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Factors affecting Access to Government Procurement Opportunities by minority groups in Kenya: a focus on eligibility and registration requirements

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**Factors Affecting Access to Government Procurement Opportunities by  
Minority Groups in Kenya: A Focus on Eligibility and Registration  
Requirements**

**Omariba Sarah Bochere**

**Submitted in partial fulfilment of the requirements of the degree of  
Master of Laws at Strathmore University**



**Strathmore Law School  
Strathmore University**

**Nairobi, Kenya**

**December, 2020**

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BOCHERE OMARIBA



9<sup>TH</sup> JUNE 2020

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## **ABSTRACT**

Public procurement in Kenya is an area that is fast evolving. The coming into force of Kenya's new constitution in 2010 set the stage for reforms in the procurement sector.

This thesis examines the eligibility and registration requirements under Kenya's preference and reservation program; it interrogates the eligibility and registration processes' appropriateness and the impact that these processes bear on the realization of the overall objectives of the public procurement (preference and reservation) program.

The thesis evaluates the legal and regulatory framework upon which Kenya's public procurement is anchored. It analyses the constitution and various legal instruments in a bid to understand how, and to what extent, they seek to improve access to public procurement opportunities by women, persons with disability and the youth.

The research also considers the preferential procurement systems of the United States of America and that of South Africa. It contrasts the eligibility criteria and the registration requirements under the preference programs in the selected jurisdictions with the those obtaining in Kenya's AGPO program.

The thesis further discusses the various complexities in the AGPO eligibility and registration processes that have emerged in the course of conducting this research and explores possible solutions to the identified difficulties.

Finally, the thesis offers a summary of the findings of the research and makes possible recommendations and suggestions for improvement.

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# **LIST OF STATUTES AND REGULATIONS**

## **KENYA**

Companies Act, No 17 of 2015.

Companies (Amendment) Act, 2017.

Constitution of Kenya, 2010.

Leadership and Integrity Act, No. 19 of 2012.

Statute Law (Miscellaneous Amendments) Act, No. 12 of 2019.

Public Procurement and Asset Disposal Act, No. 33 of 2015.

Public Procurement and Disposal Regulations and the Public Procurement and Disposal (Preference and Reservations) (Amendment) Regulations, 2013.

## **SOUTH AFRICA**

Broad-Based Black Economic Empowerment Act of 2003.

Constitution of the Republic of South Africa, 1996.

Preferential Procurement Policy Framework Act, 2000.

Preferential Procurement Policy Framework Regulations.

Preferential Procurement Regulations, 2017.

Public Finance Management Act, No. 1 of 1999.

## **UNITED STATES OF AMERICA**

Code of Federal Regulations.

Small Business Act, 15 U.S.C.

## LIST OF ABBREVIATIONS AND ACRONYMS

AGPO - Access to Government Procurement Opportunities.

B-BBEE - Broad-Based Black Economic Empowerment.

B-BBEEA - Broad-Based Black Economic Empowerment Act.

EMEs - Exempted Micro-Enterprises.

DOD - Department of Defence

GDP - Gross Domestic Product.

PPADA - Public Procurement and Asset Disposal Act.

PPDR - Public Procurement and Disposal Regulations.

PPPFA - Preferential Procurement Policy Framework Act.

PPPFR - Preferential Procurement Policy Framework Regulations.

QSEs - Qualifying Small Enterprises.



