RECONCILING INCONGRUOUS POLICY OBJECTIVES AND BENCHMARKING KENYA'S PUBLIC PROCUREMENT LAW: A REVIEW OF THE SELEX CASE

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Muthomi Thiankolu

[1] *High Court of Kenya Miscellaneous Civil Application No. 1260 of 2007: Republic v. The Public Procurement Administrative Review Board & 2 Others Ex-Parte Selex Sistemi Integrati.*

ABSTRACT

This dissertation critically examines the policy objectives underlying Kenya's Public Procurement and Disposal Act, 2005 ("**the Procurement Act**" or "**the Act**").[1] It also provides a critical analysis of the Selex Case. It argues, *inter alia*, that the drafters of the Procurement Act unnecessarily made subtle departures from the United Nations Commission on International Trade Law Model Law on Procurement of Goods, Construction and Services ("**the Model Procurement Law**").[2] Due to those subtle departures, there are many serious conflicts within the Procurement Act, and between the Act and other Kenyan laws. The conflicts, analyzed in this dissertation, can vitiate the policy objectives underlying the Procurement Act. This dissertation also benchmarks and proposes a thorough review of the Procurement Act. It concludes, *inter alia*, that pending amendments to the Procurement Act, Kenyan procurement officials, courts and tribunals must attempt to resolve the conflicts.

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[1] Act No. 3 of 2005. Updated versions of Kenyan laws are available at http://www.kenyalaw.org/ (accessed on 25th June 2009).

[2] A model law is not a legal instrument, but a suggested template for lawmakers to adopt, with or without modification. For a list of municipal laws based on the Model Procurement Law, visit http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/1994Model_status.html (accessed on 6th July 2009).

ABBREVIATIONS

DSU…….Understanding on Rules and Procedures Governing the Settlement of Disputes.

EU……...….The European Union.

GATT……...……...General Agreement on Tariffs and Trade.

GNP……..…Gross National Product.

GPA…….……Agreement on Government Procurement.

KCAA……...…….……Kenya Civil Aviation Authority.

SMEs……...……..Small and Medium-Sized Enterprises.

WTO…….……..World Trade Organisation.

CHAPTER 1: INTRODUCTION

1.1 Preliminary Remarks

Public procurement, i.e. purchase by governments and public entities of goods and services from the private sector in order to carry out public functions, is an important economic activity.[1] It constitutes a significant portion of the gross domestic product of many states.[2] Public procurement is also a strategic tool for promoting ancillary socioeconomic and political policies.[3] Various policy goals, and stakeholder interests, therefore, may inform a country's public procurement system.[4]

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[1] Lester, S. and Mercurio, B. (2008) *World Trade Law, Text, Materials and Commentary*, Hart Publishing, Portland, OR, at p. 665.

[2] *ibid*. See also Knight, L. *et al* (Eds.) (2007*) Public Procurement: International Cases and Commentary*, Routledge, London, at pp. 1 and 19.

[3] Reich, A. (1999) *International Public Procurement Law: the Evolution of International Regimes on Public Purchasing (Studies in Transnational Economic Law)*, v. 12, Kluwer International, London, at p. 2. See also Bolton, P. (2006) "*Government Procurement as a Policy Tool in South Africa*," 6 (3) Journal of Public Procurement, 193-217 at pp. 193, 195 and 196.

[4] Knight, L. *et al* (Eds.), *op. cit.* at pp. 19-22 and 343-350. See also Schooner, S. L. (2002) "*Desiderata: Objectives for a System of Government Contract Law,"* 2 Public Procurement Law Review, 103-110. According to Snider and Rendon, most scholars tend to focus on either allocative or structural policies of a procurement system, rather than both. Generally, structural policies go to the legal and institutional framework underlying a procurement system. Allocative policies, generally, go to specific outputs, goals or impacts envisioned by a procurement system. See Snider, K. F. and Rendon, R. G. (2008) "*Public Procurement Policy: Implications for Theory and Practice*," 8 (3) Journal of Public Procurement, 310-333 at pp. 317-320.

Effective resolution of procurement disputes might occasionally impel an inquiry into the policy objectives underlying the relevant procurement legislation.[5] Even upon such inquiry, resolution of procurement disputes might still present a difficult challenge–for several reasons. First, it is difficult to articulate (all) the objectives that may underlie a procurement system.[6] Second, a public procurement law may have contradictory or irreconcilable policy objectives.[7] Third, as will become clearer in the ensuing chapters of this dissertation, the objectives of a procurement law may conflict with other norms in the country's legal system. Where such conflict exists, the pursuit of one policy goal (or interest) may hamper the pursuit (or achievement) of another,[8] thereby necessitating a subtle balance (or harmonization).[9]

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[5] Regulation (read "legislation") is one of three main approaches to public procurement, the others being managerialism and centralisation. Countries generally adopt the three approaches, in various degrees of combination, to achieve the desired policy goals. See Schapper, P. R., Malta, J. N. and Gilbert, D. L. (2006) "*An Analytical Framework for the Management and Reform of Public Procurement,*" 6 (1) Journal of Public Procurement, 1-26 at pp. 4-13.

[6] Schooner, S. L., *op. cit.* at p. 103.

[7] *ibid*, at pp. 106-107. On the trade-offs that procurement officials have make among conflicting policy objectives, see Thai, K. V. (2009) *"International Public Procurement: Concepts and Practices,"* in Thai, K. V. (Ed.) *International Handbook of Public Procurement*, CRC Press, Boca Raton, FL., at pp. 2-3. See also Schapper, P. R., Malta, J. N. and Gilbert, *op. cit.* at pp. 1 and 5.

[8] Knight, L. *et al* (Eds.), *op. cit.* at p. 20.

[9] *ibid.* See the Ruling/Judgment of Justice Joseph Nyamu (as he then was), hereinafter cited as "**Nyamu J.**," annexed as to this dissertation. See also *Cash Paymaster Services (Pty) Ltd v. Eastern Cape Province & Others* (1999) (1) SA 324 (Ck), discussed in Bolton, P., *op. cit.* at pp. 207-208.

1.2 Foreword

This dissertation critically examines the policy objectives underlying the Procurement Act. It provides a critical analysis of the Selex Case and benchmarks the Procurement Act. It demonstrates and critically examines many conflicts within the Procurement Act, and between the Act and other Kenyan laws.

Chapter 2 provides an outline of the Selex Case. Chapter 3 examines the policy objectives underlying the Procurement Act. Chapter 3 also examines conflicts within the Procurement Act, and conflicts between the Act and other Kenyan laws. Chapter 4 benchmarks the Procurement Act, in the context of the issues raised by the Selex Case, against the Model Procurement Law and the World Trade Organisation's Agreement on Government Procurement ("**the GPA**"). Chapter 5 comprises conclusions.

