.6 percent in 2023 compared to a growth of 4.9 percent in 2022. The growth was spread across all sectors of the economy but was more pronounced in service-oriented activities.¹ Over the past five fiscal years from FY2017/18, the total government expenditure averaged 29.4 percent of GDP and is projected to grow further in FY2023/2024.

One of the key sectors contributing greatly to economic growth is manufacturing. In 2023, the volume of the manufacturing sector expanded by 2.8 percent, while the manufacturing share of GDP was 7.6 percent. The manufacturing value was apparent. The number of persons employed in the formal manufacturing sector increased by 4.7 percent from 336,800 in 2021 to 352,600 in 2022, accounting for 11.7 percent of the total number of persons engaged in the formal sector in 2022. The corresponding compensation of employees in the sector grew by 8.1% to KES 250.1 billion in 2022.

Despite this contribution to the economy, the manufacturing sector faces challenges such as competition from cheap imports and illegal dumping of goods in the market. Given that a significant portion of government expenditure is for procuring goods, works and services, the manufacturing sector could benefit from increased sourcing of locally produced goods, thereby contributing to the country's economic and social growth through increased job opportunities and reduced use of scarce foreign exchange on imports.

It is estimated that public procurement accounts for an average of 13-20% of GDP of countries globally, with an estimated US\$9.5 trillion in global expenditure.² In 2022, public procurement in Kenya was estimated to account for 11% of GDP.¹ In recognition of the importance of public procurement, the government through the National Treasury is in the process of implementing a new eGovernment Procurement System, which will greatly improve the efficiency and practice of public procurement.

It is against this background, with financial support from GIZ Kenya, that the Kenya Association of Manufacturers (KAM) commissioned this study to assess the public procurement legal framework and system and make recommendations aimed at promoting market access for locally produced goods.



I.2. Rationale

KAM was established in 1959 as a private sector body and has evolved into a dynamic, vibrant, credible, and respected business membership association that unites industrialists and offers a common voice for manufacturers and value add industries in Kenya.

¹ KNBS (2023)

² World Bank Group Global Public Procurement Database

The Association provides an essential link for co-operation, dialogue and understanding with the government by representing the views and concerns of its members to the relevant authorities.

In pursuit of its core mandate of policy advocacy, KAM promotes trade and investment, upholds standards, and encourages the formulation, enactment and administration of sound policies that facilitate a competitive business environment and reduce the cost of doing business.

KAM engaged procurement consulting firm, SPA Infosuv East Africa Ltd, to assess Kenya's public procurement legal framework and system and make recommendations on the promotion of market access for locally produced goods. The assessment is under the sector support program, with financing from GIZ Kenya, seeking to promote good governance in the public sector.

1.3. Objective

The Constitution of Kenya under Section 227 seeks to ensure that the government procurement system is mindful of the need to maximize on local opportunities to provide market access to enterprises in the country for sustainable growth as well as be cognizant of disfranchised groups in the trade environment such as women, youth, and persons with disabilities (PWD) as well as micro and small businesses.

The objective of the consultancy was to undertake an assessment study of the implementation of Kenya's public procurement legal framework and system promoting market access for locally produced goods. This includes measures such as preference and reservations for locally produced goods, and the Access to Government Procurement Opportunities (AGPO) program.

The study supports an effort to outline the progress Kenya has made in compliance with the constitutional provisions, with an aim to explore more possible solutions that could drive meaningful improvement of the public procurement legal framework and system in Kenya at the national level and the counties. This initiative will also support the strengthening of engagement by county business membership organizations with government on procurement matters through the business membership organization county groups.

1.4. Scope of Services

The following is the scope of services for the assignment:

- (a) Organize and hold an inception meeting with KAM and a technical stakeholder committee to review the terms of reference and reach a common understanding of the assignment and deliverables.

- (b) Prepare an Inception Report that details an understanding of the work, the appropriate methodology to be used to design the research and a suitable workplan.
- (c) Conduct research to assess Kenya's public procurement legal framework and system promoting local market access for goods, looking at measures such as preference and reservations for locally produced goods including unbundling and the access AGPO program.
- (d) Prepare a first draft assessment report based on the study findings, submit it to KAM for review by the technical committee and seek their input and comments on the key findings.
- (e) Conduct validation of the findings through facilitation and presentation at the national and select regional forums to enhance the content of the assessment report.
- (f) Prepare and submit the second draft of the assessment report by incorporating the feedback from the technical committee as well as validation and stakeholders' forums.
- (g) Facilitate and present the report at the launch to disseminate the final study findings.

1.5. Methodology

Following the inception meeting with the KAM staff on 29 August 2023, the Consultant collected relevant literature and documents from different sources. The documents reviewed include the Constitution of Kenya, the Public Procurement and Asset Disposal Act (PPADA) 2015, the Public Procurement and Asset Disposal Regulations (PPADR) 2020, tender documents for goods, works, services and consultancies, national economic reports, and other documents. The purpose was to appreciate the current practices on local content, preferences and reservations for local products and local suppliers of the goods. The references section of this report lists some of the documents reviewed and used in writing this report.

Based on the information gathered from the literature review and other sources, the four data collection tools prepared for use in the study were (a) tender documents analysis, (b) procurement practitioners survey, (c) manufacturers and suppliers surveys, and (d) personal interview guide. These tools were subjected to quality assurance before being used in the assessment. The data collection was done using the following approaches to obtain quantitative, qualitative and secondary data for the report.

- (a) The tender documents for goods for procurement in FY2022/23 and FY2023/24 to October 2023 were downloaded from the Public Procurement Information Portal (PPIP). The 120 tender documents were analyzed to collect data on the current practices regarding local content, preferences and reservations, and other aspects of public procurement in Kenya.

An online survey of procurement practitioners was administered through SurveyMonkey online research software to obtain their perception and information about application of local content, sourcing of local products, preferences and reservations in the procuring entities. Of the 294 responses from procurement practitioners, 53% were from procuring entities in the public sector, 99% had at least a diploma in procurement and an average of 7 years' experience with the current employer. The profile of the respondent procurement practitioners is provided in Annex 2. The practitioners also offered suggestions on how locally produced goods could be promoted in procurement practice.

KAM distributed a survey to manufacturers using its membership base, for members to respond through the SurveyMonkey online software. The purpose was to capture their perspectives and experiences in doing business with the public sector. The survey attracted 55 responses, with members providing quantitative and qualitative data for use in the report. Of the respondents, 70% had done business with government, of which business was 46% in tendering and 24% both tendering and through issuance of manufacturer authorization forms. The profile of the respondent manufacturers is contained in Annex 3.

To obtain information on current practices regarding local content, preferences, and reservations, personal interviews were held with senior officials in the procuring entities and organizations listed in Annex 1. The personal interviews were held with the sampled organizations.

The respondent organizations provided useful information, statistics, reports and documents, as well as qualitative data that were analyzed and used in writing this report.

Consultations were held in workshop setting with Business Membership Organizations at regional forums in Kisumu, Vihiga, Uasin Gishu, Makueni and Elgeyo Marakwet Counties. The input from these forums held between 11-20 October 2023 were used to enhance the study findings and recommendations.

The collected data was analyzed and used to prepare this assessment report, addressing the terms of reference and the deliverables. Validation forums were organized to present the draft findings to the stakeholders at the national and regional levels, and their input used to enhance the report.

1.6. Limitations

Like in any research study of this nature, there are several limitations about the assessment. *First*, it could have been ideal to interview more organizations but due to time constraints, fewer of them were interviewed. *Second*, the initial design to have the survey of the procurement practitioners to be done through the national professional body did not come through, and therefore the consultant had to resort to secondary means of sending the survey to the practitioners.

Third, the secondary data on procurement volume was self-reported, and whereas it could have been ideal to use all the actual data from all the 667 public procuring entities, only 42% of the procuring entities submitted reports on contracts with disadvantaged groups. *Fourth*, the contracts profile was done based on the contracts self-reported in the PPIP portal, and not all contracts may have been reported. Nevertheless, the contracts information obtained present a reasonable picture on procurement values.

CHAPTER 2: FINDINGS AND CONCLUSIONS

2.1. Introduction

This chapter deals with the findings and conclusions arising from the study. It starts with an overview of public procurement, examines the issues of local manufacturing, country of origin, the legislative provisions, and practicalities in the use of the current procurement system in procuring locally produced goods. The preferences and reservations are examined as two distinct schemes and how they are applied in public procurement.

2.2. Public Procurement

Public procurement is anchored in Article 227 of the Constitution of Kenya, which provides that when a state organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. Article 227(2) mandates that an Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for categories of preference in the allocation of contracts, and the protection or advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination.

The Constitution is operationalized through the Public Procurement and Asset Disposal Act (PPADA) 2015 and the Public Procurement and Asset Disposal Regulations (PPADR) 2020. According to the PPADA, procurement

means the acquisition by purchase, rental, lease, hire purchase, license, tenancy, franchise, or by any other contractual means of any type of works, assets, services, or goods including livestock or any combination and includes advisory, planning and processing in the supply chain system.

Procuring entities use public funds, that is monetary resources appropriated to them through the budgetary process, as well as extra budgetary funds, including aid, grants and loans, put at the disposal of procuring entities by donors.³ The PPADA applies except with international arrangements under treaties where Kenya is a party, in which case provisions in those agreements or treaties shall prevail. The portion of funds contributed by Kenya under the arrangement may be procured using the PPADA, requiring the contractors be registered in Kenya and insurance placed with companies registered in Kenya.

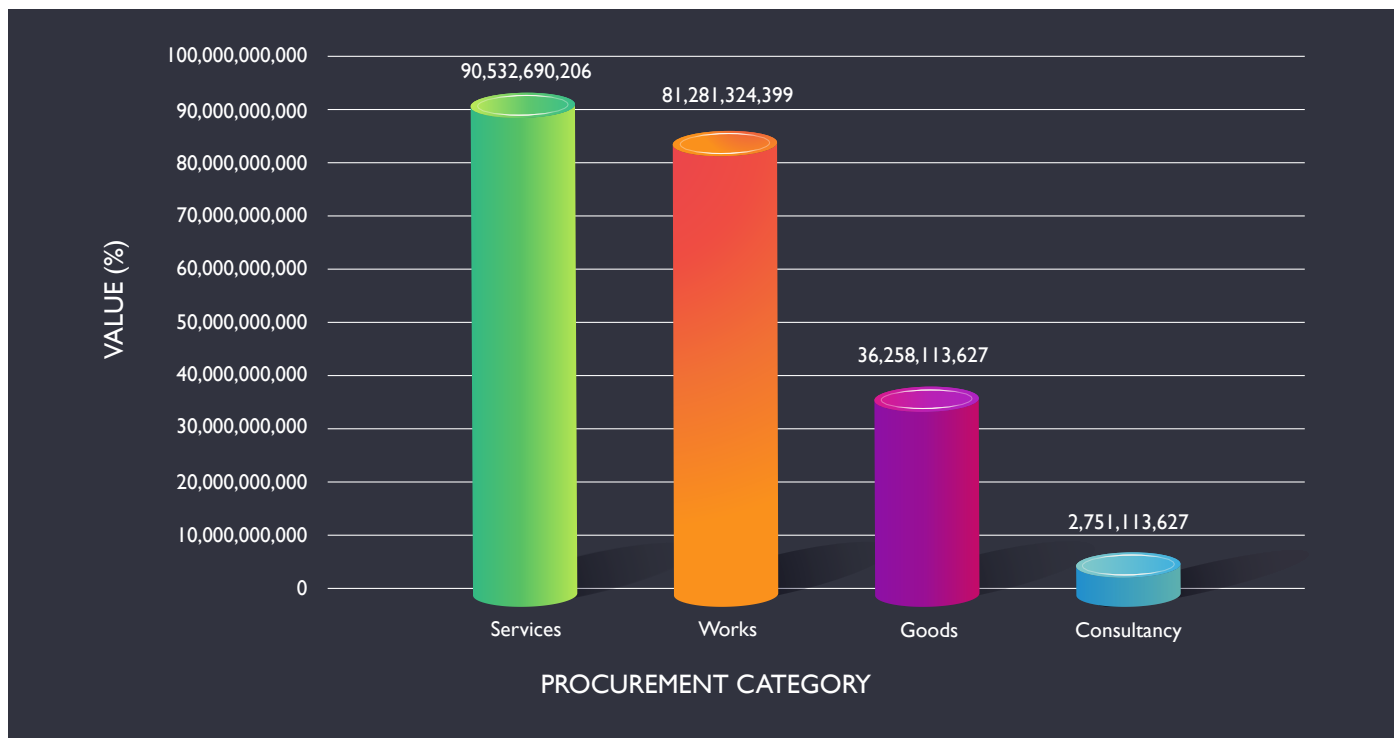
The PPADA is modelled on the UNCITRAL Model Law on Public Procurement whose main focus is to open up the market in developing countries. The model law allows for the use of preferences to support local industries while emphasizing the use of open competitive bidding.

In FY2022/23, the reported contract values⁴ by procuring entities is shown in Figure 1.

³ GOK (2015)

⁴ PPRA (2023)

Figure 1. Reported contracts by value and category



Public procuring entities reported 23,367 contracts concluded in FY2023/24 valued at KES 210,841,823,518, of which KES 8,526,269,453, that is 4%, were reserved for disadvantaged groups based on the reported data. Of the total contracts by value, the largest proportion at 43% were for non-consulting services, 39% works, and 17% goods, while consulting services were only 1%.

The works contracts use construction materials (goods) and hence of interest in this study. It is expected that the new eGovernment Procurement System, once implemented, will capture real time data on all procurement opportunities thereby increasing the number and value of contracts reported by entities.



2.3. Local Manufacturing

The term “manufacturing” refers to the creation or production of goods with the help of equipment, labour, machines, tools and chemical or biological processing or formulation. Whereas manufacturing refers to a range of human activity from handcraft to high technology, it is most commonly applied to industrial design in which raw materials from the primary sector are transformed into finished goods on a large scale.