## ACKNOWLEDGEMENT

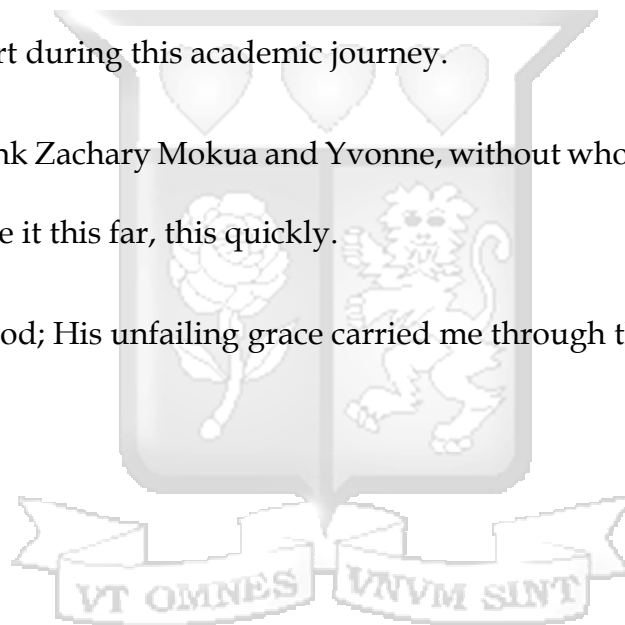
I sincerely wish to thank my supervisor, Professor Borja Lopez-Jurado. He selflessly guided and supported me by way of helpful insights and prompt and timely feedback throughout this entire research project.

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# 1 CHAPTER ONE: RESEARCH BACKGROUND.

## 1.1 Background of the Problem

Public procurement in Kenya is an area that is fast evolving. A look back in history will quickly reveal and give testament to this assertion. From a largely unregulated system in the 1960s, the recent decades have seen the public procurement regulatory regime transform immensely. In the 1970s, 80s, and 90s, procurement by the Government and other public entities was regulated by treasury circulars. This ushered in a system of statutory regulation marked by the coming into force of the Public Procurement Disposal Act in 2005. Thereafter, in 2006, Procurement Regulations were published. These were made by the Minister in exercise of the mandate conferred by the Act. A monumental event along this reform journey was the promulgation of the Constitution of Kenya 2010.<sup>1</sup> It delineated new parameters and defined new boundaries that would henceforth guide all procurement processes. By way of illustration, the principles of fairness, equitability, transparency, competitiveness and cost effectiveness<sup>2</sup> were installed as the model pillars of public procurement, by virtue of Article 227. In addition, and of significant relevance in this study, is the requirement under Article 227, enjoining National Assembly to enact procurement legislation that would make provision for an affirmative action policy that would give preference and protection to persons and groups of persons that had been the subject of unfair competition and historical disadvantage or discrimination.<sup>3</sup>

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<sup>1</sup> Kenya's constitution was subjected to a referendum on 4/8/2010. 67% of the voters approved it paving way for promulgation on 27/8/2010.

<sup>2</sup> Constitution of Kenya, 2010: Art. 227 (1)

<sup>3</sup> Constitution of Kenya, 2010: Art 227 (2)

Actuated by the constitutional imperative discussed above, the Kenyan Legislature moved to enact the Public Procurement and Asset Disposal Act, 2015 (PPADA)<sup>4</sup> essentially to ensure that the procurement legislation was brought into harmonious consonance with the provisions of the Constitution. In the meantime, however, before the enactment of the PPADA, two executive acts (pronouncements from sitting heads of state) sought to bridge the transitional gap:

In 2012, the then President of Kenya – H. E Mwai Kibaki – announced that 10% of the value of all government contracts was to be allocated to the youth.<sup>5</sup> This announcement elicited a mostly joyous reaction from Kenyans who, mindful of the sorry plight of a majority of young people, thought of the initiative as a welcome measure calculated at checking the spiraling trend of the worrisome levels of youth unemployment in the country.<sup>6</sup> In like manner, and impelled by similar motivations, the National Treasury, in September 2013, announced that 30% of all government procurement opportunities shall be set aside for the benefit of women, the youth and persons with disability.<sup>7</sup> The announcement was made pursuant a directive issued by H.E President Uhuru Kenyatta to that effect. This saw the expansion of the bracket of preference to include women and persons with disability. Why women? Why persons with disability?

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<sup>4</sup> The Public Procurement and Asset Disposal Act, No. 33 of 2015.

<sup>5</sup> Presidential Directive of 7/2/2012 at the 5th anniversary of the Youth Enterprise Development Fund.

<sup>6</sup> Kenya Country Economic Memorandum, 2016.