CHAPTER 2: THE SELEX CASE

2.1 The Tender and Award

In April 2007, the Kenya Civil Aviation Authority ("**KCAA**") invited bids in respect of *Tender Number KCAA/16/2006/2007: Modernisation and Upgrading of Air Navigation Equipment* ("**the Tender**").[1] On 14th September 2007, KCAA sent a letter ("**the notification letter**") stating that they had awarded the contract envisioned by the Tender ("**the Contract**") to a company named "*Selex Sistemi Integrati S.p.A.*" ("**Selex**").[2]

The Tender Document required KCAA to send the notification letter together with a written contract (for execution by Selex), but KCAA only sent the notification letter.[3] According to the Tender Document, the notification letter constituted formation of contract between KCAA and Selex.[4] The Tender Document required the parties to execute the Contract within 30 days from the date of the notification letter.[5]

Section 68 (1) of the Procurement Act required the parties to enter into a written contract "*based on the tender documents.*" Although the Tender Document stated that the

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[1] See the Ruling/Judgment by Justice George Dulu (hereinafter cited as "**Dulu J.**," and annexed to this dissertation), at p. 4.

[2] Dulu J., at p. 4.

[3] *ibid*, at p. 5.

[4] *ibid*, at p. 9.

[5] *ibid,* at p. 5.

notification letter constituted formation of contract between the parties, section 68 (3) stated that the contract did not come into existence until the parties "*entered*" (presumably, signed) it.

2.1.2 Termination of the Tender

Selex accepted the award of contract.[6] KCAA, however, refused to dispatch the Contract.[7] Instead, on 16th October 2007, after the 30 days within which the parties were supposed to have signed the Contract, KCAA faxed a letter ("**the termination letter**") to Selex stating that they (i.e. KCAA) had terminated the Tender in accordance with the provisions of the Procurement Act.[8] The termination letter did not state why, or how, KCAA had terminated the Tender after award and acceptance of the Contract.[9] Interestingly, the termination letter stated that KCAA intended immediately to "*restart*" the Tender (by inviting fresh bids).[10]

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[6] Dulu J., at p. 5.
[7] *ibid*.
[8] *ibid*.
[9] *ibid*.
[10] *ibid,* at p. 13.

2.1.3 Administrative Review Proceedings

Selex lodged a Request for Review of KCAA's decision with the Public Procurement Administrative Review Board ("**the Review Board**").[11] The decision to terminate the Tender, argued Selex, was unlawful. The Tender Document, as read with section 68 (1) of the Act, required KCAA to consummate the Contract.

KCAA did not file any substantive response as to why or whether it could lawfully have terminated the Tender. Instead, KCAA filed a preliminary objection against the jurisdiction of the Review Board.[12] Section 36 (1) of the Procurement Act, KCAA argued, empowered procuring entities to terminate procurement proceedings "*at any time*" without entering into a contract. KCAA had terminated the Tender pursuant to section 36 (1).[13] The termination was, pursuant to section 36 (6), immune to challenge before the Review Board or a court of law. Accordingly, the Review Board had no jurisdiction to entertain Selex's complaint.

Selex made rejoinders. Invocation of section 36 was an afterthought; the termination letter did not cite section 36.[14] In any event, section 36 only empowered procuring entities to terminate procurement proceedings. In the instant case, procurement

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[11] Pursuant to section 93 (1) of the Act.

[12] Dulu, J., at p. 5.

[13] Unless the context otherwise impels, all references to a section of an unnamed law in this dissertation are references to a section of the Procurement Act.

[14] Dulu J., at pp. 13-14.

proceedings had abated upon award and acceptance of the Contract. Accordingly, there was nothing to terminate under section 36 (1).[15] Furthermore, section 93 (2) (b) clearly indicated that section 36 only applied where a procuring entity had rejected all tenders, proposals and quotations.[16] Having accepted Selex's tender, KCAA could not subsequently invoke section 36.[17]

Courts and tribunals, Selex submitted, must narrowly interpret legislative provisions that tend to oust their jurisdiction.[18] Where such provisions are reasonably capable of having two or more meanings, the meaning that preserves jurisdiction prevails.[19] Section 36, read with section 93 (2) (b), was capable of two interpretations–one in favour of and the other ousting jurisdiction. Accordingly, the Review Board had jurisdiction to entertain the complaint.

On 19th November 2007, the Review Board ruled that it had no jurisdiction to hear Selex's complaint.

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[15] Dulu J., at pp. 13-14.
[16] *ibid.*
[17] *ibid,* at p. 7.
[18] *ibid,* per Lord Reid in *Anismnic v. Foreign Compensation Commission* [1969] 1 ALL ER 208 at p. 213.
[19] *ibid*.

2.1.4 High Court Proceedings

Aggrieved by the Review Board's Ruling, Selex lodged an application in the High Court of Kenya for leave to apply for judicial review.[20] Selex also sought interim orders, to preclude KCAA from restarting the Tender pending determination of the dispute. On 20th December 2007, the High Court granted Selex leave to apply for judicial review, but did not initially make any interim orders.[21]

On 1st February 2008, KCAA filed another preliminary objection.[22] According to section 100 (4), the decision of the Review Board took effect if the High Court failed to "*declare*" judicial review within 30 days.[23] It was more than 30 days, the Preliminary Objection stated, since Selex lodged judicial review proceedings. Accordingly, the proceedings in the High Court had abated by operation of law.

On 2nd May 2008, the High Court dismissed the preliminary objection, for several reasons.[24] First, KCAA had failed to exclude court vacations in computing the 30 days.[25]

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[20] According to section 100 (1) and (2), complainants may challenge decisions of the Review Board in the High Court of Kenya, by judicial review or appeal.

[21] In March 2008, exploiting the High Court's omission to grant interim orders, KCAA restarted the Tender. Selex filed a second judicial review application to stop any further activity on the restarted tender. See the Ruling/Judgment of Justice Alnashir Visram (as he then was, hereinafter cited as "**Visram J.**"), annexed to this dissertation. Justice Visram refused to grant interim orders, on the ground that to do so would have negated Justice Nyamu's wisdom in not granting interim orders. See Dulu J., at pp. 9, 15 and 17.

[22] Dulu J., at p. 4.

[23] *ibid*, at p. 6.

[24] Nyamu J., at p. 26.

Second, section 100 (4) was vague and hence could not oust the Court's jurisdiction.[26] Third, section 100 (4) was in conflict with other laws on judicial review.[27] Fourth, section 100 (4) was ineffective because it was inconsistent with the main objectives of the Procurement Act.[28] Fifth, section 100 (4) was ineffective to the extent that it violated the Constitution of Kenya.[29] Sixth, section 100 (4) was ineffective because it failed the tests of reasonableness and proportionality.[30] Lastly, section 100 (4) was ineffective where there were questions of jurisdictional error.[31]

With the preliminary objection overruled, the matter went to full hearing. The crux of Selex's arguments was that the Review Board acted unlawfully by failing to consider the policy objectives set out at section 2 of the Procurement Act.[32] The Review Board's Ruling, Selex told the High Court, was unlawful because it purported to give KCAA–a public body–unlimited discretion to start, terminate and restart procurement proceedings.[33] The Ruling was also replete with fundamental errors of law, especially on

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[25] Nyamu J., at p. 16
[26] *ibid,* at pp. 17 and 26.
[27] *ibid,* at p. 26.
[28] *ibid*, at pp. 17 and 26.
[29] *ibid.*
[30] *ibid*, at p. 26.
[31] *ibid*.
[32] Dulu J., at p. 6.
[33] *ibid*, at pp. 3-4 and 7.