Converting raw materials into something more useful adds value, hence, efficiency in manufacturing can lead to higher productivity and cost savings through reduced redundancies, improved quality of work, updated equipment and procedures, streamlining intake, and supply chain and distribution channels. The goods may be sold to other manufacturers for the production of other more complex products, or distributed to end users and consumers through wholesalers, and retailers who sell to individual customers.

People have historically manufactured goods using raw materials. Hand manufacturing involves use of basic tools through more traditional processes such as textile, leatherwork, carpentry, and metalwork, and this is common in Kenya. These manufacturing processes are usually labour intensive and require a lot of time. Larger businesses use machines to mass produce items on a much larger scale.

There are different types of manufacturing. *Job shop manufacturing* uses production areas instead of an assembly line and is most often used for small batch, custom products that are made to order for certain clients or customers. *Repetitive manufacturing* is appropriate when making repeat production at a committed production rate such as electronic goods, automobiles and refrigerators. The process has dedicated production lines all working on the same product or component all day and year-round. *Discrete manufacturing* uses an assembly or production line, and each product manufactured can be specifically identified, and tracks materials or components to specific units. *Batch process manufacturing* is driven by customer demand or the availability of ingredients and raw materials. *Continuous process manufacturing* runs all the time and focuses on raw materials that are often gases, powders, liquids.

In the context of this report, a product is defined as an output from a manufacturing process in Kenya, even if it is intended for later use in another manufacturing operation. Likewise, local manufacturing means production of goods whose value, either in whole or in part, is derived from growing, producing, processing, assembling, or manufacturing activities that occur within Kenya. The benefits are that local manufacturing provides jobs, enables perfecting the product, and reduces the supply chain time to market, safeguards foreign currency, and contributes to economic development.⁵

The formula for applying the value added criterion for local product is expressed as a percentage as $[(VA/EXW) \times 100]$, where VA is the difference between the ex-works price of a finished product and the customs value of the materials imported from outside the country based on Free on Board and used in the production, while EXW means the ex-works price.⁶ Based on this analogy, the local content of a locally manufactured product is the price less the customs value of imported raw materials and foreign labour.

For avoidance of doubt and for the purpose of a common application in public procurement, the government and local manufacturers should develop an agreed definition

of a locally manufactured product. The definition should be simple enough and easily applicable in procuring goods from local manufacturers by procuring entities.

2.4. Procurement Categories

2.4.1. Goods

In public procurement legislation, goods are defined to include raw materials, products, equipment, commodities in solid, liquid or gaseous form, electricity and services that are incidental to the supply of goods, works and services.⁷

Given that “product” has not been distinctly defined in the procurement law, the words “goods” and “products” are used broadly to mean “goods”. In customs and regional trade, “product” means a manufactured product including a product intended for later use in another manufacturing operation.⁸

In the development sector, goods are a category of procurement that includes commodities, raw materials, machinery, equipment, vehicles, plant, and related services such as transportation, insurance, installation, commissioning, training, and initial maintenance.⁹

According to the PPADA, locally produced products or services means goods or services that are manufactured in Kenya by firms that are registered and undertaking their business in Kenya.¹ However, the meaning of local manufacturing is unclear in the context of public procurement and does not address the issue of percentage of local content that a product should have to be recognized as local.

In cross African trade, a product is defined as output of a manufacturing process, even if it is intended for later use in another manufacturing operation. The formula for applying the value-added criterion is expressed in percentage as $(VA/EXW) * 100$ where VA is the difference between the ex-works price of a finished product and the customs value of the material imported from outside the country based on Free on Board and used in the production, while EXW means ex-works price.¹ In the East African Community (EAC), value added means the ex-works price of a finished product minus the customs value of the material imported from outside the Partner States and used in the process of production.⁸ Therefore, once a manufacturer provides the value of imported raw materials and labour, the rest would constitute local content.

⁵ KAM (2023)

⁶ ACFTAS (2022)

⁷ Section 2 of the PPADA 2015

⁸ EAC (2015)

⁹ World Bank (2016)

The standard tender documents provide that all the goods and related services to be supplied under the procurement contract should have their *origin* in an eligible country. The ineligible countries are those by law Kenya prohibits commercial relations with and by virtue of a decision of the United Nations Security Council there is prohibition to trade with.¹⁰

The term “origin” means the country where the “goods have been mined, grown, cultivated, produced, manufactured or processed; or, through manufacture, processing, or assembly, another commercially recognized article results that differs substantially in its basic characteristics from its components.”¹¹

A question arises whether simply local packaging of otherwise imported goods can be classified as originating from Kenya. There is need for the tender documents to be revised to accommodate a criterion of bidders indicating the country of origin of the offered goods, besides the variable provided in the price schedule forms.

2.4.2. Works

Of the reported public procurement contracts by value, 39% were for works, second to services at 43%. Goods constitute one of the key inputs in all works projects. This study focuses on goods rather than works, but because goods such as cement and steel form an important input in works products, it is important to analyze the procurement systems on the use of local goods in works.

The definition of works³ as presented in Box I highlights the role of goods in the works product. Most works procurement is done using Bills of Quantities (BOQ) prepared by professionals in the subject field. Whereas works contracts utilize a large proportion of goods, the procurement legislation appears to imply that only foreign bidders should demonstrate meeting the local content requirement for works contracts.

Box I. Definition of works

Works means a combination of goods and services for the construction, repair, renovation, extension, alteration, dismantling or demolition of buildings, roads or other structures and includes (a) the designing, building, installation, testing, commissioning and setting up of equipment and plant; (b) site preparation; and (c) other incidental services.

2.4.3. Services

Services in public procurement are defined³ as any object of procurement or disposal other than works and goods, and includes professional services, technical services, non-professional and commercial type of services as well as goods and works which are incidental to but not exceeding the value of those services.

Consulting services are services of predominantly intellectual, technical or advisory nature and includes services offered by all professionals³. The consulting services typically involve providing expert advice such as in feasibility studies, project management, engineering services, financial services, procurement management services, training and capacity building.

In contrast, *non-consulting services* are those services that are not consulting services, which are normally bid and contracted on the basis of performance of measurable outputs, and for which performance standards can be clearly identified and consistently applied.⁹ These may include transport, insurance, security, repairs and maintenance, installation, and training. These services are usually incidental to the offered goods or works and contracted as separate line items for goods. For example, tenderers quoting for the supply of a generator will also be required to quote for the related services such as transport to location, installation, and training of staff. Thus, procuring goods also generates a value chain for related services.

2.4.4. Policy Issues

There are several core policy issues that arise from these definitions in public procurement practice to support local industry. *First*, what constitutes locally manufactured goods? *Second*, what minimum percentage of local inputs or value added should be utilized in producing the goods for them to be classified as locally manufactured goods? *Third*, what documentary evidence could tenderers submit to procuring entities to indicate that the offered goods are manufactured in Kenya? *Fourth*, what agency, authority, or office should issue such a documentary certificate for the locally manufactured good? *Fifth*, whether local manufacturers could be willing to indicate local content of their goods in the certificate.

2.5. Procurement Planning

Procuring entities are required under Section 53 of the PPADA to prepare an annual procurement plan using the prescribed format and within the approved budget, prior to the commencement of each financial year and as part of the annual budget preparation process.¹

¹⁰ Clauses 4.1 and 3.9 of the instructions to tenderers of the tender documents for goods.

¹¹ Clause 4.3 of the instructions to tenderers of the tender documents for goods.

The format of the procurement plan, among others, includes the item description, unit, quantity, procurement method, source of funds, estimated cost, and process time to contract completion. The procuring entities are required to indicate which items could be aggregated to be procured as a single package or if the items will be packaged into lots as part of an unbundling of procurement under preferences and reservations. The format however does not have an option for procuring entities to indicate whether the subject goods shall be locally manufactured or having Kenya as the country of origin.

The procurement plan should indicate a reservation of a minimum of 30% of the budget for enterprises owned by women, youth, persons with disabilities (PWD) and other disadvantaged groups. The 30% reservation currently benefits enterprises owned by women, youth and PWD, but the “other disadvantaged groups” such as micro and small businesses have not been clearly identified as such to benefit from reservations.

The procurement planning should be based on either indicative or approved budgets. As provided in Section 2A of the PPADA, the procuring entity is required to carry out market surveys to inform the placing of orders or decision making on a procurement by the relevant awarding authority. Section 2B mandates the entity to conduct a market survey at the beginning of the financial year to prepare a current *cost handbook*, revised every six months for use in decision making in the procurement process.

It is expected that the market survey provides an avenue for the procuring entity to conduct market research to establish if the items in the procurement plan are manufactured locally. This would enable a decision to be made on the approach to the market by setting an eligibility criterion that the subject goods shall be locally manufactured and having Kenya as the country of origin. To conclude, several challenges are rife in the practice of market survey in procurement. *First*, whereas the law provides for an option of engaging the market early before the next financial year, in reality, procurement plans are prepared after the budget has been approved. *Second*, because of this, procuring entities have very little time to carry out market survey to establish if the planned goods are manufactured in Kenya and the number of manufacturers for the goods to establish the level of competition in the market.

Third, the user departments often delay in preparing acceptable specifications that could be used to perform the market surveys on time. *Fourth*, a lack of a common marketplace either physical or online serving as a go-to database and place for locally produced goods. *Fifth*, a skills gap among procurement practitioners on effective conduct of market surveys as well as correct lot-sizing of

contracts to suit procuring locally produced goods and local suppliers.

Sixth, the hurried time in commencement of procurement process often accords little time to assess the market on the available goods produced by local suppliers to design the procurement accordingly.

2.6. Sources of Supply

There are different sources of supply analyzed for this report: (a) local or foreign, and (b) manufacturers or traders, (c) form of ownership, and (d) register of suppliers.

2.6.1. Location of Supplier

The firms that bid for public tenders could have their principal offices located either in Kenya or foreign countries, while others may be shell companies without a verifiable office. Procuring entities usually require bidders to submit a certificate of incorporation or registration to evidence the existence and country location of the firms. The public procurement system has been designed to allow bidders from any eligible country to bid for public tenders except those prohibited by United Nations Security Council and those where Kenya prohibits commercial relations with that country. The tender documents however have no criterion for procuring entities to require that the offered goods should have Kenya as the country of origin.

To identify firms that operate at any of the 47 counties, procuring entities normally require bidders to submit the county business permit to benefit from the 20% reserved for county specific opportunities. The same approach applies to business with National Government Constituency Development Fund, where the procuring entity may require that eligible bidders be located in a specific constituency. The requirement for business permit is normally removed for national tenders or the entity may require that a business permit from any county shall suffice.

A bidder can either be a citizen contractor or local contractor; the two terms are often confusing in practice. It is clear that a citizen contractor is a person, or a firm wholly owned and controlled by persons who are citizens of Kenya. On the other hand, a local contractor is a person or firm registered in Kenya under the Companies Act 2015 or of any other written law and whose operation is based in Kenya. A local contractor may be in various forms: (a) be 100% owned by foreign nationals, (b) have at least 51% shareholding by Kenyans, (c) have any other combination of shareholding among Kenyans and foreign persons, or (d) 100% owned by Kenyan citizens.

This apparently simple distinction becomes a challenge

in practice where a local contractor is confused with a citizen contractor and the combination of shareholding for the purpose of applying margins of preference. There is also a challenge of confusing local supplier with local goods, mostly that awarding a local supplier is synonymous with supply of local goods, when in fact there is no direct correlation. There is need to differentiate between (a) reservation for local suppliers and (b) reservation for locally produced goods.

2.6.2. Category of Supplier

Suppliers refer to anyone who could provide the required goods. In public procurement, a supplier is a person or firm that enters into a procurement contract with a procuring entity to supply goods, works or services. The words supplier and contractor are used synonymously in public procurement. There are two main categories of suppliers in our context: manufacturers and traders.

A *manufacturer* is any business that produces finished goods from raw materials, using various tools, equipment, and processes, and then sells the goods either directly to consumers or through traders. Manufacturers ought to meet product certification requirements through a process involving performance and quality assurance tests of the goods being produced. To enhance consumer protection and to ascertain the country of origin of the goods, the certification bodies usually emphasize on meeting the applicable national or international standards. In public procurement, this certification is an essential documentary evidence, that the goods are in fact produced by a manufacturer located in Kenya.

A *trader* could be a wholesaler, retailer, or distributor who usually sources from multiple manufacturers to bid and supply to procuring entities or to service the end customers. Procuring entities often require traders who are offering goods on behalf of a manufacturer to submit a manufacturer's authorization form signed by a senior representative of the manufacturer for the purpose of product warranty and guarantee.

The challenge in public procurement is the practice of requiring all bidders, whether traders or manufacturers alike to submit a manufacturer's authorization form. The other is requiring all bidders to submit a manufacturer's authorization form for small value common non-equipment items. Because all tenderers are lumped

together, local manufacturers are lost. There is need to review the tender documents to provide for bidders to indicate if they are traders or manufacturers and if local manufacturers.

2.6.3. Form of Supplier

A supplier can take different forms, such as sole proprietor owned by one person, partnership owned by more than one person, private limited company owned by either one or more persons, public limited company listed company in the Nairobi Securities Exchange or other exchange.

Each of these forms of businesses are required to submit documentary evidence of their existence. These are a registration certificate for sole proprietors and partnerships, and certificate of incorporation for limited companies. To evidence the owners of each form of business in tendering to public entities, sole proprietors are asked to submit national identity card or passport of the owner, partnerships furnish CR13 while limited companies provide CR12.

These documents are necessary for public entities to rule out instances of conflict of interest of the bidders. Whereas manufacturers are more likely to be limited companies, most traders who form the large number of bidders in public tenders are formed as either sole proprietors or partnerships. The confidential business questionnaire used in public procurement captures details for each form of business to assess the risks associated with contracting.

2.6.4. Register of Suppliers

Each public procuring entity is required to maintain and update a list of registered suppliers for each category according to its procurement needs. The application for inclusion in the register may be made any time and at no cost and the registration list shall be updated periodically.¹²

The applicant should fulfil (a) eligibility criteria¹³ as summarized in Table I and (b) the qualification criteria on experience, resources, equipment and facilities to provide that is being procured.