<sup>7</sup> National Treasury Circular No. 14/2013.

In Africa, generally, and particularly in Kenya, women are thought of as the backbone of rural economies.<sup>8</sup> If any ground is to be gained in the fight against poverty, women have – as of necessity – to be factored into the equation of the country’s economic and development agenda.

Another matter of definite equal importance concerns the plight of persons with disability. One major challenge facing persons with disability in Kenya, is a general lack of employable and entrepreneurial skills.<sup>9</sup> Necessarily flowing out of this sorry state of affairs, is their unapologetic exclusion from the country’s development programs; this does little, if anything at all, to improve the economic independence of persons with disability.

The said presidential directive saw the amendment – in 2013 – of the Public Procurement (Preference and Reservations) Regulations.<sup>10</sup> In order that the said directive be implemented promptly and efficiently, the president launched the Access to Government Procurement Opportunities (AGPO) program in October 2013. The objective of this program is to offer facilitation to enterprises owned by women, persons with disability and the youth, so that they are better placed to participate more fully in business opportunities offered by the government through public procurement. This initiative would have the effect of shielding the target enterprises from competition posed by more established firms.<sup>11</sup>

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<sup>8</sup> State of Food and Agriculture (SOFA) 2011 Report dedicated to Women in Agriculture, pp. 44-45.

<sup>9</sup> Norhasyikin Rozali et al. “Challenges faced By People with Disability for Getting Jobs: Entrepreneurship Solution for Unemployment” International Journal of Academic Research in Business and Social Sciences: 2017, Vol. 7 No.3. pp. 67-71.

<sup>10</sup> Legal notice No. 114 of 2013.

<sup>11</sup> <https://agpo.go.ke/>

To concretize this initiative further, and as a show of renewed promise and vigor towards achieving the goal of empowering the members of the target groups, the Government earmarked KES. 531 billion out of its national budget of KES. 1.77 trillion from its 2015/2016 allocation for the needs of the target groups.<sup>12</sup>

## 1.2 Research Problem

It is estimated that up to 15-25% of the developing countries' Gross Domestic Product (GDP) goes into the procurement of goods and services as well as the carrying out of other public works. Further, that up to at least 50% of developing countries' GDP goes into total government expenditure.<sup>13</sup> According to the Institute of Economic Affairs, Kenyan Government procurement expenditure has steadily maintained an upward trajectory across the last decade, from 15.3% of GDP in 2008/09 to 19.5% of GDP in 2016/17.<sup>14</sup>

The Public Procurement Regulatory Authority (PPRA) report for 2015/16 revealed that out of a cumulative budgetary allocation of KES. 87 Billion attributable to 156 procuring entities on the national government grid, only KES. 18.7 Billion was reserved for the targeted groups. Concerning county governments, the report shows that procuring entities with an aggregate budget of KES. 28.8 Billion, reserved KES. 6.2 Billion to the targeted groups. "Cumulatively, the two levels of government

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<sup>12</sup> People Unlimited "Kenya's Efforts to Empower Women, Youth and Persons with Disability through Public Procurement." Hivos Report, pp. 6-8.

<sup>13</sup> Knack, Stephen; Biletska, Nataliya; Kacker, Kanishka. 2017. "Deterring Kickbacks and Encouraging Entry in Public Procurement Markets: Evidence from Firm Surveys in 88 Developing Countries" (English). Policy Research Working Paper; no. WPS 8078. Washington, D.C. World Bank Group, pp. 87-93.

<sup>14</sup> Institute of Economic Affairs, Budget analysis 2018, (June 2018) at pg. 4

reported to have reserved a total of KES. 24.8 billion representing 21.5% of the total annual procurement budget of KES. 115 billion.”<sup>15</sup> No doubt, 21.5% fundamentally falls short of the requisite 30% statutory minimum requirement. More importantly, and as will be developed later in this research, the 21.5% compliance indicator may not be truly reflective of the actual uptake of the AGPO quota reserved for the special interest groups. Some members of the special interest groups are used by more established business enterprises merely as a front, a disguise or a façade to gain the AGPO certification, whereas, in actual fact, the entity in question is owned and run by people who are not eligible to be accorded preference under the program.