jurisdiction and interpretation of ouster clauses.[34] Furthermore, to the extent that it was diametrically opposed to the policy objectives set out at section 2 of the Procurement Act, the Ruling vitiated legislative intent.[35] The primary duty of the Review Board, Selex argued, was to ensure that procuring entities acted in accordance with the policy objectives set out in section 2. Moreover, there could never be a valid termination of procurement proceedings in circumstances raising doubt as to fairness, transparency, integrity or any of the other policy objectives set out at section 2.[36]

KCAA countered. Although the notification letter constituted formation of the Contract, it was subject to execution.[37] Second, KCAA did not have funds for the project envisioned by the Tender.[38] Third, procurements relating to the safety of Kenya's airspace were a very sensitive matter. Such procurements required expediency and finality of decisions, and hence were unsuitable for judicial challenge.[39] Fourth, the Review Board had correctly found that it lacked jurisdiction.[40] Furthermore, Selex had

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[34] Dulu J., at pp. 3-4 and 7.
[35] *ibid,* at pp. 6.
[36] *ibid.*
[37] *ibid*, at pp. 9-10.
[38] *ibid*.
[39] *ibid.*
[40] *ibid.*

not made a request for reasons for termination of the Tender as required by section 36 (3).[41]

On 28th August 2008, the High Court issued a final decision. The Review Board, the Court held, had made a fundamental error of law by interpreting section 36 broadly.[42] Section 36 (6) only governed procurement proceedings, which had ended with the award of the Tender.[43] Accordingly, both the High Court and the Review Board had jurisdiction to review the decision to terminate the Tender.[44]

The dispute did not end at the High Court. Rather than determine the case finally, the High Court remanded it to the Review Board.[45] Although Selex had sought to quash the decision of the Review Board, a prayer that the Court granted, it had not sought to quash the decision of KCAA to terminate the Tender.[46] Lastly, ruled the High Court, there was no merit in the argument (by Selex) that section 36 was unconstitutional.[47]

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[41] Dulu J., at pp. 9-10
[42] *ibid*, at p. 20.
[43] *ibid.*
[44] *ibid*, at p. 24.
[45] *ibid*, at p. 25.
[46] *ibid*, at p. 24.
[47] *ibid*, at pp. 21-22.

2.2 Issues Arising from the Selex Case

The Selex Case revealed many serious issues relating to the Procurement Act. These include (a) conflicts within the Act; (b) conflicts between the Act and other Kenyan laws; (c) lack of clarity on the policy objectives underlying the Act; and (d) judicial indifference to the policy objectives underlying the Act. The Case reveals the need for a thorough review of the Act, especially in order to achieve the policy objectives set out at section 2. The ensuing parts of this dissertation seek to critically analyze and benchmark the Act, in the context of the issues raised by the Selex Case.

CHAPTER 3: THE OBJECTIVES AND THE CONFLICTS

3.1 Preliminary Remarks

The Procurement Act does not define any of the policy objectives set out in section 2; it leaves it to the courts (and the Review Board?) to interpret those objectives. It is unclear whether section 2 establishes a hierarchy of norms, i.e. whether a policy objective set out an earlier paragraph of section 2 supersedes, in the event of conflict, a policy objective set out in subsequent paragraphs. It is also unclear whether the list of policy objectives set out in section 2 of the Procurement Act is exhaustive. Moreover, save for section 39 and the last paragraph of section 2, all the other sections of the Procurement Act have more to do with the procurement process than using procurement as a policy tool.[1]

3.1.2 Economy and Efficiency

The primary objective of procurement regulation is to ensure that public entities acquire goods and services on the best possible terms.[2] The goals of economy and efficiency, therefore, relate to cost savings and the expediency with which the procurement system

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[1] On use of procurement as a policy tool, and how international trade agreements (or regional economic integration agreements) can hamper such use, see Arrowsmith, S. (1995) "*Public Procurement as an Instrument of Policy and the Impact of Market Liberalisation*," 111 Law Quarterly Review, 235-284. See also Martín, F. M. J. (1996) *The EC Public Procurement Rules: a Critical Analysis*, Oxford University Press, New York, at pp. 45-48.

[2] Trepte, P. (2004) *Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation*, Oxford University Press, New York, at p. 129. See also Arrowsmith, S., *op. cit.* at p. 235.

works.[3] A procurement system is efficient (and economical) when procuring entities spend the least amount of resources in purchasing what they need.[4]

The theoretical rationale for the policy objectives of economy and efficiency is simple: according to elementary economics, resources are scarce and finite. Accordingly, we ought to spend resources in the most sparing manner that achieves maximum utility (i.e. satisfaction of the needs/wants at issue). In the context of public procurement, the goals of economy and efficiency enjoin governments to spend taxpayers' money prudently. Prudence in public expenditure is particularly critical for a poor country, whose government may find it difficult to supply basic amenities for its people.[5] Apparently, in spite of the Act, economy and efficiency (and possibly competition) remain highly elusive in the Kenyan procurement system:-

> *"Mr. Speaker, it has become clear that public entities are paying extremely highly inflated prices for items that are easily available in the market."*[6]

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[3] See Schooner, S. L., Gordon, D. I. and Clark, J. L. (2008) "*Public Procurement Systems: Unpacking Stakeholder Aspirations and Expectations*," GWU Law School Public Law Research Paper No. 1133234, at pp. 8-9. Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1133234 (accessed on 3rd June 2009).

[4] Schooner, S. L. (2002) "*Desiderata: Objectives for a System of Government Contract Law*," 2 Public Procurement Law Review, 103-110 at p. 107.

[5] See Trepte, P., *op. cit.* at p. 78.

[6] 2009-2010 Budget Speech by the Kenyan Minister for Finance to Parliament, at paragraph 73, available at http://www.treasury.go.ke/index.php?option=com_docman&task=cat_view&gid=87&ItemId=54 (accessed on 8th July 2009).

The Selex court's appreciation of economy and efficiency appears somewhat hazy.[7] Vagueness and discrepancies of the Act on the issue, however, may have influenced the court's evasive approach. Section 66 (4) provides, for instance, that the successful tender "*shall be the tender with the lowest evaluated price.*"[8] This requires that evaluation criteria be objective and quantifiable.[9] It also requires procurement officials to accord a weight/score, communicated in advance in the tender documents, to each evaluation criterion.[10] The Procurement Act, however, does not give any guidance on the relative weight/score that procurement officials should accord to bid price, quality, service or other factors that may go to determining the evaluated price. This creates a loophole for subjective evaluation, contrary to the requirements of objectivity and quantifiability. Regulation 50 of the Procurement Regulations, which sets out detailed rules on tender evaluation, does not also establish any such guidance. In fact, Regulation 50 does not mention non-price factors. In practice, therefore, procuring entities award procurement contracts to the lowest tender rather than the tender with the lowest evaluated price.