Each procuring entity is required to prepare a register

¹² Sections 57 and 71 of the PPADA

¹³ Section 55 of the PPADA and Regulation 145 of the PPADR

Table I. Eligibility criteria for registration of suppliers and tendering

#	Eligibility criteria of the bidder	Purpose
1	The person has the legal capacity to enter into a contract.	Bidders are asked to identify themselves by submitting a certificate of incorporation or registration or copies of PIN and ID.
2	Not insolvent, in receivership, bankrupt, or in the process of being wound up.	Bidders are required to declare that they are not insolvent, in receivership or bankrupt wound up because it is impossible and risky to deliver under these conditions.
3	The person, if a member of a regulated profession, has satisfied all the professional requirements.	To maintain professional ethics and delivery, bidders are required to submit certificates issued by professional bodies.
4	The procuring entity is not precluded from entering into a contract with the person under Section 38 of the PPADA.	The Director General of the PPRA may direct a procuring entity to take actions against offending suppliers, who then are not eligible.
5	The person and subcontractors is not debarred from participating in procurement proceedings under Part IV of the PPADA.	The suppliers that have been debarred by the PPRA are not allowed to bid for contracts in public procurement.
6	The person has fulfilled its tax obligations.	It is a constitutional requirement that all suppliers meet their tax obligation as evidenced by a tax compliance certificate.
7	The person has not been convicted of corrupt or fraudulent practices.	The suppliers convicted of corruption or fraud are not eligible to bid for public procurement opportunities.
8	The person is not guilty of any serious violation of fair employment laws and practices.	The suppliers legally in violation of fair employment laws and practices are ineligible to tender.

of suppliers. The register should be updated at least every six months, and the new suppliers notified of their admission into the list. The procuring entity is required to evaluate the list every two years and to generate a fresh list of suppliers through open advertisement inviting anyone interested to submit applications.¹⁴ This notice for registration of suppliers does not apply for the disadvantaged groups, who are already registered with the National Treasury and issued with an AGPO certificate.

Several issues are notable from the system for the registration of suppliers. *First*, procuring entities normally take less time analysing what they usually procure, leading to mismatched classification of categories of goods for which suppliers will be registered. This results in a mismatch during procurement because some of the goods required were not classified correctly to attract qualified suppliers in that category.

Second, there is no standard document for registration of suppliers, leaving procuring entities to either use the older versions applicable for the 2005 procurement law or modify the more complex standard tender

document for prequalification of contractors, which is for a different procurement procedure and inappropriate for registration of suppliers, making the process more complex than necessary.

Third, the registration templates have no option for suppliers to indicate if the goods they intend to offer are produced in Kenya and that the supplier itself is located in Kenya. These variables are important if the procuring entities decide to invite suppliers offering locally produced goods.

Fourth, the registration requirements can sometimes be cumbersome, leading to small businesses either dropping out or forced to engage experts to prepare their registration documents, thereby increasing the cost of doing business.

Sixth, there is no centralized register of local manufacturers and their locally produced goods, from which procuring entities could conduct market survey to inform their procurement planning and subsequent procurement of the goods. Besides the registration of suppliers, there is need for a national electronic register of manufacturers

¹⁴ Regulations 44 and 69 of the PPADR.

with the category of locally produced goods.

Seventh, there is lack of transparency on how the suppliers are selected from the register to be invited to submit quotations or restricted tenders, some contending that only a few favoured suppliers appear to benefit from being the list. This perception leads to fewer and honest suppliers being interested in applying for registration as

suppliers to public entities.

2.7. Procurement Methods

The PPADA allows several methods for the procurement of goods depending on the set conditions, the most relevant for this study and for procuring goods are summarized in Table 2.

In FY2022/23 a total of 23,367 contracts valued at

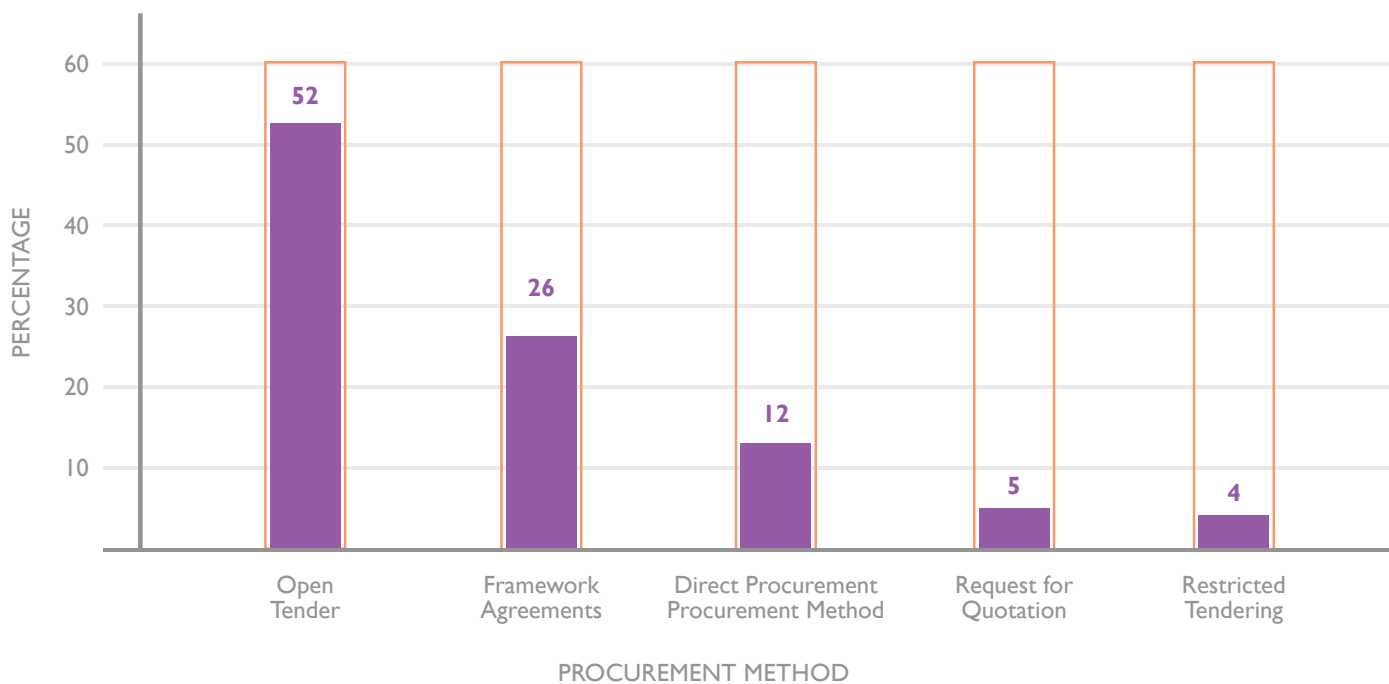
Table 2. A review of methods for procuring goods

#	Method	Conditions for Use	Key Findings
1	Open Tender	This is the preferred method where an open advertisement is placed in the media for any qualified supplier, local or foreign to submit competitive bids. In 2023, open tenders represented 24% of the total reported contracts by number and 52% of the contracts by value. ⁴	<p>Most tenders are open national tender while international open tenders are often few and larger in value. The conditions of participation should be neutral, but local suppliers and local goods are allowed margins of domestic preference.</p> <p>International tendering applies if there will be no effective competition unless foreign tenderers participate, local or citizen contractors are eligible for preferences and reservations.¹⁵</p>
2	Restricted Tender	The method is used where the invitation will be to pre-qualified suppliers, time and cost will not allow invitation of a large number of bidders, in case of a few suppliers in the market, goods estimated to cost less than KES 30 million. At least 10 bidders are invited to submit bids.	<p><i>First</i>, prequalification of suppliers is applicable for complex goods and is rarely done in public procurement in Kenya.</p> <p><i>Second</i>, where time and cost is a concern, the entity uses the register of suppliers. The KAM to work with the National Treasury to prepare a central electronic register of local manufacturers and the products they produce, which could be used in invitation of restricted tenders.</p> <p><i>Third</i>, if there are few suppliers in the market, the advert appears in the entity website to inform bidders of the opportunity, but most websites seldom function and knowing which entity has advertised a notice is hard.</p>
3	Direct Procurement	The method is used for goods from a supplier having exclusive rights, due to war, catastrophic event, for continuity; the procuring entity may source from a specific one supplier.	This is the riskiest method that also lacks transparency. However, if there is a database or catalogue of locally produced goods, it will increase chances of entities buying the locally produced goods using the direct procurement method.
4	Request for Quotation	In 2023, about 66% of the reported contracts were done using request for quotation method. The most often used method, for goods estimated to cost between KES50,000 and KES 3 million per request for quotation. At least three suppliers drawn from the register are invited to submit quotations.	The issue is that the procuring entity decides which supplier is invited to submit quotations; often a lot of suppliers in the register never get this opportunity.

5	Force Account	In this method, the entity uses state and public officers using public assets, equipment and labour to deliver a project. The goods for use in the project should be sourced using the procurement law.	The downside of this method is allowing public entities to perform business that should be done by the private sector.
6	Electronic Reverse Auction	The electronic reverse auction system is supposed to be approved by the PPRA. All registered suppliers are invited to bid online electronically, and bidders can adjust price downwards in competition until a winner is identified.	This method is suitable for commonly used goods with standard specifications so that technical aspects is known before the bidding process. It will be best option to ensure fair bidding process.
7	Framework Agreement	Where the quantities of goods to be procured are unknown at the time of entering into the agreement. At least seven suppliers are included in the specified category of procurement. Bidders are invited to compete in a mini-competition and awarded the contract if the lowest evaluated bid. Also call off orders can be placed directly to the supplier in the framework agreement.	Suppliers in a framework agreement can benefit from being invited to submit bids in a mini competition. Manufacturers can submit bids for inclusion in the framework agreement; to be issued with orders from time to time as the need arises. This system currently works well with Supplies Branch contracts.
8	Community Participation	The methods involves the community in delivery of projects. The project committee organizes for procurement of goods to be used in the Project. The community based service providers may also be engaged competitively to implement the community Project. The methods involves the community in delivery of projects. The project committee organizes for procurement of goods to be used in the Project. The community based service providers may also be engaged competitively to implement the community Project.	The county level local producers of goods could organize themselves to supply products to community projects. However, the method is not used widely across the country and the value of such sales could be minimal.
9	Low Value	The goods are not procured on frequent basis and are not covered in framework agreement and no evaluation committee is required. The method is used for low value goods estimated to cost less than KES50,000 per item per year. The procurement unit obtains the goods from a reputable supplier using cash and issued with a KRA ETR receipt.	The procurement unit staff are free to obtain the goods from any source and any product. It would be desirable that first priority is given to locally produced goods. This will be much easier if there was a database of local products with the names and contacts of the suppliers who are able to issue an ETR receipt.

KES210,841,823,518 were reported to PPRA through the PPIP portal. The contracts profile by procurement method is shown in Figure 2.

Figure 2. Proportion of reported contract values by method



Based on a review of the procurement methods, we conclude as follows.

First, the open tender method comprises of 52% of the total contracts by value followed by framework agreements at 26%. There is need for manufacturers to get a good portion of the contracts on open tender through changes in the procurement legislation cited elsewhere in this report.

Second, framework agreements are very important in procuring goods that are used across many procuring entities and are already in use through the Supplies Branch of the State Department for Public Works. Currently motor vehicles, foodstuffs, and other items are under framework agreement, and procuring entities just place a purchase order to obtain them. It would be important to explore the same arrangement particularly for locally produced goods, that is with a more elaborate definition of what constitutes local manufacturing.

Third, 66% of procurements by number are done using the request for quotation, while restricted tender method comprises 3.8% of procurements, by value of the contracts. In both methods, the main source of suppliers invited to submit bids or quotations is the register of suppliers. There is need to have a central register of manufacturers, coupled with a revision in the procurement law, for public entities to direct their invitation to bid or quote to those in the electronic register of local manufacturers and local products.

Fourth, procuring entities decide on which names of suppliers to include in the request for quotations or to submit bids in restricted tenders. As noted earlier, there

is a challenge in ensuring that all eligible and qualified suppliers are invited to quote or bid. Oftentimes, a few suppliers happen to garner most of these opportunities to the exclusion of many in the register of suppliers.

Fifth, electronic reverse auction could address the problem of selective invitation of suppliers, but this method is seldom used in the public sector. There is need for the National Treasury and the PPRA to ensure the electronic reverse auction is included in the new eGovernment Electronic Procurement System.

Sixth, although not widely used, community participation method could be used at county level to obtain goods from county business organizations, if it is well managed and capacity built on its use.

2.8. Tender Documents

The standard tender documents for goods have been prepared by the PPRA for use in conduct of public procurement using standardized instructions, procedures and criteria for evaluation and selection of the successful bidder. Procuring entities are supposed to customize the document for each procurement, without materially changing the set provisions.

This section reviews the practices in preparing the tender documents and how they impact on procurement of locally produced goods. The analysis includes a review of 120 tender documents for various goods downloaded from the PPIP portal that is maintained by the PPRA.

2.8.1. Outline of Tender Documents

The tender document for goods contains the invitation to tender notice, with relevant information to enable the bidder to obtain the document from the procuring entity. The notice should indicate if it is a national or international tender, if evaluation and award shall be done for one or more lots (unbundling), any required bid security, if the tender is reserved for disadvantaged groups, and deadline date for submission of bids. *There is need to add a variable to enable procuring entities to specify that a subject tender is for locally produced goods, where there is clear market research to show that there is critical mass of locally produced goods and suppliers to meet the requirements without creating a monopoly for the subject goods.*

The instructions to tenderers are not to be modified; they provide information to help bidders to access the tender document, prepare and submit bids, opening of bids, evaluation and award of contract. Any required modifications in the instructions to tenderers is done through the tender data sheet, and the procuring entity does customize it for each specific procurement.

A review of 120 tender documents for goods prepared in FY2022/23 reflect challenges in correct drafting of the tender data sheet, with several variables left out blank or filled out incorrectly. This risk will multiply once focus is shifted to customizing the tender data sheet to procure locally produced goods. Therefore, practical training and

capacity building would be required to ensure successful procurement of local goods.