Whence emerges the disconnect? This question is the catapult – as it were – that launches us into the specifics of this research initiative.

### **1.3 Research Objectives**

This study therefore, seeks to investigate and interrogate how the AGPO eligibility criteria, coupled with the registration requirements under the AGPO program have contributed to the obvious lapse that presents itself either as an implementation gap or as a misstatement of the compliance levels in the AGPO initiative. As will be discussed later on in this chapter, available material in this study area suggests that findings from various research initiatives conducted on this topic have been inconclusive and have majorly concentrated on the negative role played by procuring entities in orchestrating non-compliance. No known research has tilted the lens to

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<sup>15</sup> Institute of Economic Affairs, Budget analysis 2018, (June 2018) at pg. 9.

focus on the role (if any) that the current AGPO eligibility criteria or the registration requirements under the AGPO program have played in compounding the complexity of the non-compliance problem.

This study therefore proposes to take advantage of this open research horizon in a bid to answer various emergent fundamental questions. The research will explore, in detail, the legal and regulatory framework that anchors public procurement in Kenya. Borrowing from the preference and reservation programs in the United States and South African jurisdictions, this research will draw comparisons and suggest possible improvements to the Kenyan AGPO initiative. The study will ultimately propose and recommend solutions to any gaps - as regards the eligibility criteria and registration requirements under the AGPO program - that may emerge in the course of the research.

## **1.4 Hypotheses**

1. There is a relationship between the AGPO eligibility criteria and registration requirements for special interest groups and the success of the AGPO initiative.
2. Specific changes in the AGPO registration requirements could facilitate the achievement of better AGPO compliance levels.
3. Specific changes in the AGPO eligibility criteria could help achieve better participation by members of the special interest groups in the AGPO program.

## 1.5 Research Questions

1. What relationship exists between the AGPO registration requirements and the non-compliance by the Government and other public institutions to the 30% statutory reservation rule under the AGPO initiative?
2. What legislative changes in the AGPO registration requirements would first, achieve and then ensure continued sustainability of optimal AGPO compliance levels?
3. What legislative changes in the AGPO eligibility criteria would help achieve better participation by members of the special interest groups in the AGPO program?

## 1.6 Conceptual Framework

A good public procurement system should not only endeavor to be transparent, fair, equitable cost-effective and competitive,<sup>16</sup> it should also provide for a system that allows persons and groups of persons who have been the subject of historical disadvantage by reason of unfair competition and discrimination,<sup>17</sup> to be given preference and protection when awarding government contracts.

Any system of public procurement that seeks to promote the participation of members of certain special interest groups should ensure not only that the parameters for eligibility under the preference and reservation scheme are properly defined, but also

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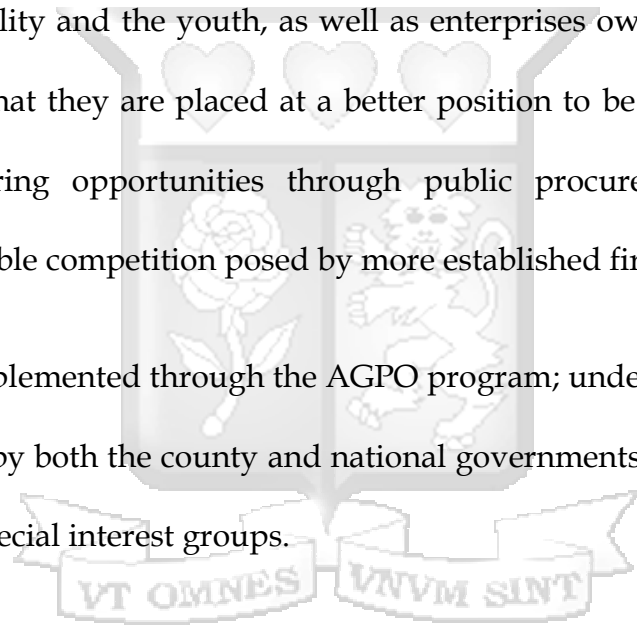
<sup>16</sup> Constitution of Kenya, 2010: Art. 227(1).