A procurement system that only awards contracts to the lowest tender, without due regard to non-price factors, will invariably lead to purchase of low quality products–especially

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[7] In some instances, the court seems to treat finality and expediency (sections 36 and 100) as separate policy objectives of the Act, but ranking lower than the objectives set out in section 2. In other instances, the court treats finality as though it is synonymous with efficiency. See Nyamu J., at pp. 8, 12, 13, 17, 18, 23 and 25.

[8] A similar rule applies to requests for quotations. See section 89 (4).

[9] Trepte, P., *op. cit.* at p. 202.

[10] *ibid*, at p. 95.

when tenderers compete on the basis of differentiated rather than homogenous products or services.[11] Accordingly, there should be discretion to accept either the lowest or the most economically advantageous tender.[12] Under the criterion of the most economically advantageous tender, price is only one of many, and not necessarily the decisive, elements for comparison of tenders.[13]

The drafters of the Procurement Act also seem to have ignored the issue of abnormally low bids–some of which are explicable on factors antithetical to fair competition and other policy objectives underlying the Procurement Act. A bid may be abnormally low, for instance, because the bidder enjoys prohibited state subsidies, or abuses labour or intellectual property rights.[14]

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[11] See Trepte, P., *op. cit.* at pp. 96, 105-108 and 324-327.

[12] On such a dual system, see Article 53 of Directive 2004/18/EC of the European Parliament and of the Council of 31st March 2004 on the Coordination of Procedures for the Award of Public Works Contracts, Public Supply Contracts and Public Service Contracts ("**Directive 2004/18/EC**").

[13] Apparently, procurement officers tend to accord primacy to the criterion of lowest tender even where it is permissible to award the contract under the criterion of the most economically advantageous tender. See Badcoe, P. (2001) "*Best value - an overview of the United Kingdom Government's policy for the provision and procurement of local authority services,"* 2 Public Procurement Law Review 63-81 at p. 67. On whether procuring entities in the European Union ("**the EU**") may consider non-economic factors under the criterion of the most economically advantageous tender, see *Concordia Buses Finland v. Helsinki Municipality*, [2002] ECR I-7213.

[14] The Procurement Act is silent on abnormally law tenders. In the EU, procuring entities may reject an abnormally low bid if it is explicable on these grounds, among others. See Article 55 of Directive 2004/18/EC. See also Trepte, P., *op. cit.* at pp. 326-327.

3.1.3 Competition, Transparency and Integrity

Many commentators see these as the overarching, most important goals of a sound procurement system.[15] Though conceptually distinct, these goals are complementary; a procurement system that lacks one will almost inevitably lack the others.[16] The goal of (fair) competition requires procuring entities to allow all willing and eligible bidders to participate in a tender and to treat similar bids similarly and impartially–in accordance with pre-communicated, objective and quantifiable criteria.[17] The goal of fair competition requires tenderers, *inter alia*, to (a) supply accurate information;[18] (b) refrain from collusion and fraud;[19] and (c) refrain from improperly influencing procurement officials.[20] The goal of transparency requires timeous availability to all stakeholders of information relating to specific procurement opportunities, the applicable rules and tender

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[15] See, for instance, Schooner, S. L., *op. cit.* at pp. 104-106. See also Yukis, C. R. (2007) "*Integrating Integrity and Procurement: the United Nations Convention against Corruption and the UNCITRAL Model Procurement Law,*" 36 (3) Public Contract Law Journal, 307-329 at p. 308.

[16] See Schooner, S. L., *op. cit.* at p. 106. For a superb and precise discourse on the interrelation among these three goals, see Allen, R. L. (2002) "*Integrity: Maintaining a Level Playing Field*," 2 Public Procurement Law Review, 111-114.

[17] See section 66 (2) and (3).

[18] Sections 115 and 135.

[19] Sections 41 and 42. See also section 11 of the Restrictive Trade Practices, Monopolies and Price Control Act, Chapter 504 of the Laws of Kenya ("**the Restrictive Trade Practices Act**"). While section 137 (1) of the Procurement Act provides for a penalty of a fine not exceeding Ksh.4,000,000.00 or imprisonment for up to ten years (or both) for the offence of collusive tendering, the Restrictive Trade Practices Act provides for penalty of a fine not exceeding Kshs.100,000.00 or imprisonment for a term not exceeding three years or both.

[20] Sections 38 and 135.

evaluation criteria.[21] The goal of integrity goes to the rules of conduct for procurement officials.[22] The goal of integrity seeks to suppress bribery, conflicts of interest, favouritism and other unethical conduct.[23]

Besides the sections already cited, the Procurement Act contains other provisions designed to achieve competition, integrity and transparency. These include (a) section 2 on the objectives of the Act; (b) sections 25 and 93 on administrative review of procurement decisions; (c) section 54 on advertisement of procurement opportunities; (d) sections 60 and 66 on opening and evaluation of tenders; (e) section 139 on codes of ethics; and (f) section 141 on public availability of the Act. Regrettably, the Act also contains provisions that run counter to the goals of competition, transparency and integrity. First, as demonstrated in the ensuing parts of this dissertation, the preferences established under the Procurement Act are arguably incompatible with the goal of (fair) competition. Second, the provisions that tend to exclude judicial oversight (sections 36 and 100) are incompatible with the goals of transparency and integrity.[24]

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[21] Schooner, S. L., *op. cit.* at pp. 105-106.
[22] *ibid*, at p. 104.
[23] *ibid*.
[24] Allen, R. L., *op. cit.* at p. 112.

3.1.4 Accountability and Public Confidence

Accountability is about procurement officials explaining or defending their actions or decisions, especially when challenged by disaffected tenderers or other stakeholders.[25] It entails punishing procurement officials for violations of procurement rules.[26] Even where procurement officials have acted with probity, and within the rules, there may still be questions of political accountability for their decisions and actions. Politically, citizens have an interest in how the government spends their taxes:[27]

> "*They presented, and presented forcefully, that…it would be unwise and…an outrageous thing that their money that they put up in taxes with the Government of the United States should be paid out upon a governmental project–paid out in an amount of six millions, or thereabouts, to any foreign country.*"[28]

The most notable provisions of the Procurement Act on accountability and public confidence are arguably sections 93 and 100 on review of procurement decisions and 137 (2) on sanctions against errant procurement officials. The provisions on tender award criteria, fair competition, transparency, and integrity, explored in other parts of this

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[25] Schooner, S. L., Gordon, D. I. and Clark, J. L., *op. cit.* at p. 13.

[26] *ibid.*

[27] *ibid*, at p. 19.

[28] Speech of Senator Hiram Johnson (of California) to the US Congress on the Buy American Act (in 1933), excerpted in Reich, A., *op. cit.* at p. 48.

dissertation, also bolster accountability and public confidence in the procurement system. Regrettably, the Procurement Act also contains provisions that are inimical to accountability and public confidence. First, although public confidence in procurement procedures is one of the policy objectives set out in section 2 of the Act, members of the public have no automatic standing in procurement disputes.[29] Second, the wide discretion given to procuring entities under section 36 is amenable to abuse, thereby undermining accountability and public confidence.[30] The requirement under section 36 (7) for procuring entities to give a report to the Public Procurement Oversight Authority ("**the Authority**") does not mitigate the threat to accountability, since procuring entities may terminate a tender for corrupt, underhand or otherwise unlawful purposes but submit a report with fictitious but plausible explanations. The investigative and other powers of the Authority (sections 101 to 105) would be ineffective in such instances, since a termination of procurement proceedings pursuant to section 36 would be immune to judicial scrutiny.