The section on evaluation and qualification criteria is critically important and sets out the procedure and the criteria that shall be used in the evaluation and award of the contract. A detailed review is presented in the subsections below, but the setting of correct evaluation and qualification criteria continues to be one of the weakest links in public procurement in Kenya today. This has been attributed to a nationwide and widespread systemic failure and practices that are counter to the provisions in the tender documents.

Tendering forms are provided so that the bidder could use them to prepare and submit the bid. The schedule of requirements provides the list of required goods and related services, as well as technical specifications. The general and special conditions of the contract provide the terms and conditions applicable for each contract to be signed with the successful bidder.

2.8.2. Tender Data Sheet

The tender data sheet modifies clauses in the instructions to bidders to make them more specific and relevant for each subject tender. The standard tender document for goods is used here to illustrate the several clauses in the tender data sheet that are relevant regarding any emerging policy issue on procurement of locally produced goods.

#	Clause	Key Findings
1	ITT 1.1. The number and identification of lots (contracts) comprising this invitation for tenders is <i>[insert the number and identification of lots or contracts]</i>	The procuring entity is required to analyze and unbundle its requirements by identifying goods that could be locally produced and indicate as a distinct lot. The local manufacturers or traders could submit bids specifically for this lot. However, 69% of the tender documents reviewed did not clearly state the evaluation and award shall be item-wise or lot-wise, posing challenges in the subsequent evaluation of bids.
2	ITT 1.2(a). The electronic procurement system shall be used for the following aspects of the tendering process <i>[list aspects here and modify the relevant parts of the tender data sheet accordingly]</i>	This clause may be used to indicate that tender documents will be issued via email, website, database and if possible, bid submission and evaluation be done online. The clause is particularly useful if electronic reverse auction is deployed to be accessible to all eligible and qualified bidders.
3	ITT 3.1. Maximum number of members in the Joint Venture (JV) shall be <i>[insert number]</i>	The use of JV in procuring goods can be a challenge because each product is manufactured by a specific manufacture and not joint ventures, hence procuring entities are reluctant to allow JV when procuring goods. About 76% of the tender documents in FY2023 did not allow joint ventures in the subject tenders. Nevertheless, if a procurement is properly packaged to isolate the related services such as customs clearing services, local transport, installation, training, and maintenance, then the local suppliers could sign a JV with foreign bidders for the local partners to perform most of the related services.

4	<p>ITT 6.2. A pre-tender conference will be held/ not held (select one) on <i>[specify date and time]</i> at <i>(specify city, street, building, floor and room)</i></p>	<p>A pre-tender conference is important for the procuring entity to explain and clarify provisions in the tender documents. It will be useful to have the conferences before submission of bids so that bidders have a higher chance of being successful. However, in 89% of the reviewed tender documents, there was no provision pre-tender conferences due to tight procurement timelines.</p>
5	<p>ITT 10(j). The tenderer shall submit the following additional documents in its tender <i>[list any additional documents]</i></p>	<p>Where the procuring entity requires the offered goods be locally manufactured goods, then the procuring entity should require bidders to submit a certificate of conformity for local production. There is need to formalize this certification of local content.</p>
6	<p>ITT 13.6. Prices quoted for each lot (contract) shall correspond at least to <i>[insert figure]</i> percent of the items specified for each lot (contract). Prices quoted for each item of a lot shall correspond at least to <i>[insert figure]</i> percent of the quantities specified for this item of a lot.</p>	<p>Where the tender is in lots, bidders are required to quote prices for all items in each lot without omitting any item, otherwise the item would be considered priced in other items. The bidder should also quote for all the quantities specified for the lot and should not reduce to fit their capacity to produce. About 69% of the tender documents did not set this criterion correctly. This clause means that procuring entities should be careful in lot sizing; training is required in this area.</p>
7	<p>ITT 13.8(b). Price for inland transportation, insurance, and other local services required to convey the goods from the named place of destination to their final destination.</p>	<p>The tender documents have price schedules for related services to ensure the goods are brought to the final destination. Bidders are supposed to quote for these services separately, but most rarely do, opting instead to lump all costs on the goods. However, 88% of the tender documents failed to list the related services to enable bidders to quote for each one of them. Practical training of procurement practitioners is necessary.</p>
8	<p>Manufacturer authorization is <i>[insert required or not required]</i></p>	<p>The procuring entity will indicate if a manufacturer authorization is required, especially for higher value equipment that would require maintenance and warranty over time. However, the tender documents as drafted do not appear to differentiate between a bidder as a manufacturer who does not need to issue itself a manufacturer authorization and a bidder as a trader who should submit a manufacturer authorization.</p> <p>Whereas in 65% of tender documents bidders were required to furnish the manufacturer's authorization form. However, 91% of the tender documents failed to be clear that manufacturer authorization form is required only from trading suppliers.</p> <p>There is need to revise the tender documents to make it clear that it is bidders offering goods on behalf of manufacturers that should submit the manufacturer authorization form, and that manufacturers of the goods should not be required to submit it.</p>
9	<p>A margin of preference and/or reservation <i>[insert either "shall" or "shall not"]</i> apply and specify the details. If a margin of preference applies, the application methodology shall be defined in Section III – Evaluation and Qualification Criteria.</p>	<p>Of the reviewed tender documents, 99% of the criterion on margins of preference was not set correctly. The default option should be that margins of preference shall apply irrespective of whether the subject tender is national or international open tender or restricted tender. However, in practice, procuring entities assume incorrectly that margins of preference only apply to international open tenders. There is need to clarify this issue because even foreign bidders participate in open national tenders and restricted tenders.</p>

The following findings and conclusions are drawn regarding the tender data sheet of the tender documents for goods, which should be revised to address the recommendations.

- (a) Revise the standard tender documents to guide on lot sizing so that some lots are clear that the subject items shall be locally produced.
- (b) Maximize the use of electronic procurement system in applying electronic reverse auction to reach as many local suppliers offering locally produced goods.
- (c) Package the procurement of goods so that the related services are clearly indicated to enable local suppliers to enter into joint ventures with foreign firms to offer the related services in Kenya.
- (d) PPRA to capacity build public procurement officers on the need to conduct proper pre-bid conferences to enable bidders to increase their chances of winning contracts.
- (e) KAM in collaboration with the government, should prepare a system for issuance of a certificate of conformance of local content, which could be used by procuring entities to evaluate tenders and identify locally produced goods upon delivery under the contracts.
- (f) The tender data sheet should be modified to state that only traders offering goods on behalf of manufacturers are required to submit the manufacturer's authorization forms, and not manufacturers offering their own manufactured goods.
- (g) PPRA should build capacity of public procurement officers to understand that margins of preference are applicable irrespective of the procurement method used in the tender for goods.

2.8.3. Documents Comprising the Tender

The standard tender document for goods has 100 pages, while the tendering forms that bidders should use to prepare and submit bids is only 24 pages, showing the tender documents were designed with efficiency to facilitate bidders to prepare bids.

Clause 10 of the instructions to tenderers in the tender documents for goods provides for the following as the documents comprising the tender: (a) form of tender, (b) price schedules, (c) tender security or tender-securing declaration, (d) alternative tender if permissible, (e) written confirmation authorizing the signatory of the tender to commit the bidder, (f) documentary evidence establishing the bidder's qualifications to perform the contract, (g)

documentary evidence establishing the bidder's eligibility to tender, (h) documentary evidence establishing the eligibility of the goods and related services to be supplied by the tenderer, (i) documentary evidence that the goods and related services conform to the tender document, (k) tenders submitted by a joint venture shall include a copy of the joint venture agreement entered into by all members or a letter of intent to execute a joint venture agreement in the event of a successful tender, and (l) any other document required in the tender data sheet.

Hence, the documents that bidders are required to prepare their bid are well specified in the instructions to tenderers by using the tendering forms and attaching the support documents. This practice is meant to ensure the bidder uses only 24% of the tender document in bidding.

In practice however, procuring entities demand that bidders fill in the information in the tendering forms and submit the whole tender document back as the bid. This practice leads to bulky bids submitted by bidders, increasing the cost of doing business and discouraging small businesses from public tendering due to the tediousness. *The PPRA should issue a circular to procuring entities to direct them to adhere to this requirement in the tender documents so that the submission of bids will be easier especially for small businesses in Kenya.*

2.8.4. Technical Evaluation Criteria

Technical evaluation criteria are concerned with the technical specifications and requirements of the procuring entity. During bid evaluation, the procuring entity checks the offered product brochure or description of goods to establish a pass/fail basis, based on whether the offered goods meet the required specifications. Whereas 89% of the reviewed tender documents provided the technical specifications, in 82% of them, the technical evaluation criteria were not set correctly, leading to subjective evaluation of bids.

To establish the eligibility of the goods and related services, the bidder is required to declare by writing the country of origin of the offered goods in the price schedule forms.¹⁶ None of the reviewed tender documents required bidders to offer goods manufactured in Kenya. Moreover, 98% of the tender documents did not specify what documents are required to provide evidence of country of origin of the goods.

Therefore, bidders are seldom asked to furnish any documentary evidence that the goods originate from the stated country. There is need for bidders to provide a document showing the country of origin for the offered goods, including those produced in Kenya. During bid evaluation, the document will be used to assess if the bidder meets the set country of origin criterion on a pass/fail basis.

Upon delivery of the contracted goods, the certificate and the contract will be used to check against the delivered goods to confirm that the country of origin as offered is the same as that in the contract. This policy will facilitate the procurement of locally produced goods and reduce abuse among bidders who purport to offer local products but end up importing them to service the contract.

To establish the conformity of the goods and related services to the tendering documents, the bidder is required to furnish, as part of its bid, the documentary evidence that the goods conform to the technical specifications and specified standards¹⁶. The documentary evidence may be in the form of literature, drawings, or data, and shall consist of a detailed item by item description of the essential technical and performance characteristics of the goods and related services.

This requirement is for demonstration of the substantial responsiveness of the goods and related services to the technical specification and the schedule of requirements. Common evidence of the technical aspects of the goods is a product brochure containing the basic technical aspects of the goods. Brochures are common for most manufacturers in the world but not so in manufacturing in Kenya.

A major concern among public procurement officers is the quality of local products. In the absence of product brochures or detailed technical description of the offered goods, it is difficult for procuring entities to evaluate the offer to arrive at reasonably good quality for contracted goods. There is need to facilitate procurement of locally produced goods by encouraging local manufacturers to design product brochures for their goods to be used as technical brochures in tendering to public entities.

In public procurement practice, the standards for workmanship, process, material, and equipment, brand names or catalogue numbers specified in the schedule of requirements are intended to be descriptive only and not restrictive.¹⁶ The bidder may offer other standards of quality, brand names, or catalogue numbers, provided that it demonstrates that the substitutions ensure substantial equivalence or are superior to those specified in the schedule of requirements of the tender documents. These criteria ensure that all bidders, irrespective of the product they offer, are treated fairly during technical evaluation without discrimination. Locally produced goods therefore have a fair chance if well presented to an acceptable level of quality.

The schedule of requirements in the tender documents should provide sufficient information to enable bidders to prepare bids efficiently and accurately, containing the following.

First, the list of goods and delivery schedule contains description of goods, quantity, unit of measure, final destination for delivery, earliest delivery date, latest delivery date, and the bidder's offered delivery date. The dates are to be stated as the number of days from the contract signature date, but procurement practitioners are often unclear how to set out this variable. The list of goods and delivery schedule were not prepared correctly in about 66% of the tender documents reviewed, suggesting practical skills issues.

Second, the list of related services and completion schedule provides for the description of services, quantity, unit of measure, place of rendering services, and final completion date. These related services could be local transport, insurance, training, and installation, that are incidental to the goods. However, of the 120 tender documents reviewed for this report, the list of related services and completions schedule were not filled correctly and did not list the services incidental to the goods.

Third, technical specifications of the goods and related services should be provided, which should be neutral and providing for submission of product brochures and description of offered goods. Whereas 89% of the reviewed tender documents provided the technical specifications, in 82% of them, the technical evaluation criteria were not set correctly, risking a subjective evaluation of bids.

Fourth, drawings where applicable, indicating the names and purpose in the tendering. *Fifth*, inspection and tests which shall be performed at pre-shipment and upon delivery, prior to receiving the goods to ensure the contracted goods are the correct ones delivered. In the context of locally manufactured goods, the inspection upon delivery is quite important to check if indeed the goods were produced in Kenya if specified in the contract. Several issues are notable in public procurement practice regarding the technical evaluation criteria and evaluation for goods, which if addressed would improve the opportunities for locally produced goods.

- (a) There is no explicit criteria for the procuring entity to opt for locally produced goods as well as to indicate that the goods shall have their country of origin as Kenya.
- (b) It is unclear which centralized national agency should issue the certificate of conformity of the goods on local content and could perform the function effectively over time.
- (c) Procuring entities often do not set correct specifications for required goods, leading to bidders' guesswork on what is required.
- (d) Whereas entities require bidders to submit

brochures or detailed description of offered goods, this requirement is seldom used in the evaluation of bids to check on conform/not conform basis, based on whether the offered products met the required specifications and schedule of requirements.

- (e) Unlike foreign manufacturers, most local manufacturers rarely publish or publicize their product brochures, which means that internet search mostly returns foreign product offerings, thereby reducing visibility of local products when procuring entities perform online market survey.
- (f) Without product brochures, local manufacturers are at a disadvantage in bidding and winning public tenders and other public procurement opportunities.
- (g) Often procurement officers tasked with the work of preparing tender documents often confuse technical evaluation criteria of the offered product and the qualification criteria for the bidder.

2.8.5. Qualification Evaluation Criteria

The qualification evaluation criteria relate to the bidder itself to establish on a pass/fail basis if the bidder is qualified to perform the contract if awarded. This is different from technical evaluation criteria where the entity checks if the offered goods meet the required specifications. Oftentimes, procurement officers confuse the two sets of criteria making public procurement cumbersome and not meeting the objectives. In most cases, procurement practitioners wrongly set the qualification criteria using point scores, and inappropriately label it technical evaluation criteria. There is need for practical training in this area.