<sup>17</sup> Constitution of Kenya, 2010: Art. 227(4).

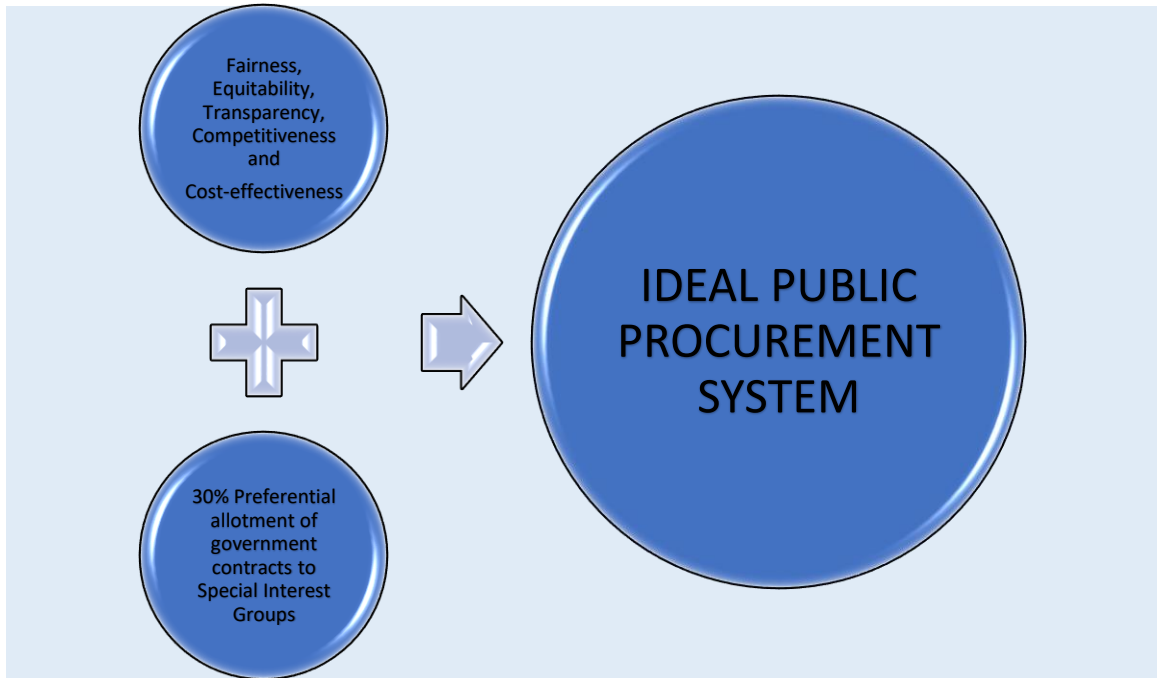
that it adopts a registration procedure for the special interest groups that will achieve overall efficiency. A preference and reservation program that does not incorporate watertight eligibility criteria, or one whose registration requirements are unnecessarily cumbersome will invariably fail to achieve its target reservation threshold.

The Kenyan public procurement legal regime adopts a preference and reservation scheme that is aimed at facilitating certain special interest groups - being, women, persons with disability and the youth, as well as enterprises owned by members of these groups - so that they are placed at a better position to be able to take part in government tendering opportunities through public procurement while being shielded from possible competition posed by more established firms.