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[29] Under section 96 (d), the Review Board "*may*" permit persons other than tenderers and procuring entities, presumably members of the public, to participate in its proceedings. According to judicial review rules, a third party must convince the High Court that he/she is "*a proper person to be heard*." Moreover, a literal reading of Order LIII Rule 6 of the Civil Procedure Rules suggests that the High Court can only hear such third party in opposition to, and not in support of, the proceedings.

[30] Reducing discretion among procurement officials is one of the key objectives of procurement regulation. For insights, see Trepte, P., *op. cit.* at pp. 102 and 104.

3.1.5 Local Industry and Economic Development

Two main ideologies inform public procurement policy, i.e. the free-market and interventionist ideologies.[31]

The free-market ideology holds that market forces (of demand, supply, competition *etc*) are the best tools for achieving optimal/efficient use of resources.[32] Underlying the free-market ideology is a theoretical construct called "*perfect competition*," which, in turn, is based on a number of assumptions.[33] Under the free-market ideology, the purpose of procurement regulation is to correct market failure, not to pursue social or political objectives.[34] Accordingly, procurement officials should award contracts solely on economic/commercial considerations.[35]

The interventionist ideology, on the other hand, permits instrumental use of procurement to pursue objectives wider than mere economic efficiency in the use of public funds.[36] The wider objectives may include, for instance, improving standards of behaviour in the

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[31] Martín, F. M. J. (1996) *The EC Public Procurement Rules: A Critical Analysis*, Oxford University Press, New York, at p. 41.

[32] *ibid.*

[33] For insights on perfect competition, and the underlying assumptions, see Trepte, P., *op. cit.* at pp. 66-68.

[34] *ibid.* Market failure refers to situations where the assumptions underlying the theoretical construct of perfect competition do not hold.

[35] *ibid.* On shortcomings of market fundamentalism (i.e. the assumption that markets by themselves solve all economic problems), see Stiglitz, E. J., (2008) "*The Future of Global Governance*," in Serra, N. and Stiglitz, E. J. (Eds.) *The Washington Consensus Reconsidered: Towards a New Global Governance*, Oxford University Press, New York, at pp. 316-317.

[36] Martín, F. M. J., *op. cit.* at p. 41.

private sector, promoting fair wages or empowerment of disadvantaged/marginalised groups and communities.[37]

The Procurement Act is largely free-market oriented, notably with regard to the policy objectives of economy, efficiency, and competition. The Act, however, also permits instrumental, interventionist and redistributive uses of procurement. Section 39 (2), for instance, empowers the Minister for Finance, in consideration of "*economic and social development factors*," to prescribe preferences (and or reservations) in public procurement (and disposal). The preferences may apply to goods, services (or combinations of goods and services), works, regions, disadvantaged groups or micro, small and medium enterprises ("**SMEs**").[38] Where the value of procurement is below the prescribed threshold, and the Government of Kenya wholly finances the procurement, entities must give "*exclusive preference*" to Kenyan citizens.[39] Moreover, procuring entities "*may*" give a margin of preference in the evaluation of bids to candidates offering

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[37] See Arrowsmith, S., *op. cit.* at pp. 242-244. See also Bolton, P. (2007) "*An Analysis of the Preferential Procurement Legislation in South Africa,*" 1 Public Procurement Law Review, 36-67.

[38] As stated more clearly in the ensuing parts of this dissertation, there are many pitfalls of using preferential procurement to promote infant industries, the most notable of them being moral hazard and the resultant likelihood of such industries not outgrowing their infancy. See Reich, A. (1999) *International Public Procurement Law: the Evolution of International Regimes on Public Purchasing (Studies in Transnational Economic Law)*, v. 12, Kluwer International, London, at pp. 30-31.

[39] Section 39 (8) (a). The thresholds are Ksh.200,000,000.00 (about US$714,000.00) in respect of goods or services, and Ksh.200,000,000.00 (about US$ 2,900,000.00) in respect of works. See Regulation 28 of the Public Procurement and Disposal Regulations, 2006 ("**the Procurement Regulations**").

Kenyan products.[40] Procuring entities may also give a margin of preference depending on the shareholding of Kenyan citizens in a company tendering for works, goods or services.[41]

Domestic preferences pervade many procurement systems.[42] Generally, such preferences seek, *inter alia*, to (a) promote industrial development; (b) shield (infant) domestic industry from foreign competitors; and (c) create/preserve employment for domestic workforce.[43]

There is no evidence that the Minister for Finance considered any "*economic or social development factors*" in setting the thresholds and preferences prescribed under section 39. What is "*economic development*," the policy objective set out at section 2 (f) of the Act? The phrase "economic development" refers to increase in a county's Gross National Product ("**GNP**") accompanied by changes in output distribution and in the

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[40] Section 39 (8) (b) (i). Under Regulation 28 (2) (a) of the Procurement Regulations, the prescribed margin of preference is 15% of the evaluated price of the tender. The word "*may*" suggests that the decision to give a margin of preference is discretionary. A supplier, therefore, cannot compel a procuring entity to give a margin of preference. It is unknown, as at the date of this dissertation, whether a procuring entity can give a margin of preference that is lower or higher than that prescribed under the Procurement Regulations.

[41] Under Regulation 28 (2) (b) of the Procurement Regulations, the prescribed margin of preference is 6% of the evaluated price of the tender where the percentage of shareholding of locals is less than twenty per cent. It is 8% of the evaluated price of the tender where the percentage of the locals is less than fifty-one per cent but above twenty per cent.

[42] See Ssenoga, F. (2006) "*Examining Discriminatory Procurement Practices in Developing Countries*," 6 (3) Journal of Public Procurement, 218-249 at pp. 218-219 and 222-224. Domestic preferences may be explicit or implicit, *de jure* or *de facto*.

[43] On economic arguments for and against domestic preferences, and whether they actually achieve their stated or intended objectives, see Reich, A., *op. cit.* at pp. 19-50.

structure of the economy.[44] Factors indicative of economic development include improvement in the material well-being of the poorer segments of the population, a decline in agriculture's share of GNP and substantial technical advances originating within the country.[45] Economic development is different from economic growth. While the former connotes improvement in the wellbeing of the population, especially the poorer segments of it, the latter only refers to increase in GNP.[46]

It is doubtful that Kenya, a poor and highly agrarian country,[47] indeed one of the less developed countries of the world,[48] can rely on interventionist procurement policies to achieve significant economic growth or development. She ought, instead, to focus on other factors that boost economic development (e.g. foreign direct investment, good governance, rule of law and protection of private property rights). Indeed, available literature suggests that use of procurement to promote industrial development, for instance, has often failed to achieve that objective.[49] Save for sectors that naturally rely on government contracts, e.g. armaments, preferential procurement cannot save

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[44] Nafziger, E. W. (2006) *Economic Development*, 4th Edition, Cambridge University Press, New York, at p. 15. GNP refers to a country's total output of goods and services.