A review of the tender documents revealed that in 81% of them, the qualification criteria were set incorrectly. Of more concern, in 91% of the tender documents, the procurement practitioners ignored the guidelines in the standard tender document by failing to provide two sets of qualification criteria, one set for the manufacturer and another set for the trading supplier.

As required in the standard tender documents, when procuring goods, the qualification criteria are set differently in two sections for (a) manufacturers producing the goods they offer, and (b) trading suppliers offering goods on behalf of manufacturers. Logically, manufacturers of goods should not be required to submit own manufacturer's authorization forms; rather, they are supposed to produce evidence that they are indeed the manufacturers of the goods. Yet, 91% of the tender documents failed to make this distinction.

The qualification evaluation criteria provided in tender

documents and the required documentary evidence and forms is outlined in Annex 2 and an analysis of their application and challenges are summarized next.

- (a) **Years in Business:** The criterion requires the manufacturer to have been producing the goods over a specified period of time as evidenced by the certificate of incorporation and a manufacturing license or similar evidence, and in the case of locally produced goods, evidence that indeed the goods are locally produced. The number of years set as criterion depends on the complexity of the goods and risk in procuring them. A common practice is to require between 2-5 years of years in manufacturing the product. However, procuring entities often and unfairly increase the number of years ostensibly to avoid and reduce risk of doing business with "briefcase suppliers."
- (b) **Financial Capacity:** The bidder is required to demonstrate that it has access to funds to meet the cashflow requirements under the proposed contract. This could be in the form of current bank balance, net positive cashflow in financial statements, liquid assets, lines of credit from a bank, or treasury bills and bonds. The guideline is to demonstrate cashflow of at least the estimated cost of the proposed contract value. One poor practice noted is procuring entities asking bidders to submit one year of bank statements, which is unnecessary and bulky and only serves to increase the cost of doing business.
- (c) **Average Annual Turnover:** The annual turnover for goods manufactured and/or supplied within a specified number of years, such as five years. The period is selected by the procuring entity depending on the complexity of the goods under procurement, allowing for more years for complex goods. The information is derived from the audited accounts and financial statements and summarized in the form for average annual supply turnover. The guide is an average annual turnover equivalent to 2.5 times the estimated cost or budget for the goods as derived by the procuring entity. The issue however is that procuring entities often require much higher turnover than necessary for the subject contract, locking out otherwise qualified bidders, leading to less competition in the subject tender.
- (d) **Similar Experience:** The bidders are required to have a minimum level of experience in a combination of three factors. *First*, a specified number, say three contracts similar to the subject tender. *Second*, delivered within a specified number of years, say five years, prior to the tender submission date. *Third*, each contract of a specified minimum value, say KES 5 million. Procuring entities unnecessarily require too many similar contracts of very high value for the bidder to be seen as most qualified. This practice

locks out otherwise many qualified local bidders at the detriment of growing the local manufacturing base. Moreover, the required documentary evidence in terms of previous contracts and purchase orders become too bulky, which discourages bidders, takes time to prepare and increases the cost of doing business. There is need for practical training of the public procurement officers.

- (e) **Technical Capacity:** This criterion is applicable for manufacturers and not trading suppliers. The manufacturer is required to demonstrate that it has installed capacity to produce the required minimum number of goods per month or per year. The minimum number of units of goods produced should

be stated realistically commensurate with the subject quantities required under the proposed contract. The issue is where procuring entities set too high a capacity than necessary for the subject contract.

2.8.6. Tendering Forms

The standard tender documents contain the tendering forms that bidders are supposed to use to prepare and submit bids. These forms are outlined and analysed in Table 3 in respect of substance when procuring locally produced goods, local manufacturing, and trading suppliers. In addition to the tendering forms, support documents are required for bidders to furnish as documentary evidence for each criterion.

Table 3. The purpose and findings on tendering forms

#	Tendering Forms	Key Findings
1	Form of Tender	The form of tender is the bid and is prepared on the stationery of the bidder with physical address and contacts. One of the proposed declarations is that the bidder meets the eligibility criteria, which in the proposed policy will include eligibility that the goods are originating in and were produced in Kenya. The declaration is that the offered product is in conformity with the specifications and schedule of delivery. The format for tender price differs depending on whether there shall be one lot contract, more than one lot contract, or unit prices in framework agreements.
2	Certificate of Independent Tender Determination	The certificate is signed by each bidder to declare that the offered price was solely determined by themselves without collusion with a competitor. The form was introduced in the PPADR as a means of fighting corruption, but its efficacy so far in doing so is miniscule. The content of this certificate should be integrated as summarized content in Paragraph (q) of the Form of Tender to avoid too many forms that make preparing bids a tedious task.
3	Form SD1 Self Declaration that the Person is not Debarred in the Matter of the PPADA 2015	Using this form, the bidder declares that the bidder, directors and subcontractors have not been debarred from participating in procurement proceedings under Part IV of the Act. This separate form is really unnecessary in the tender document because the declaration can be included as one paragraph in the Form of Tender and it will serve the purpose instead of having a separate form to be filled by bidders.
4	Form SD2 Self Declaration that the Person/Tenderer will not Engage in Any Corrupt or Fraudulent Practices.	Clause (o) of the Form of Tender already contain a declaration on fraud and corruption. The separate self-declaration that the bidder, its servants, agents and subcontractors will not engage in corrupt or fraudulent practice serves only as a repetition of what is contained in the Form of Tender. This SD2 form should be removed from the tender documents and its contents included in summary form under Clause (o) of the Form of Tender.
5	Declaration and Commitment to the Code of Ethics	Already Clause (p) of the Form of Tender contains a declaration and undertaking about adherence to the code of ethics and yet this separate form has been provided repeating the same matter. The declaration on the adherence to the code of ethics should be removed as a separate form and summarized under Clause (p) of the Form of Tender.
6	Appendix I Fraud and Corruption	The appendix is placed in the tender document without any requirement for signing by the bidder. The anticorruption clauses are important but are more appropriate under the conditions of contract of the tender document and subsequently in the signed contract with the successful bidder. The Appendix I should not be part of the tendering forms and should be moved to the conditions of contract of the tender documents.

7	Tenderer Information Form	<p>The form is important to capture the basic information of the bidder such as bidder name, joint venture partner name, country of registration, year of registration, physical address, authorized representatives. Bidders are required to furnish the tax compliance certificate, registration documents, joint venture agreements, and documents for state owned enterprises, organization chart and list of board of directors.</p> <p>However, it appears this information is a repetition of what is required elsewhere. This format has been derived from the World Bank standard bidding documents without customizing to Kenyan context. The content of this form can easily be integrated into the confidential business questionnaire while retaining the same usefulness in public tendering. Also, the Tenderer's JV Members Declaration Form is unnecessary and a duplication because the JV members can use the Tenderer Information Form to provide the same required information.</p>
8	Tenderer's Eligibility Confidential Business Questionnaire	<p>The confidential business questionnaire has been at the heart of public procurement for a long time. The form contains the bidder details, general and specific details about the firm whether sole proprietorship, partnership or company showing the shareholding structure of the firm. This is useful information that can be used in preferences and reservations schemes. The form also has a section on disclosure of interest, and conflict of interest disclosure. The form is useful and provides good information for evaluation. However, it needs to be formatted professionally for ease of use by bidders. Also, a brief on the consequences of false declaration is required to remind the bidders of the consequences of doing so. As observed earlier the content of the Tenderer Information Form should be integrated in the Confidential Business Questionnaire.</p>
9	Price Schedule Forms	<p>The price schedules are provided for bidders to indicate the description of goods, country of origin of the goods, quantity, unit price, total price. Another form is used for related services to indicate the description of services, country of origin of services, delivery place and date, unit price and total price.</p> <p>The price schedule form for goods manufactured in Kenya require details on description of goods, delivery date, quantity, unit price Ex Works, price per line item for inland transportation and other services required to convey the goods in Kenya to the required destination, sales and taxes payable per line item, and total price per line item.</p> <p>While it sounds obvious, the form for goods manufactured in Kenya does not have a variable on country of origin, which is crucial in the bidder's explicit declaration about the source of the goods and related services.</p>
10	Form of Tender Security	<p>This option is for the tender security obtained from a financial institution as a bank guarantee. The Form of Tender Securing Declaration is used in place of the tender security mostly for disadvantaged groups under the procurement reservation scheme.</p>
11	Manufacturer's Authorization Form	<p>This form should be in the letterhead of the manufacturer and furnished by trading suppliers but should not be required for manufacturers of the goods. The form indicates the name and location of the manufacturer, extends the guarantee and warranty with respect to the goods offered by the trading suppliers.</p> <p>The issue however is that most procuring entities are unclear on when to require a manufacturer authorization form and if manufacturers should furnish this form when bidding for public tenders. Of the 120 reviewed tender documents 91% failed to state that the manufacturer's authorization form is only required for trading suppliers. The PPRA should conduct practical capacity building to sensitize public procurement officers on its use.</p>

12	Financial Resources Form	This form is missing from the standard tender documents for goods. The tender documents require bidders to furnish information to meet the criterion on financial capacity. However, there is no tendering form in the standard tender documents for goods that bidders could use to furnish this information. The PPRA should customize the Financial Resources Form used for tender documents for works for use in the standard tender documents for goods so as to standardize the information provided by bidders during bidding.
13	Average Annual Supply Turnover	The tender documents for goods provide a guide on the setting the qualification criterion on average annual turnover. However, the standard tender document does not have a tendering form for bidders to use in furnishing the required information to meet this criterion. The PPRA should customize the Average Annual Turnover Form used in the tender documents for works for use in the standard tender documents for goods so as to standardize the information provided by bidders during bidding for supply of goods.
14	Manufacturing Capacity Form	This form does not currently exist in any standard tender documents. The proposed policy change focusing on local manufacture of goods will necessitate creation of this form. The purpose is for manufacturers to state the basic information about their production capacity of the subject goods in a year. This is to avoid bidders stating that they manufacture goods locally only for them to import the same goods to meet local production shortfall. The manufacturers will also be required to attach evidence that the goods are manufactured in Kenya and the proportion of local content in the bid price.
15	Similar Experience Form	In the standard tender documents for goods, there is no tendering form for bidders to state their experience in supply of similar goods. The PPRA should design the Similar Experience Form and include it in the standard tender documents for goods so as to standardize the basic information from all bidders.

To summarize, the current standard tender documents for goods should be revised to delete the certificate of independent tender determination, self-declaration forms SD1 and SD2, declaration and commitment to the code of ethics, and appendix I on fraud and corruption, and transfer the relevant clauses to the corresponding clauses already existing in the Form of Tender. The following forms are missing and should be added to the standard tender documents for goods: financial resources form, average annual supply turnover form, manufacturing capacity form, and similar experience form. These forms should correspond to the qualification criteria already provided for in the standard tender documents for goods.

2.8.7. Conditions of Contract

The general conditions of contract and the special conditions of contract have been provided in the standard tender documents for goods. Clause 7.2 of the conditions of contract provides that all goods and related services to be supplied under the contract shall have their origin in an eligible country. If the procuring entity stated that the offered goods shall have Kenya as country of origin, then this clause should be enforced to check if the delivered goods are manufactured in Kenya. About 95% of the tender documents had no country of origin indicated in the special conditions of contract.

Clause 12 of the general conditions of contract requires that the delivery of the goods and completion of the related services shall be in accordance with the schedule. The details of shipping and delivery documents are in the special conditions of contract. These include bill of lading, airway bill, insurance certificate, warranty certificate, inspection certificate, and factory shipping details. There is need to have a certificate to indicate that the goods and related services are produced in Kenya or rendered by citizens. This will assist procuring entities to link the eligibility criteria on local products while receiving the goods.

The standard payment terms provided in the special conditions of contract is payment within 30 days after the date of the acceptance certificate for the respective delivery. In practice, however, procuring entities delete this clause and leave it open ended, thereby exposing bidders to endless wait for payment and reduces chances of them charging and claiming interest on delayed payment.

A majority of procuring entities leave the special conditions of contract blank, rendering the interpretation of clauses difficult. *As part of its compliance audit, the PPRA should ensure that the tender documents under the special conditions of contract clearly show the required payment period of 30 days and contain all the other required information available at the stage of publishing the tender documents.*

2.9. Margins of Preference

There is tension between two issues: whether the focus of local content policy should be “*locally produced goods*” or “*local contractors and citizen suppliers*”, and the two are quite different in policy perspective.

The public procurement legislation struck a middle ground and provided for both, with more emphasis on local contractors and citizen contractors rather than locally produced goods. The key findings are summarized in Table 4. The public procurement legislation has mixed up reservations with preferences, making its application and compliance a lot more difficult.