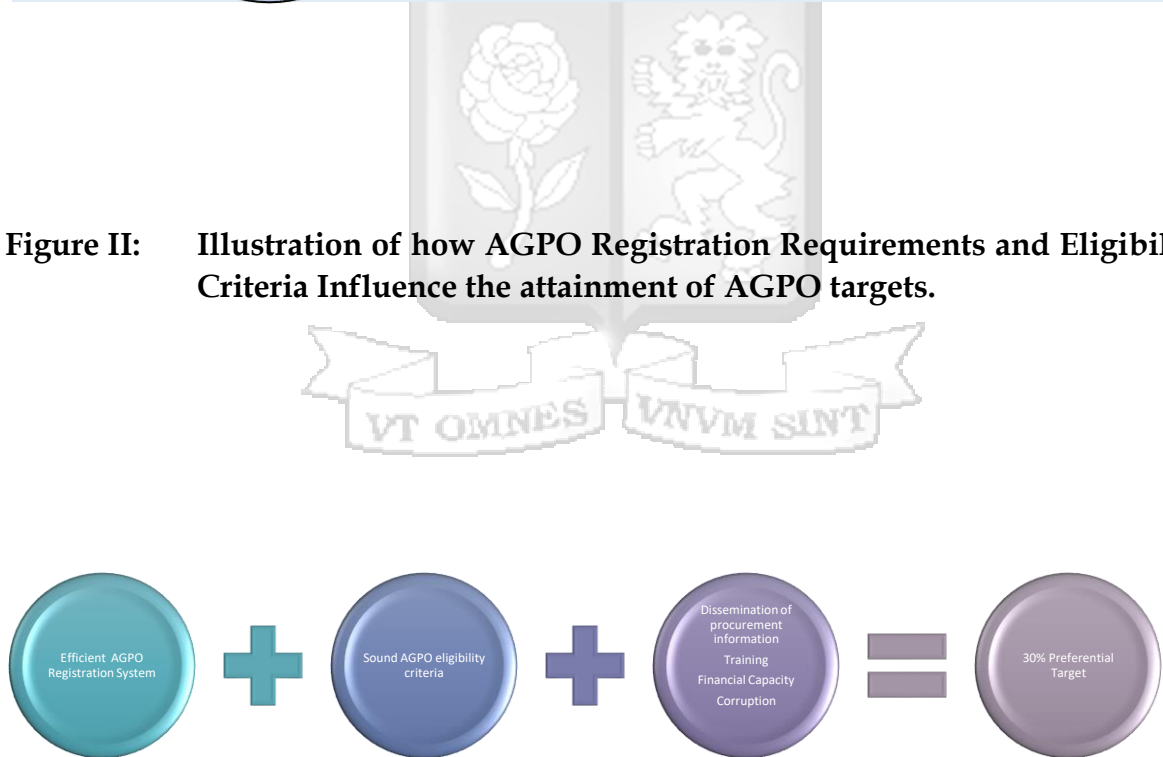
This initiative is implemented through the AGPO program; under this program, 30% of all procurement by both the county and national governments should be reserved for the identified special interest groups.



**Figure I: Illustration of the Principles of an Ideal Public Procurement System**



**Figure II: Illustration of how AGPO Registration Requirements and Eligibility Criteria Influence the attainment of AGPO targets.**



## 1.7 Theoretical Framework

### 1.7.1 Introduction

The research identified two broad theories that would hold and support the essence of this study; these are the affirmative action theory and the empowerment theory. These theories were selected because they offered a better understanding of this research topic and would therefore provide the required guidance in the course of conducting the study.

Both theories support and advance the notion of preference and as such are well suited to guide this study.

### 1.7.2 Affirmative Action Theory

The correct response to a probative question that seeks a universal definition to the concept of affirmative action may be illusive, largely because although it is a concept of widespread usage, affirmative action does not have an official legal definition. For our purposes however, we shall adopt the definition crafted by Marc Bossuyt, special rapporteur of the United Nations. He defines affirmative action as a *“coherent packet of measures, of a temporary character, aimed specifically at correcting the position of a target group in one or more aspects of their social life, in order to obtain effective equality.”*<sup>18</sup>

The proponents<sup>19</sup> of the affirmative action theory justify the adoption and usage of affirmative action techniques as a corrective and remedial measure against past

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<sup>18</sup> Elviria Dominguez Redondo, “United Nations Approach to Temporary Special Measures”, Journal of Law. December 2018, Pp. 67-78.