[45] *ibid*.

[46] *ibid.*

[47] http://devdata.worldbank.org/AAG/ken_aag.pdf (accessed on 4th July 2009).

[48] Nafziger, E. W., *op. cit.* at p. 25. See pp. 27-30 on shortcomings of comparing developing and developed countries' GNP.

[49] Arrowsmith, S., *op. cit.* at pp. 244-245.

uncompetitive or inefficient industries.[50] Rather than promoting economic development, protection of inefficient/uncompetitive industries might actually have the perverse/reverse effect of promoting economic stagnation.[51] Protectionist use of procurement undermines competition.[52] In the context of international trade, protectionism creates non-tariff barriers to trade, leads to misallocation of resources and vitiates comparative advantage.[53]

Even from a strictly national perspective, protectionist procurement policies are of questionable economic merit. Where domestic industry is uncompetitive or inefficient, preferential procurement unnecessarily increases the cost of government programmes.[54] It would offend economic logic for Kenya, a poor country the majority of whose citizens live in abject poverty, to award procurement contracts to uncompetitive or inefficient domestic suppliers when she could make vital savings by contracting more efficient (hence cheaper) foreign suppliers.[55] Kenya could use such savings to provide necessaries

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[50] Reich, A., *op. cit.* at pp. 27-29.

[51] Trepte, P., *op. cit.* at p. 143.

[52] Reich, A., *op. cit.* at pp. 24-26. On the possibility of domestic preferences increasing competition, rather than undermining it, see Ssenoga, F., *op. cit.* at p. 226.

[53] On the concept of comparative advantage, and the merits and demerits of protectionist policies, see Lester, S. and Mercurio, B. (2008) *World Trade Law, Text, Materials and Commentary*, Hart Publishing, Portland, OR, at pp. 46-58.

[54] Reich, A. *op. cit.* at p. 21. See also pp. 35-39 on empirical evidence from studies conducted in various countries on this issue.

[55] See Ssenoga, F., *op. cit.* at pp. 227-228.

of life to her people.[56] Furthermore, the extra costs incurred in contracting inefficient domestic producers may not necessarily have uniform welfare benefits across the population. Instead, such extra public expenditure may inequitably transfer national wealth to a small number of well-positioned individuals, say industrialists, at the expense of the working and lower income classes.[57]

The risk of the foregoing paradoxes might explain why section 71 requires procuring entities to allow foreign bidders to participate in a tender where it appears that there will not be "*effective"* competition. It might also explain why section 39 requires the Minister to prescribe domestic preferences "*in consideration of economic and social development factors*." However, neither section 39 nor section 71 mitigates the risk. The Procurement Act does establish any rule on the interaction between sections 39 and 71. In particular, section 71 does not expressly establish an exemption to the preferences prescribed under section 39.

3.2 Resolving the Conflicts

The Procurement Act anticipates conflicts with other Kenyan laws. Section 5 provides that in the event of conflict between the Procurement Act (or regulations made under the

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[56] In 2009, about 10 million Kenyan citizens risked starvation while the Kenyan Government engaged in wasteful spending. See Baraza, L. (2009) "*How Coalition Government Big Shots tighten their Belts...in Grand Style*," available at http://www.nation.co.ke/News/-/1056/557516/-/u3rxjx/-/index.html (accessed on 27th May 2009).

[57] Reich, A., *op. cit.* at p. 40.

Procurement Act) and any other Act or regulations, on matters relating to public procurement, the Procurement Act (or regulations made under the Procurement Act) shall prevail. By providing that regulations made under the Act prevail over other Acts in the event of conflict, section 5 offends the rule that "*no subsidiary legislation shall be inconsistent with the provisions of an Act*."[58] According to section 6, the Procurement Act prevails, in the event of conflict, over treaties or other international agreements to which Kenya is a party–save for negotiated grants or loans. This offends the rule that a state cannot invoke its domestic law to justify treaty violations.[59] Section 7 provides that in the event of conflict between the Act and a condition imposed by a donor, of funds, the condition prevails with respect to a procurement that uses those funds and no others.

Strangely, the parties in the Selex Case did not address the court (or the Review Board) on the provisions of sections 5 to 7 of the Procurement Act. Even more strangely, of the many judges who heard the dispute, only Justice Nyamu appeared to appreciate the policy implications of the challenged decision:-

> "…*the court must look at the intention of Parliament…which is inter alia, to promote the integrity and fairness as well as to increase transparency and accountability in Public Procurement Procedures…* "[60]

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[58] See section 31 (b) of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Kenya.
[59] Articles 27 and 46 of the Vienna Convention on the Law of Treaties.
[60] Nyamu J., at pp. 11-12.

Instead of addressing the policy implications of the challenged decision, the other judges appeared to concern themselves more with technical and interpretive rules. Justice Dulu, who gave the final judgment, only allowed Selex's application because the Review Board interpreted section 36 widely rather than narrowly. Although his judgment mentions Selex's arguments on policy implications of the challenged decision, it does not contain any decision or comment on those policy implications. Justice Visram (as he then was) declined interim orders on the ground that judicial review laws anticipate the court to grant such orders at the leave stage.[61] By declining interim orders, Justice Visram vitiated the spirit of section 94 of the Procurement Act, which provides for automatic suspension of procurement proceedings upon the filing of a Request for Review.

So, how ought the conflicts described in this dissertation to be resolved? Anyone attempting this vexed question ought to note a few preliminary points. First, sections 5-7 are of no use to the extent that the Procurement Act contains provisions that offend the Constitution of Kenya.[62] Second, in spite of how clearly or tightly worded they may be, sections 5-7 (inclusive) are unlikely to prevail, in a judicial forum, over other entrenched norms of the Kenyan legal system, especially those relating to judicial review. Third, it is difficult–and indeed objectionable–to invoke sections 5-7 (inclusive) if the effect would

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[61] Visram J., at p. 4.

[62] Section 3 of the Constitution of Kenya states, "*This Constitution is the Constitution of the Republic of Kenya and shall have the force of law throughout Kenya and…if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void...*"

be to thwart achievement of the policy objectives set out at section 2. Fourth, although it provides for resolution of conflicts between itself and other laws, the Procurement Act does not provide for resolution of its own conflicts.

In view of Kenya's (perceived?) grand and systemic corruption, her procurement officials, judges and members of the Review Board should arguably place greater emphasis on the policy goals of integrity, transparency and accountability.[63] Although the task may be difficult, or even impossible, Kenyan procurement officials, judges and members of the Review Board must attempt to resolve, rationalize or harmonize the conflicts. Alternatively, they must make trade-offs among various competing goals of the Procurement Act, taking due account of changes in the relative importance of individual policy objectives and the circumstances of each case. Most importantly, they must strive to strike a balance between principal and secondary/ancillary, and between economic and socio-political, objectives of the Procurement Act.

[63] Many studies have depicted Kenya as one of the most corrupt countries of the world. See, for instance, Transparency International, (2009) "*Global Corruption Barometer*," available at http://www.transparency.org/publications/publications/gcb2009 (accessed on 19th June 2009).