Table 4. Key findings on application of margins of preference

#	Clause and Requirement	Key Findings and Conclusion
1	Section 155 of the PPADA provides that only such manufactured articles, materials, or supplies wholly mined and produced in Kenya shall be subject to preferential procurement.	This clause is crucial in developing local manufacturing. However, there is need to develop a certification to show the percentage of local content in the value of the local product being offered to public entities and for use in applying margins of preference.
2	<i>Regulation 145(1)</i> : A person shall be qualified to benefit from preference and reservation scheme if that person meets the requirements of Section 55 of the Act.	The referenced Section 55 of the PPADA is about eligibility criteria, which all bidders irrespective of whether they are disadvantaged shall meet. However, the Eleventh Schedule for Registration of Disadvantaged groups does not require the groups to submit documentary evidence of meeting all eligibility criteria specified in Section 55 of the PPADA, risking registration of firms that are ineligible.
3	<i>Regulation 145(2)</i> : A person shall not be qualified to benefit from a preference and reservation scheme (a) as a contracting firm, unless that person is qualified as a local contractor or a citizen contractor, or (b) as a micro enterprise or an enterprise owned by disadvantaged groups unless that person is registered by the National Treasury upon application.	(a) This regulation allows both local contractors (who could be wholly foreign owned), and citizen contractors to benefit from reservations; given that foreign firms with local registration are likely having higher capacity, this clause disadvantages the citizen contractors. (b) The reference only to micro enterprises instead of micro, small, and medium enterprises leaves out a lot of citizens owned firms that should benefit from the reservation scheme managed by the National Treasury.
4	<i>Regulation 146(1)</i> : A micro, small, and medium enterprise or a disadvantaged group wishing to participate in public procurement shall apply for registration to the National Treasury in the form set out in the Eleventh Schedule to these regulations.	The reference to small, micro and medium enterprises (MSME) is misleading because there is no disadvantaged group that has been specifically created for MSME. The only groups relate to women, youth and PWD irrespective of whether they own small or large business. There is need to recognize MSME as a category of disadvantaged group of business to benefit from reservations.
5	<i>Regulation 146(2)</i> : All lists of registered enterprises from the National and County levels shall be submitted to the PPRA for consolidation, publication and updating in the State Portal.	The purpose of this list is to have a comprehensive database of disadvantaged firms maintained at the central level to enable procuring entities utilize it as and when required. It is unclear if the PPRA prepares such a list in the State Portal.
6	<i>Regulation 147 (1)</i> : A firm shall be qualified as (a) a local contractor if it is registered in Kenya and has above 51% Kenyan shareholding, (b) a citizen contractor if wholly owned and controlled by persons who are Kenyan citizens.	The definition of local contractor under Regulation 147(1) is different from that in Section 2 of the PPADA. The Act recognizes any company registered in Kenya as a local company while the regulations add a caveat that the company should be at least 51% Kenyan shareholding to be called a local contractor.
7	<i>Regulation 148(1)</i> : A foreign contractor may benefit from a preference and reservation scheme where it enters into a joint venture or subcontracting	The reference to “and reservation” is misplaced because the margin of preference applies in percentages over the bid price of the offered goods.

arrangement, as evidenced by written agreements, with a firm that is registered in Kenya and where Kenyan citizens have majority shares.

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| 8 | <p><i>Regulation 148(1):</i> A foreign contractor may benefit from a preference and reservation scheme where it enters into a joint venture or subcontracting arrangement, as evidenced by written agreements, with a firm that is registered in Kenya and where Kenyan citizens have majority shares.</p> | <p>The reference to “and reservation” is misplaced because the margin of preference applies in percentages over the bid price of the offered goods.</p> |
| 9 | <p><i>Regulation 148(2):</i> Where a citizen contractor has entered into contractual arrangements with a foreign contractor in accordance with paragraph (1), a 10% margin of preference in the evaluated price of the tender shall be applied. <i>Regulation 148(3):</i> A citizen contractor referred to in paragraph (2) of the regulations shall demonstrate technical capability and competence to perform.</p> | <p>The challenge however arises where the local firm has no technical capability and competence to perform and are often shunned aside once the contract is signed. To promote local manufacturing, there is need to focus the margins of preference on the percentage of local value added in the bid price rather than the supplier.</p> |
| 10 | <p><i>Regulation 164:</i> Margin of preference for international tendering and competition: For the purpose of Section 157(8)(b) of the Act, the margin of preference for international tendering and competition pursuant to Section 89 of the Act shall be:</p> <ul style="list-style-type: none">(a) twenty percent (20%) margin of preference of the evaluated price of the tender given to candidates offering goods manufactured, mined, extracted, grown, assembled or semi- processed in Kenya and the percentage of shareholding of Kenyan citizens is more than fifty percent (50%);(b) fifteen percent (15%) margin of preference of the evaluated price of the tender given to candidates offering goods manufactured, mined, extracted, grown, assembled or semi- processed in Kenya;(c) ten percent (10%) margin of preference of the evaluated price of the tender, where the percentage of shareholding of Kenyan citizens is more than fifty percent (50%);(d) eight percent (8%) margin of preference of the evaluated price of the tender, where the percentage of shareholding of Kenyan citizens is less than fifty percent (50%) but above twenty percent (20%); and(e) six percent (6%) margin of preference of the evaluated price of the tender, where percentage of shareholding of Kenyan citizens is above five percent (5%) and less than twenty percent (20%). | <p>The highest margin of preference of 20% is given where the bidder is offering locally manufactured goods and where Kenyans have more than 50% shareholding. There is a concern regarding which document a bidder should furnish during bidding to confirm that the offered goods were indeed manufactured in Kenya.</p> <p>Foreign firms can misuse this clause by dealing with a citizen contractor who has no capacity to perform, for the mere purpose of gaining the 20% margins of preference.</p> <p>The danger in giving margins of preference focused on the supplier is that the supplier ends up buying the goods from foreign sources at the expense of locally produced goods.</p> <p>There is need to have a policy change to have the margin of preference applied focusing on the value added in locally produced goods. This is in contrast to having margins of preference focused on the supplier as is currently the norm in the public procurement law.</p> |

2.10. Procurement Reservations

There are two types of reservations recognized under the public procurement legislation: one based on reserving procurement opportunities for firms and another for locally produced goods. Each of these is presented below in the context of the benefit for local production.

2.10.1. Reservation for Firms

Procuring entities are required under Regulation 149 of the PPADR, when processing procurement under Section 157(5) of the Act, to allocate at least 30% of its annual procurement budget for the purpose of procuring goods, works and services from enterprises owned by youth, women and PWD. The disadvantaged groups are required to apply to the National Treasury for registration. The registration requirements however fail to distinguish between those that are *actually* disadvantaged and those that are not. The principle of *equity* is not achieved because some of those classified as disadvantaged run businesses with millions of turnover yet they compete with new entrants who have very little capacity. Moreover, there is no effective system for graduation out of the disadvantaged groups, having attained the required capability.

Box 2. Goods with exclusive preference

(a) Motor vehicles, motorcycles, bicycles, plant and equipment which are assembled in Kenya; (b) Furniture, textile, foodstuff, oil, ICT, steel, cement, leather, agroprocessing, sanitary products, (c) Goods manufactured, mined and extracted or grown in Kenya, or (d) Hospitality, air travel and security services and (c) any other goods made in Kenya

Despite the provision for “any other goods made in Kenya”, four issues arising from this clause are (i) the identification of a few products makes an impression that those are the only items subject to exclusive preference yet all locally produced products are subject to exclusive preference, (ii) tendering documents have not been designed for the procuring entity to indicate that the goods shall be produced in Kenya, (iii) there is no common documentary evidence to show that the goods are actually produced in Kenya; (iv) without such document, procuring entities find it difficult to set a criterion in favour of local goods.

According to Regulation 154(1) and despite the provision of Section 54(1) of the Act, a procuring entity may, for the purpose of ensuring maximum participation of citizen contractors, disadvantaged groups, and small, micro and medium enterprises in public procurement, *unbundle* a category of goods, works and services in practicable quantities and do so through lotting.

The Regulation 156 of the PPADR provides that an enterprise registered by the National Treasury as a target group benefiting from the preference and reservation scheme shall be entitled to such benefits for a period of

As provided under Section 157(4)(d) of the PPADA and Regulation 151(1), the counties, sub-counties and constituencies shall be regions where exclusive preference and reservation schemes shall apply. These are the regions where citizen contractors are based and operate. The main document bidders furnish to demonstrate they are from the county is the specific business permit and evidence of location of the office.

According to Regulation 151(3), citizen contractors, who are based and operate in the regions, shall be given exclusive preference when participating in procurement, using funds from county government or any devolved fund. The exception happens where the procuring entity establishes that there is no local capacity available for the subject procurement, in which case, the opportunity is opened to national or international level bidders.

2.10.2. Reservation for Goods

According to Section 147(1) and (4) of the PPADA and Regulation 152(1) of the PPADR, a procuring entity shall grant *exclusive preference* to citizen contractors offering goods, services and works that are assembled, manufactured, mined, extracted or grown in Kenya. These include the goods listed in Box 2.

two years, which may be renewed biennially for up to a maximum of 10 years. However, there is no clear system for graduating the businesses after the 10 years.

2.11. Local Content

2.11.1. Legal Basis

The legal basis for local content in public procurement is provided in Section 157(9) as outlined in Box 3.

Box 3. Legal provision for local content

For the purpose of ensuring sustainable promotion of local industry, a procuring entity shall have in its tender documents a mandatory requirement as preliminary evaluation criteria for all foreign tenderers participating in international tenders to source at least 40% of their supplies from citizen contractors prior to submitting a tender. Regulation 144(2) requires that “...all tenderers include in their tenders a local content plan for the transfer of technology.

- (a) According to Regulation 144(1), an accounting officer shall, in accordance with Section 155(5)(b) of the Act, ensure that a procuring entity's tender documents contain a mandatory requirement as preliminary evaluation criteria specifying that the successful bidder shall (a) transfer technology, skills, and knowledge through training, monitoring and participation of Kenyan citizens, and (b) reserve at least 75% employment opportunities for Kenyan citizens for works, consultancy services, and non-consultancy services, of which not less than 20% shall be reserved for Kenyan professionals at management level.
- (b) Regulation 144(2) provides that the accounting officer shall ensure that the procuring entity's tender document contains a mandatory requirement specifying that all tenderers include in their tender a local content plan for the transfer of technology.
- (c) Under Regulation 144(3), the local content plan shall include (a) positions reserved for employment of local citizens, (b) capacity building and competence development program for local citizens, (c) timeframe within which to provide employment opportunities, (d) demonstrate efforts for accelerated capacity building of Kenyan citizens, (e) succession planning and management, (f) a plan demonstrating linkages with local industries, which ensure at least 40% inputs are sourced from locally manufactured articles, materials and suppliers, partially mined or produced in Kenya, or where applicable have been assembled in Kenya.
- (d) The local content policy provides a legal framework for utilization of local content in the local market

including the use of local labour, skills, technology, raw materials and inputs in economic and social activities in Kenya. The policy would also contribute to job creation, forex exchange, and enhance inclusivity in participation of MSMEs.

The practicality and implication of these legal provisions are analysed below in respect to the expected impact on promotion of locally produced goods.

2.11.2. Goods

A product, or good, is defined as an output from a manufacturing process, even if it is intended for later use in another manufacturing operation. The formula for applying the value added criterion is expressed as a percentage as $[(VA/EXW) \times 100]$, where VA is the difference between the ex-works price of a finished product and the customs value of the materials imported from outside the country based on FOB and used in the production, while EXW means the ex-works price.¹⁷ This formula gives the value of the local content for the particular goods.

Depending on the magnitude of the value of the imported raw materials, the local content for the goods represents a continuum, where the local content can range between 0% and 100% of the price of the good.

To identify the local content will require a listing and value of the imported raw materials, the balance divided by the selling price to obtain the percentage of local content for the product. This percentage of local content can be used to apply margins of preference in favour of locally produced goods. The more local content, the higher the margin of preference that is applicable to the subject goods (see Table 5).

Table 5. Comparison of different value added in locally produced goods

#	Description	Scenarios		
		KES	KES	KES
1	Ex works price (EXW)	1,000	1,000	1,000
2	Less FOB value of imported raw materials (RM)	200	500	800
3	Value Added Amount (VA)	800	500	200
4	Value Added Percentage (VA/EXW) x100	80%	50%	20%

2.11.3. Consulting Services

When procuring consulting services, there are several ways in which local content can be achieved in favour of Kenyan experts.

First, by setting the technical evaluation criteria to include a specified number of points for Kenyans, among the key experts, as measured by the level of effort slotted

for Kenyans. The points allocated for local experts is usually 10% and could be increased to 20%, motivating international consulting firms to seek for local experts in key positions.

Second, the technical criterion for transfer of knowledge and training program will also be included for the consultants to propose on how they shall transfer knowledge to Kenyans.

Third, provide that the key experts shall have good experience working in Kenya or Africa.

Fourth, provide for a margin of preference, say 20%, in favour of consulting firms on the financial price offered by the Kenyan citizens consulting firms. The margins of preference should not be on the technical scores but rather the financial price and subsequent comparison of proposed prices.

2.11.4. Works

To establish the local content for works, Table 6 has been provided as part of the tendering forms in the standard tender documents. The instructions appear to suggest that the form shall be filled only by foreign firms, who shall submit documentary evidence that the criterion has been met.

It was observed that the factor on “subcontract to local

Table 6. Tendering form for the 40% local content

Item	Description of Work Item	Describe Location of Source	Cost (KES)	Comments
A	Local Labor			
1				
2				
B	Sub contracts from local sources			
1				
2				
C	Local materials			
1				
2				
D	Use of local plant and equipment			
1				
2				
E	Add any other items			
1				
2				
Total cost of local content				
Percentage of contract price				

sources” could mean that once the subcontractor gets the contract from the contractor, there is nothing that bars them from importing the materials and goods from foreign sources to meet the subcontract. The same applies to local plant and equipment because these items may not be necessarily manufactured in Kenya. These loopholes should be sealed so that this form sets criteria of sourcing of local materials and labour and not obtaining materials and labour from “local contractors”.

The same principle used in goods should be applied for works, so that the contractor, whether local or foreign,

states and clearly lists the materials and labour that shall be imported into Kenya, so that the balance of the contract price will consist of local value added, save for exported profit (see Table 7).

Given that works in most cases use local materials, this criterion will be less cumbersome than asking contractors to list all local content. Also, this method is neater because the contractor will show evidence of customs declarations and taxes paid, as evidence of the total materials imported into the country.

Table 7. Comparison of different value added for works

#	Description	Scenarios		
		KES	KES	KES
1	Bid price	1,000	1,000	1,000
2	Less value of imported materials	200	500	800
3	Less value of imported equipment	100	200	100
4	Less value of imported labour	300	200	100
5	Value Added Amount	400	100	0
6	Value Added Percentage	40%	10%	0%

2.11.5. Non consulting Services

The non-consulting services such as transport, security guarding, cleaning, and others will use the same approach as for works. The local content will be the balance between the bid price and the value of imported materials, labour and equipment.

2.12. Preferential Procurement Master Roll

The Preferential Procurement Master Roll includes medicine, medical supplies, medical equipment, medical laboratory supplies, metal and allied, automotive accessories, paperboard and packaging, timber, wood and furniture, building, mining and construction, food and beverages, leather and footwear, textiles and apparel, plastic and rubber, chemical and allied, energy electrical and electronics, and cross cutting sectors.