CHAPTER 4: BENCHMARKING THE PROCUREMENT ACT

4.1 The Procurement Act and the Model Procurement Law

The drafters of the Procurement Act largely relied upon the Model Procurement Law,[1] but unnecessarily made a few subtle departures from it. The Procurement Act is very similar to the Model Procurement Law. Accordingly, this chapter focuses not on the similarity between them, but on the subtle yet significant differences between them. Those subtle differences, it is submitted, largely contributed to the Selex dispute, and the conflicts described in the foregoing chapters of this dissertation.

4.1.2 Termination of Procurement Proceedings

Although section 36 of the Procurement Act is largely similar to Article 12 of the Model Procurement Law, termination under the Model Procurement Law may be subject to prior approval by an organ of state other than the procuring entity. Second, under the Model Procurement Law, a procuring entity cannot terminate procurement proceedings unless they have reserved the right to do so in tender documents. Third, unlike the Procurement Act, the Model Procurement Law clearly indicates that procuring entities cannot terminate a tender after accepting a bid, proposal, offer or quotation. Furthermore, as is evident from the guide to the Model Procurement Law, the power to terminate

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[1] http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/1994Model_status.html (Accessed on 6th July 2009).

procurement proceedings exists to serve the public interest.[2] The power of termination, the guide states, was not intended to give unlimited discretion or justify violations of fundamental principles of justice.[3] Strangely, the judges who heard the Selex dispute, with the exception of Nyamu J., eschewed this important issue. There was no rational or otherwise justifiable basis for departing from Article 12 of the Model Procurement Law. The departure only serves to undermine public confidence, accountability, transparency and other policy objectives of the Act. Furthermore, the departure can lead to unnecessary, complex and expensive litigation.

4.1.3 When Procurement Contract enters into force

On the point at which a procurement contract enters in force, both the Model Procurement Law and the Procurement Act appear to give primacy to the time when the parties sign the contract.[4] However, where the tender documents provide that notification constitutes formation of contract, the Procurement Act is unclear on this issue, because, in such instances, section 68 (1) contradicts section 68 (3). The omission of a clear definition of the interaction between section 68 (1) and (3) sharply contrasts with the elaborate provisions on the interrelationship among various sub-paragraphs of Article 36 of the Model Procurement Law. Furthermore, unlike the Procurement Act, the Model

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[2] See notes on Article 12, contained in the Guide of enactment annexed to the Model Procurement Law.

[3] *ibid*.

[4] See Article 36 (2) (b) of the Model Procurement Law, and section 68 (3) of the Procurement Act.

Procurement Law prohibits either party, after acceptance of award of a procurement contract, from taking any step that interferes with its entry into force.[5] Instead of such a prohibition, the Procurement Act appears to place a one-sided obligation on tenderers, and not procuring entities, to consummate the contract after award.[6]

4.1.4 Protectionism, Intervention and Scope

The objective of promoting international trade (by contracting suppliers irrespective of their nationality), set out in the preamble and Article 8 of the Model Procurement Law, does not appear at section 2 of the Procurement Act. Instead, section 71 of the Procurement Act pegs participation of foreign suppliers on absence of effective competition. It appears, therefore, that the general rule under the Procurement Act is to favour domestic suppliers while the general rule under the Model Procurement Law is to grant access to procurement markets to suppliers without regard to their nationality.[7] The Model Procurement Law, however, is not entirely free-market oriented. Just like the Procurement Act, it also permits instrumental/interventionist uses of procurement. Under the Article 8, for instance, procuring entities may exclude foreign suppliers on grounds specified in regulations or other provisions of law. Moreover, under Article 34 (4) (d)

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[5] See Article 36 (2) (b) of the Model Procurement Law.

[6] Under section 115 (1) (e), the Director General of the Authority may debar a tenderer from participating in future procurement proceedings on the ground that the tenderer has, in the past, refused to enter into a written contract (with a procuring entity) as required by section 68.

[7] See paragraph (b) of the preamble to the Model Procurement Law.

and 39 (2), procuring entities may accord margins of preference to domestic suppliers if the law permits such preferences.

The drafters of the Procurement Act might have considered promotion of international trade antithetical to the policy objective of promoting local industry and economic development. While this might plausibly explain the omission of the goal of promoting international trade from the Procurement Act, it is noteworthy that drafters of the Procurement Act also omitted some provisions of the Model Procurement Law that go to promotion of local industry and economic development. These include considerations of the effects of accepting a tender on (a) balance of payments position; (b) foreign exchange reserves; (c) technology transfer; and (d) development of managerial, scientific and operation skills.[8]

On scope of application, although the Model Procurement Law allows states to exclude defence or national security procurements from the general rules established therein, a trend also reflected in international trade law treaties,[9] the Procurement Act applies to defence and national security purchases.[10] Furthermore, while defence and national security procuring entities must award a procurement contract to the lowest bidder under

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[8] See Article 34 (4) (c) (iii) of the Model Procurement Law.

[9] See, for instance, Article XXIII: 1 of the GPA. Available at http://www.wto.org/english/docs_e/legal_e/gpr-94_e.pdf (accessed on 11th June 2009).

[10] Section 133 (1). The section permits defence and national security organs, in consultation with the Authority, to operate a dual procurement system, under which some items may be procured using open tendering procedures and others using restricted tendering procedures.

the Procurement Act, the Model Procurement Law anticipates possibility of departure from that rule because of national defence and security considerations.[11]

4.2 The Procurement Act and the GPA

The GPA is one of the plurilateral, i.e. optional, agreements of the World Trade Organisation ("**the WTO**").[12] Like other WTO agreements, the GPA seeks to promote liberalisation and expansion of international trade.[13] Generally, the GPA precludes use of procurement as a policy tool, especially where such use restricts international trade.[14] Kenya is not a Party to the GPA.[15] In view of the stated policy objectives of the Procurement Act, can Kenya accede to the GPA without making substantial amendments to the Act?

4.2.2 Discrimination, Offsets and Preferences

Non-discrimination is the central premise of the GPA.[16] The GPA prohibits Parties, with respect to all laws, regulations, procedures and practices regarding covered procurement,

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[11] Article 38 (4) (c) (iv).

[12] Lowenfeld, A. F. (2008) *International Economic Law*, 2nd Edition, Oxford University Press, New York, at p. 89. Plurilateral agreements do not bind all WTO membership; they only apply to the particular states that have ratified or acceded to them.

[13] See the preamble to the GPA.

[14] Arrowsmith, S. (1995) "*Public Procurement as an Instrument of Policy and the Impact of Market Liberalisation*," 111 Law Quarterly Review, 235-284 at pp. 258, 282 and 283.

[15] http://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm#parties (accessed on 4th May 2009).

[16] Trepte, P. (2004) *Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation*, Oxford University Press, New York, at p. 377.

from discriminating foreign products, services or suppliers.[17] The GPA also prohibits use of offsets such as those established under section 39 (8) (b) of the Procurement Act.[18] The GPA, however, permits developing countries to negotiate (at the time of accession) conditions for use of offsets. Where a developing country negotiates the use of offsets, the GPA states, it can only use them for qualification to the procurement process and not as criteria for awarding contracts. This means procuring entities may put offsets as a condition for eligibility to tender, but they cannot use them to grant preferences between tenderers who meet the offset requirement.[19] To the extent that the Procurement Act allows procuring entities to prefer bidders who meet offset requirements with a higher margin, say a higher domestic content or higher percentage of local ownership, they amount to criteria for awarding contracts. Accordingly, it offends the GPA.

There being no official publication on the issue, one can only speculate whether the goal of promoting domestic industry and economic development, set out at section 2 (f) of the

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[17] Article III. Article VIII: (b) of the GPA seems to restrict the use of procurement as a policy tool: *"any conditions for participation in tendering procedures shall be limited to those which are essential to ensure the firm's capability to fulfil the contract in question…"* See Ssenoga, F. (2006) "*Examining Discriminatory Procurement Practices in Developing Countries*," 6 (3) Journal of Public Procurement, 218-249 at p. 221.

[18] See Article XVI of the GPA. The GPA defines offsets as "*measures used to encourage local development or improve the balance-of-payments accounts by means of domestic content, licensing of technology, investment requirements, counter-trade or similar requirements*."

[19] Trepte, P., *op. cit.* at p. 378.

Procurement Act, explains Kenya's non-accession to the GPA.[20] It is noteworthy, however, that the GPA requires Parties to take due account of developing countries' need to:-

> "…*promote the establishment or development of domestic industries including the development of small-scale and cottage industries in rural or backward areas; and economic development of other sectors of the economy*."[21]

The GPA also permits developing countries to negotiate mutually acceptable exemptions from national treatment with respect to certain entities, products or services in their covered lists.[22] Such exemptions, however, are subject to review, with a possibility of extension or modification, every three years.[23]

Save for the few inconsistencies explored in this part, the preferences established under the Procurement Act would fit into the scheme of the GPA. While Kenya might successfully negotiate exemptions to the GPA's non-discrimination rules, such exemptions may not necessarily constitute a sufficient incentive for her accession to the

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[20] According to Lester and Mercurio, many countries opt not to accede to the GPA because of a fear that its transparency and non-discrimination rules would impede pursuit of developmental goals of an industrial or social character, e.g. promotion of domestic industries. See Lester, S. and Mercurio, B. (2008) *World Trade Law, Text, Materials and Commentary*, Hart Publishing, Portland, OR, at pp. 666-667.

[21] Article V: 1 (b).

[22] Article V: 4.

[23] Article V: 14.

GPA. Triennial review of such exemptions, required by the GPA, might ultimately diminish their usefulness, and threaten Kenya's long-term use of the procurement as a policy tool. Furthermore, Kenya (and indeed any other developing country) must weigh the economic benefits of GPA accession, if any, against the detriment that her domestic industries would suffer if she were to abolish or modify the preferences established under the Procurement Act in order to meet obligations arising from the GPA.

4.2.3 Disputes

The GPA requires Parties to establish timely, effective, transparent, and non-discriminatory domestic procedures for resolution of procurement disputes.[24] While the dispute resolution system established under the Procurement Act might pass the GPA requirement of non-discrimination, it fails on transparency, timeliness and effectiveness. On transparency, although the Authority publishes the Act and makes it generally available as anticipated by Article XX: 3 of the GPA,[25] procuring entities can invoke section 36 to shield underhand or even unlawful decisions from judicial scrutiny. As regards timeliness, the Kenyan judiciary cannot expeditiously dispose procurement

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[24] Article XX: 2. Article XXII of the GPA provides for intergovernmental resolution of disputes under the Understanding on Rules and Procedures Governing the Settlement of Disputes ("**the DSU**"). According to Trepte, the GPA's provision for both municipal and intergovernmental dispute resolution mechanisms is a remarkable achievement, in view of the fact that the intergovernmental approach to dispute resolution under the General Agreement on Tariffs and Trade ("**the GATT**") has largely been ineffective in relation to procurement. See Trepte, P., *op. cit.* at p. 376.

[25] Visit http://www.ppoa.go.ke/ (accessed on 1st July 2009).

disputes as anticipated by the GPA (or even the Procurement Act), due to legal and administrative constraints:-

> *"The instant case could not be heard [within 30 days]…as a result of the Courts Christmas vacation…once leave is granted…the applicant is granted 21 days within which to file the notice of motion...The ouster clause...has been imposed in the face of a backlog in the courts (which…) averages between 3 to 10 years."*[26]

On effectiveness, legal loopholes and technicalities that undermine granting of interim orders, such as those invoked by Justice Visram in the Selex Case, do not meet the standards of the GPA. In Particular, lack of provision for interim orders once a dispute goes to the High Court falls short of the GPA requirement of-

> *"rapid interim measures to correct breaches…and to preserve commercial opportunities."*[27]

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[26] Nyamu J., at pp. 8, 15 and 18.

[27] Article XX: 7.

CHAPTER 5: CONCLUSION

Kenya enacted the Procurement Act with a view to achieving seven key policy objectives, viz. (a) economy and efficiency; (b) fair competition (c) integrity and fairness; (d) transparency and accountability; (e) public confidence in procurement procedures; (f) promotion of local industry; and (g) economic development. Although the Procurement Act is based on the Model Procurement Law, it contains a few needless, subtle and very significant departures from the latter. Due mainly to those needles, subtle departures, there are many serious conflicts within the Procurement Act–and between the Act and Kenyan laws.

Conflicts within the Procurement Act, and between the Act and other Kenyan laws, largely contributed to the Selex Case. The conflicts may lead to other unnecessary litigation in the future. The conflicts can vitiate the policy objectives set out in section 2 of the Procurement Act, thereby undermining the effectiveness and integrity of the Kenyan procurement system.

The Selex court failed to appreciate the policy implications of the challenged decision. The dispute was not, as the judges (except Justice Nyamu) seem to have thought, merely about whether the Review Board had interpreted section 36 broadly or narrowly, or whether the High Court could grant interim orders at one stage or another. The Selex dispute was rather about whether the termination of the Tender, in the circumstances of

the case, undermined realisation of the policy objectives set out at section 2 of the Procurement Act. In view of the primacy of those policy objectives, the defence of section 36 ought to have failed irrespective of whether procurement proceedings had ended, and irrespective of whether the Review Board had interpreted section 36 narrowly or broadly.

Save for the conflicts explored in the foregoing parts of this dissertation, the Procurement Act would measure up to most requirements of the Model Procurement Law, and the GPA. Resolution of the conflicts explored in the foregoing parts of this dissertation requires a thorough review of the Procurement Act. Pending such review, Kenyan procurement officials, judges and members of the Review Board must attempt to resolve, rationalize or harmonize the conflicts. Alternatively, they must make trade-offs among competing objectives of the Procurement Act, taking due account of changes in the relative importance of individual policy objectives and the circumstances of each case.

While the Procurement Act would arguably pass most requirements of the GPA, Kenya might still want to weigh socioeconomic and political benefits, if any, against the costs of GPA accession.

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APPENDICES