According to KAM, the Master Roll will require (a) enhanced access to information about available opportunities for local manufactures to participate in; (b) public entities should use the procurement portal to list all public tenders floated by their respective institutions; (c) the national and county governments should provide information about special projects to allow for the private sector to interrogate the bill of materials and assess which products can be supplied by local manufacturers;

Moreover, (d) the status of implementation of the Local Content Policy and uptake of products from the Master Roll of publicly available products should be well updated on the public procurement portal. This is to facilitate monitoring and evaluation of milestones made in localizing public procurement; (e) The Preferential Procurement Master Roll should be shared across all public and private entities to support uptake of products from this list. The challenge however is that not many procuring entities were aware of the Master Roll. It was also unclear how the Master Roll was prepared and if all the items in the Master Roll were indeed manufactured in Kenya.

About 68% of public procurement officers have heard about the Master Roll. Several issues arise about this master roll. *First*, it is unclear how the list was developed and if indeed all those listed goods are actually manufactured in Kenya. *Second*, the Master Roll is not anchored in law. *Third*, it is cumbersome coming up with the master roll and continuously update it. *Fourth*, instead of developing a master roll, the policy should shift to defining a locally produced product and how to identify such products.

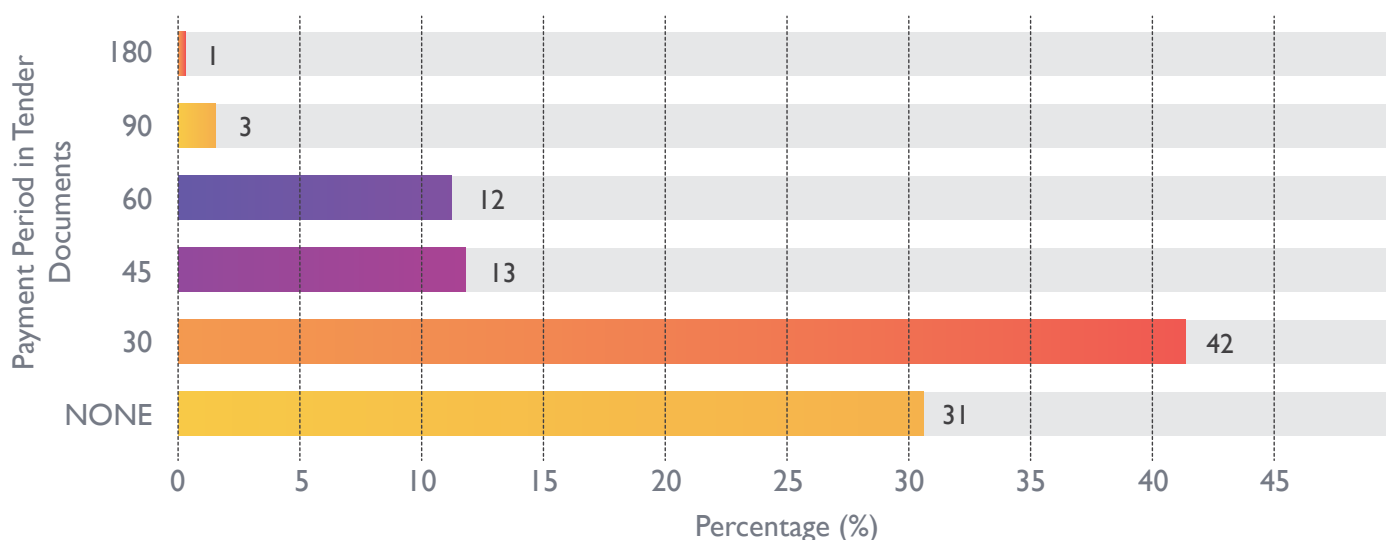
2.13. Supplier Payments

Late payment or failure to pay suppliers for goods delivered has been a serious challenge in Kenya for some time. According to Regulation 150 of the PPADA, *subject to availability of funds* and after proper certification of goods, services or works have been done, a procuring entity shall make prompt payments for all performed contracts including enterprises owned by youth, women and persons with disabilities and shall make payments within 60 days from the date of receipt of the invoice.

The 60 days payment period appears reasonable but is conditional on availability of funds, with procuring entities endless excuse about unavailable funds. Notably, to monitor the early payment of suppliers, Regulation 150(4) of the PPADR provides that procuring entities shall submit a quarterly payment performance statistic to the National Treasury and the PPRA demonstrating compliance with the obligation to pay invoices within 60 days for publication.

As shown in Figure 3, about 31% of the tender documents did not have information about the payment period. Moreover, whereas the payment period in the standard tender documents is 30 days, procuring entities modified this period to 45, 60, 90 or even 120 days in an attempt to delay payment of suppliers and reduce the chances of the aggrieved suppliers charging interest on delayed invoices.

Figure 3. Payment period stated in tender documents, N=120



CHAPTER 3: SUMMARY FINDINGS, RECOMMENDATIONS AND ACTION PLAN

The following summary findings and recommendations are made to address the identified weaknesses in the public procurement framework and systems. The schedule proposes the timelines within which each recommendation is expected to commence by the responsible organizations. The timelines have been proposed with effect from the publication of this report as follows: Short Term (ST) of 6 months, Medium Term (MT) of one year, and Long Term (LT) of more than one year.

#	Key Finding	#	Recommendation	Responsible	Schedule
1	The existing legal definition of locally produced product or service does not address the issue of percentage of local content that a product should have to be recognized as a local. In the context of public procurement system and practice, there is no clear, practical operational definition and meaning of the words “local goods”, “local product”, “local manufacturing”, and “local manufacturer”, which makes it difficult for procuring entities to correctly set the eligibility and evaluation criteria for procuring locally produced goods and from local manufacturers.	1.1	The stakeholders in the manufacturing sector should work with the government to develop operational definitions of local goods, local product, local manufacturer, and local manufacturing, as well as the percentage of local content for the goods to be classified as local, which is practically useful in the public procurement legislation.	a. Kenya Association of Manufacturers b. The National Treasury c. The State Department for Trade d. The State Department for Industry e. Public Procurement Regulatory Authority	MT
		1.2	All the standard tender documents for goods, works, services and consultancies should be revised to include the definitions of “local goods”, “local product”, “local manufacturing”, and “local manufacturer”, to provide the operational definition of these terms in procuring goods from local manufacturers.	a. Kenya Association of Manufacturers b. The National Treasury c. The State Department of Trade d. Public Procurement Regulatory Authority	MT
		1.3	All the standard tender documents for goods, works, services and consultancies should be revised to include the definitions of “local goods”, “local product”, “local manufacturing”, and “local manufacturer”, to provide the operational definition of these terms in procuring goods from local manufacturers.	a. Kenya Association of Manufacturers b. The National Treasury c. The State Department for Trade d. Public Procurement Regulatory Authority	MT
2	The standard tender documents provide that all the goods and related services to be supplied under the procurement contract should have their <i>origin</i> in an eligible country. The ineligible countries are those by law Kenya prohibits commercial relations with and by virtue of a decision of the United Nations Security Council, there is prohibition to	2.1	The standard tender documents should be revised to provide a criterion for bidders to indicate the country of origin of the offered goods, besides the variable provided in the price schedule forms.	a. Kenya Association of Manufacturers b. The National Treasury c. Public Procurement Regulatory Authority	ST

	trade with. However, there is no clause that provides Kenya as the country of origin for the offered goods.				
3	To effectively procure local products from local manufacturers, there is lack of clear consensus on the documentary evidence that a tenderer shall submit to evidence that the goods were manufactured in Kenya. It is also unclear which agency, authority, or office should issue such a documentary certificate for the locally manufactured goods. Also, whether local manufacturers could be willing to indicate local content of their goods in the certificate.	3.1	The key stakeholders should consult amongst themselves to reach a consensus and consult with the Government to agree on which organization should issue a certificate of local content that clearly indicates the percentage of local inputs used in the product. The identified organization should put in place credible system for the assessment of products and issuance of the Certificate of Local Content.	<ul style="list-style-type: none"> a. Kenya Association of Manufacturers b. The National Treasury c. Department of Trade d. Department of Industry e. Public Procurement Regulatory Authority 	MT
		3.2	Revise the standard tender documents for goods, works and services to guide the use of the Certificate of Local Content as eligibility criteria, margins of preference, and financial evaluation criteria when procuring goods, and for use in receiving the goods upon delivery.	<ul style="list-style-type: none"> a. Kenya Association of Manufacturers b. The National Treasury c. Public Procurement Regulatory Authority 	MT
4	The procurement plan format does not have an option for indicating if the subject goods shall be local products from local manufacturer.	4.1	The standard format for preparing the procurement plan should be revised to insert a column for indicating on a YES/NO basis if the goods shall be local products from local manufacturers.	<ul style="list-style-type: none"> a. Kenya Association of Manufacturers b. The National Treasury c. Public Procurement Regulatory Authority 	ST
5	There is no standard document for registration of suppliers, leaving procuring entities to either use the older versions applicable for the 2005 procurement law or modify the more complex standard tender document for prequalification of contractors, which is for a different procurement procedure and inappropriate for registration of suppliers, making the process more complex than necessary.	5.1	Design a standard tender document for registration of suppliers that is in line with the public procurement legislation and considering recommendations containing in this report.	<ul style="list-style-type: none"> a. Kenya Association of Manufacturers b. The National Treasury c. Public Procurement Regulatory Authority 	MT
6	There is no centralized register of local manufacturers and corresponding locally produced goods, from which procuring entities can conduct market survey to inform procurement planning and subsequent sourcing of the goods.	6.1	Prepare and implement a national online register of manufacturers of locally produced goods that could be accessed by procuring entities and the public for local goods manufactured in Kenya.	<ul style="list-style-type: none"> a. The National Treasury b. Public Procurement Regulatory Authority 	LT
7	Procuring entities decide on which names of suppliers to invite to submit bids in restricted tenders and request for quotation. Not all eligible and qualified suppliers are invited to quote or bid. Mostly, few suppliers happen to garner most of these opportunities to the exclusion of many in the register of suppliers. Electronic reverse auction could address the problem of selective invitation of suppliers, but it is not in use in the public sector.	7.1	The National Treasury and the PPRA should ensure that the electronic reverse auction is included in the new eGovernment Electronic Procurement System. All those in a specified category of goods should be invited to submit bids or quotations.	<ul style="list-style-type: none"> a. The National Treasury b. Public Procurement Regulatory Authority 	LT

8	A review of 120 tender documents for goods prepared in FY2022/23 reflect challenges in correct drafting of the tender data sheet, with several variables left out blank or filled out incorrectly.	8.1	Revise the standard tender documents for goods to provide clarity on lot-sizing, use of electronic procurement system, listing of related services, pre-bid conference, joint ventures, goods originating from Kenya, manufacturer's authorization forms for trading suppliers and not manufacturers, and other recommendations in this report.	<ul style="list-style-type: none"> a. Kenya Association of Manufacturers b. The National Treasury c. Public Procurement Regulatory Authority 	ST
9	The documents that bidders are required to prepare their bid are well specified in the instructions to tenderers by using the tendering forms and attaching the support documents. In practice however, procuring entities demand that bidders fill in the information in the tendering forms and submit the whole tender document back as the bid. This practice leads to bulky bids submitted by bidders, increasing the cost of doing business and discouraging small businesses and local manufacturers from public tendering.	9.1	Government should issue a circular to procuring entities to direct them to adhere to the requirement in the tender documents about the documents comprising the tender so that the submission of bids will be easier, especially for small local businesses in Kenya.	<ul style="list-style-type: none"> a. Public Procurement Regulatory Authority b. Kenya Association of Manufacturers 	ST
10	Unlike foreign manufacturers, most local manufacturers rarely publish or publicize their product brochures, which means that internet search mostly returns foreign product offerings, thereby reducing visibility of local products when procuring entities perform online market surveys. Without product brochures, local manufacturers are at a disadvantage in bidding and winning public tenders and other public procurement opportunities. Additionally, they are less visible when online market surveys are conducted for procurement planning.	10.1	Conduct consultations among stakeholders in the manufacturing sector and develop a policy on local manufacturers to prepare technical product brochures for the locally produced products.	<ul style="list-style-type: none"> a. Kenya Association of Manufacturers b. The National Treasury c. State Department for Trade d. State Department for Industry e. Public Procurement Regulatory Authority 	MT
11	Procuring entities often do not correctly set specifications for required goods, leading to set bidders' guesswork on what is required. Whereas procuring entities require bidders to submit product brochures or detailed description of offered goods, this requirement is seldom used in the evaluation of bids to check on conform/not conform basis if the offered product met the required specifications and schedule of requirements. This lapse leads to delivery of poor quality goods, which increases the perception that locally produced goods are of poor quality.	11.1	A guidance circular should be issued to procuring entities on the setting of specifications and proper technical evaluation of bids on <i>conform/not conform</i> basis to check if the offered goods met the required technical specifications. The circular should be clear on the distinction between technical evaluation criteria and qualification evaluation criteria and its application in evaluation of bids.	<ul style="list-style-type: none"> a. Public Procurement Regulatory Authority b. Kenya Association of Manufacturers 	LT

12	As required in the standard tender documents, when procuring goods, the qualification criteria are required to be set differently in two sections for (a) manufacturers producing the goods they offer, and (b) trading suppliers offering goods on behalf of manufacturers. However, a review of the tender documents revealed that in 81% of them, the qualification criteria were set incorrectly. Of more concern, in 91% of the tender documents, the procuring entities ignored the guidelines in the standard tender document by failing to provide two sets of qualification criteria, one for manufacturers and another set for trading suppliers.	12.1	Manufacturers of goods should not be required to submit own manufacturer's authorization forms; rather, they are supposed to produce evidence that they are indeed the manufacturers of the goods. A circular should be issued to procuring entities to ensure this distinction is made when preparing tender documents for goods.	a. Public Procurement Regulatory Authority b. Kenya Association of Manufacturers	ST
13	A review of the standard tender documents for goods shows that the certificate of independent tender determination, self-declaration forms SD1 and SD2, declaration and commitment to the code of ethics, and appendix I on fraud and corruption, are provided as separate forms despite being incorporated in the Form of Tender, leading to bulky documentation requirements that lead to high cost of preparing bids and doing business. Also, the following tendering forms used to demonstrate meeting the qualification criteria are missing from the tender documents: financial resources form, average annual supply turnover form, manufacturing capacity form, and similar experience form.	13.1	The standard tender documents for goods should be revised to delete the certificate of independent tender determination, self-declaration forms SD1 and SD2, declaration and commitment to the code of ethics, and appendix I on fraud and corruption, and transfer the relevant clauses to the corresponding clauses existing in the Form of Tender. The following forms are missing and should be added to the standard tender documents for goods: financial resources form, average annual supply turnover form, manufacturing capacity form, and similar experience form. These forms should normally correspond to the qualification criteria already provided for in the standard tender documents for goods.	a. Public Procurement Regulatory Authority b. Kenya Association of Manufacturers	ST
14	Under the conditions of contract, there is no requirement for the supplier to furnish a certificate to show the country of origin of the delivered goods or the local content. Procuring entities often leave the special conditions of contract blank, rendering the interpretation of clauses difficult.	14.1	A circular should be issued on the proper customization of the special conditions of contract, including documents required to evidence the country of origin of the goods, and evidence of local manufacturing of the goods.	a. Public Procurement Regulatory Authority b. Kenya Association of Manufacturers	ST
15	There is tension between two issues: whether the focus of Local Content Policy should be "locally produced goods" or "local contractors and citizen suppliers", and the two are quite different in policy perspective	15.1	The tender documents should be revised to provide for margins of preference for goods manufactured in Kenya based on the percentage of local content of the offered goods.	a. Public Procurement Regulatory Authority b. Kenya Association of Manufacturers	ST
16	Procuring entities are required under Regulation 149 of the PPADR when processing procurement under Section 157(5) of the Act, to allocate at least 30% of its annual procurement budget for the purpose of procuring goods, works and services from enterprises	16.1	The current definition of disadvantaged groups should be refined to include micro and small business, graduation out of the disadvantaged groups, and ensure the allocation benefits those that actually need to be under the reservation scheme.	a. The National Treasury b. Public Procurement Regulatory Authority c. Kenya Association of Manufacturers	LT

	<p>owned by youth, women and PWD. The disadvantaged groups are required to apply to the National Treasury for registration. The registration requirements however fail to distinguish between those that are <i>actually</i> disadvantaged and those that are not. The principle of <i>equity</i> is not achieved because some of those classified as disadvantaged run businesses with millions of turnover, yet they compete with new entrants who have very little capacity. Moreover, there is no effective system for graduation out of the disadvantaged groups, having attained the required capability.</p>				
17	<p>To establish the local content for works, a tendering form has been provided in the standard tender documents to demonstrate at least 40% local content. The instructions appear to suggest that the form shall be filled only by <i>foreign firms</i>, who shall submit documentary evidence that the criterion has been met. This is misleading because foreign bidders are allowed to submit bids even for national tenders, and some through joint ventures with local firms.</p>	17.1	<p>The local content tendering form should be revised, with slightly different formats and variables for goods, works, or services to enable bidders list the value of imported raw materials and labour, based on which the local content is derived from.</p>	<ul style="list-style-type: none"> a. Public Procurement Regulatory Authority b. Kenya Association of Manufacturers 	ST
18	<p>About 68% of public procurement officers have heard about the master roll. Several issues arise about this master roll. First, it is unclear how the list was developed and if indeed all those listed goods are actually manufactured in Kenya. Second, the master roll is not anchored in law. Third, it is cumbersome coming up with the master roll and continuously updating it. Fourth, instead of developing a master roll, the policy should shift to defining a locally produced product and how to identify such products. There is lack of a common marketplace either physical or online serving as a go-to database and place for locally produced goods to serve as source of information for market surveys used in procurement planning.</p>	14.1	<p>Consult key stakeholders in the manufacturing sector and government and develop a database of local goods and their manufacturers and develop a database readily accessible to the public and the procuring entities.</p>	<ul style="list-style-type: none"> a. Kenya Association of Manufacturers b. The National Treasury c. Department of Trade d. Department of Industry e. Public Procurement Regulatory Authority 	MT
19	<p>Late payment or failure to pay suppliers for goods delivered has been a serious challenge in Kenya for some time. According to Regulation 150 of the PPADA, <i>subject to availability</i> of funds and after proper certification of goods, services or works have been done, a procuring entity shall make prompt payments for all performed contracts including enterprises owned by youth, women and persons with disabilities and shall</p>	19.1	<p>The procurement law and regulations should be amended to provide for at most 30 days payment period. Likewise, the standard tender documents should be revised to provide for the 30 days payment period. A clause for penalty on late payment should be introduced in the standard conditions of contract.</p>	<ul style="list-style-type: none"> a. Kenya Association of Manufacturers b. The National Treasury c. Department of Trade d. Department of Industry e. Public Procurement Regulatory Authority 	ST

	<p>make payments within 60 days from the date of receipt of the invoice.</p> <p>The 60 days payment period appears reasonable but is conditional on availability of funds, with procuring entities endless excuse about unavailable funds. Notably, to monitor the early payment of suppliers, Regulation 150(4) of the PPADR provides that procuring entities shall submit a quarterly payment performance statistic to the National Treasury and the PPRA demonstrating compliance with the obligation to pay invoices within 60 days, for publication.</p> <p>About 31% of the tender documents did not have information about the payment period. Moreover, whereas the payment period in the standard tender documents is 30 days, procuring entities modified this period to 45, 60, 90 or even 120 days in an attempt to delay payment of suppliers and reduce the chances of the aggrieved suppliers charging interest on delayed invoices.</p>			
20	<p>There is lack of skills among public procurement officers in correct setting of eligibility criteria, technical evaluation criteria, financial evaluation criteria, and qualification evaluation criteria aimed at procuring local products from Kenyan manufacturers.</p>	20.1	<p>The PPRA in collaboration with KAM should prepare practical training modules and materials and conduct nationwide training and capacity building of public procurement officers and user departments on the areas of weakness identified in this report.</p>	<p>a. Public Procurement Regulatory Authority b. Kenya Association of Manufacturers</p> <p>ST</p>

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ANNEXES

Annex I. Organizations for personal interviews

#	Organization	Respondent
1	Executive Office of the President	Chief of Staff and Head of Public Service
2	State Department of Trade	a. PS State Department of Trade b. Director Internal Trade
3	Auditor General	a. Director Audits b. Procurement Director
4	Public Procurement Department: The National Treasury	a. Director PPD b. Manager, Preferences and Reservations
5	Public Procurement Regulatory Authority	a. Director General b. Director Compliance
6	Kenya Institute of Supplies Management	a. Chief Executive Officer b. Head of Capacity Building
7	Micro and Small Enterprises Authority	a. Director Strategy Planning and Coordination b. Registrar of MSEs c. Director SCM
8	Department of Defense	Director Supply Chain Management
9	Council of Governors	a. Chairperson Trade and Finance b. Manager Planning, Monitoring
10	Kisumu County	a. CEC Trade or Finance County Government b. Chairperson Trade or Finance Committee County Assembly c. Director Supply Chain Management
11	Vihiga County	a. CEC Trade or Finance County Government b. Chairperson Trade or Finance Committee County Assembly c. Director Supply Chain Management
12	Uasin Gishu County	a. CEC Trade or Finance County Government b. Chairperson Trade or Finance Committee County Assembly c. Director Supply Chain Management
13	Machakos County	a. CEC Trade or Finance County Government b. Chairperson Trade or Finance Committee County Assembly c. Director Supply Chain Management
14	Elgeyo Marakwet	a. CEC Trade or Finance County Government b. Chairperson Trade or Finance Committee County Assembly c. Director Supply Chain Management
15	Makueni	a. CEC Trade or Finance County Government b. Chairperson Trade or Finance Committee County Assembly c. Director Supply Chain Management
16	Kenya Bureau of Standards	a. Director Standards Development and Trade b. Supply Chain Manager
17	Kenya Private Sector Alliance	a. Head of SME Development b. Program Manager Sustainable Inclusive Business
18	Kenya National Chamber of Commerce	Chief Executive Officer
19	Kenya Association of Manufacturers	a. Deputy Head Policy Research and Advocacy b. Procurement Manager

Annex 2. Profile of Respondent Procurement Practitioners

Gender	Number	Percentage (%)
Male	192	64
Female	102	34
<i>Respondent Job Level:</i>		
Assistant	96	33
Officer	138	47
Manager	49	17
Director	9	3
<i>Professional Qualification:</i>		
Certificate	3	1
Diploma	61	21
Bachelors	167	57
Masters	54	18
Doctorate	8	3
<i>Years' Experience:</i>		
Mean	7	
Median	6	
Minimum	1	
Maximum	43	
Total Respondents: 294		

Annex 3. Profile of Respondent Manufacturers

Gender	Number	Percentage (%)
Male	192	64
Female	102	34
<i>Respondent Job Level:</i>		
Assistant	96	33
Officer	138	47
Manager	49	17
Director	9	3
<i>Professional Qualification:</i>		
Certificate	3	1
Diploma	61	21
Bachelors	167	57
Masters	54	18
Doctorate	8	3
<i>Years' Experience:</i>		
Mean	7	
Median	6	
Minimum	1	
Maximum	43	
Total Respondents: 294		

Annex 4. Format for setting the qualification criteria for goods manufacturers and traders

- (a) The Procuring Entity shall carry out the post-qualification of the Tenderers using the requirements specified below.
- (b) The criteria are divided into two; for a **manufacturer** and **trading supplier**. If the Tenderer is a **manufacturer**, it shall meet the qualification criteria under A below.
- (c) If a Tenderer is a **Trading Supplier** offering the goods on behalf of the manufacturer under Manufacturer’s Authorization Form, the manufacturer shall demonstrate the qualifications under A, and the Tenderer shall meet the qualification criteria under B.
- (d) Manufacturers are not required to submit Manufacturer’s Authorization Form but shall provide evidence that they are the manufacturers of the subject goods.
- (e) Where a Manufacturer’s Authorization Form is not required by the procuring entity, the **Trading Supplier** shall meet the three criteria numbers 7, 8 and 9 under B.
- (f) The minimum qualification requirements for multiple contracts will be the sum of the minimum requirements for respective individual contracts.
- (g) Tenderers that do not meet the qualification criteria shall be disqualified at this stage and shall not proceed further in evaluation.

No.	Subject	Qualification Criteria	Required Documentary Evidence and Forms
A: Tenderer as Manufacturer			
1	Years in Business	The Tenderer shall have been manufacturing similar goods for the last (insert the number of years to cover a sufficiently long period, ranging from 2 to 5 years, depending upon the goods to be procured).	<ul style="list-style-type: none"> a. Certificate of Incorporation or Registration; and, b. Manufacturing License or similar evidence
2	Financial Capacity	The Tenderer shall demonstrate that it has access to, or has available, liquid assets, unencumbered real assets, lines of credit, and other financial means (independent of any contractual advance payment) sufficient to meet the supply cash flow of Kenya Shillingsequivalent.	<ul style="list-style-type: none"> a. Financial Sources Form b. Letter from Financial Institution as evidence of financial resources.
3	Average Annual Turnover	Minimum average annual supply turnover of Kenya Shillings [insert amount, specify a figure about 2.5 times the total estimated cost in the procurement plan or budget)] or equivalent, calculated as total certified payments received for contracts of goods manufactured and supplied within the last..... [insert number of years).	<ul style="list-style-type: none"> a. Average Annual Supply Turnover b. Audited Accounts and Financial Statements
4	Experience	The Tenderer shall furnish documentary evidence to demonstrate successful manufacture and completion of at least (Insert number) contracts of similar Goods in the last (Insert years), each contract of a value of at least Kenya shillings equivalent.	<ul style="list-style-type: none"> a. Contract Agreement or Purchase Order, and b. Delivery Notes
5	Technical Capacity	The Tenderer shall have installed capacity to manufacture at least units of similar goods per month.	Evidence of Manufacturing Capacity

B. Tenderer as Trading Supplier

6	Manufacturer's Authorization	If a Tenderer is a supplier offering the goods on behalf of or from a manufacturer under Manufacturer's Authorization Form, the Manufacturer shall demonstrate the above qualifications criteria under A and the Tenderer shall demonstrate it meets the following criteria.	Manufacturer's Authorization Form
7	Financial Capacity	The Tenderer shall demonstrate that it has access to, or has available, liquid assets, unencumbered real assets, lines of credit, and other financial means (independent of any contractual advance payment) sufficient to meet the supply cash flow of Kenya Shilling [insert amount].	<ul style="list-style-type: none"> a. Financial Sources Form b. Letter from Financial Institution as evidence of financial resources.
8	Average Annual Turnover	Minimum average annual supply turnover of Kenya Shillings [insert amount] equivalent calculated as total certified payments received for contracts in progress and/or completed within the last [insert of year] years, divided by [insert number of years] years.	<ul style="list-style-type: none"> a. Average Annual Supply Turnover b. Audited Accounts Financial Statements
9	Similar Experience	The Tenderer has satisfactorily and substantially completed at least (insert number) contracts of a similar nature as a prime supplier or a joint venture member, each of a minimum value in Kenya shillings [insert amount] equivalent.	Similar Experience Form

Source: Adapted by the author from the standard tender documents for goods

Who we are

Kenya Association of Manufacturers (KAM) is the leading voice and representative of manufacturing and value-add industries in Kenya since its establishment in 1959.

KAM is a dynamic, vibrant, credible organization that unites industrialists and offers a common voice for businesses. The Association's key role is to advance a favourable policy environment for the manufacturing industry to achieve global competitiveness in addition to providing demand-driven services and support to manufacturing.

The Association represents over 1,300 companies classified in 14 different sectors. Additionally, KAM has 7 regional offices across the country.

Our Vision

To be a World Class BMO that effectively delivers services to its members

Our Mission

To promote global competitiveness, sustainable local manufacturing and exports

Our Purpose

To create prosperity for the nation through sustainable industrialization

A publication of

KENYA ASSOCIATION OF MANUFACTURERS

Creating prosperity for the nation through sustainable industrialization

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