<sup>19</sup> Kojima F., “School choice: Impossibilities for Affirmative Action”, Games and Economic Behaviour, Vol. 72, July 2012, pp. 685-693

injustices and wrongs whose negative effects have cascaded forwards in the time continuum, into the present, and with a real possibility of spilling over into the foreseeable future. Affirmative action, they argue, helps to reverse this undesirable trend and creates a more positive and beneficial future for all.<sup>20</sup>

Another lens through which the affirmative action theorists view its utility is as a motivational tool. They maintain that members of a minority group who, by virtue of affirmative action have certain benefits accruing to them and are now occupants of positions of influence – so to speak – are viewed by other members of the group as role models and objects of emulation.<sup>21</sup>

Affirmative action as a theory is however not without criticism. The critics argue that properly implemented, affirmative action as a policy was intended to achieve equality of status for all – to end individual discrimination as well as facilitate and engender equality.<sup>22</sup> They note that there have however been instances of abuse with the result that rather than pursue its proper end – equality – affirmative action has essentially mutated into what is now seen as a policy that not only acknowledges and endorses preference for minorities, but one that also ultimately actively pursues favoritism.<sup>23</sup> This, affirmative action opponents argue, is the very definition of discrimination. They press the argument further: affirmative action in its corrupted state – they say –

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<sup>20</sup> Joel Thomas Tierno, "On the Justification of Affirmative Action" *Public Affairs Quarterly* Vol. 21, No. 3 (Jul. 2007), pp.56-62.

<sup>21</sup> Joel Thomas Tierno, "On the Justification of Affirmative Action" *Public Affairs Quarterly* Vol. 21, No. 3 (Jul. 2007), pp.56-62.

<sup>22</sup> Hellmers, Kimberly, "Affirmative Action: A Contradiction of Theory and Practise", *Centre for the Study of Ethics in Society Papers*, (1998), Paper 46.

<sup>23</sup> Iddo Landau, "Are You Entitled to Affirmative Action?" *International Journal of Applied Philosophy*, (1997) vol. 11. No. 2.

undermines character and competence as it creates the expectation of being granted preference merely on account of group status.<sup>24</sup>

### 1.7.3 Empowerment Theory

Empowerment theory is a construct that aspires to draw a correlational link between individual or group (as the case may be) strengths and social policy and ultimately to societal change.<sup>25</sup> Empowerment theorists postulate that the wellbeing of individuals or members of a specified group is intricately tied up with the circumstances obtaining in their larger surrounding, being the reality of their social and political environment.<sup>26</sup> The goal of empowerment-oriented interventions is not only to generally foster and stimulate a positive impact so far as surmounting challenges is concerned, it also takes on the character of making sure that opportunities that would foster knowledge and skills development are made available to participants through involvement in programs that are specifically designed to attain that purpose.<sup>27</sup>

Definitions of the concept of empowerment abound. There is however a golden thread of bedrock foundational values that cuts across all definitions. First off, empowerment is conceptualized as an intentional and / or deliberate undertaking. Next, it assumes

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<sup>24</sup> Iddo Landau, "Are You Entitled to Affirmative Action?" *International Journal of Applied Philosophy*, (1997) vol. 11. No. 2.

<sup>25</sup> Rappaport J, "Terms of Empowerment/Exemplars of Prevention: Towards a Theory for Community Psychology" *American Journal of Community Psychology* (1987), 15(2).

<sup>26</sup> Rappaport J, "Terms of Empowerment/Exemplars of Prevention: Towards a Theory for Community Psychology" *American Journal of Community Psychology* (1987), 12 (7).

<sup>27</sup> Rappaport J, "In Praise of Paradox: A Social Policy of Empowerment over Prevention." *American Journal of Community Psychology* (1987) 9 (1).

the character of a process as distinguished from a one-off event, that is, by its very nature, empowerment is ongoing.

The aim of the process espoused by the empowerment theory, the proponents maintain, is to get the participants – who invariably tend to be people lacking an equal share of valued resources or opportunities – to a place of greater access to those opportunities.<sup>28</sup> By its very nature, empowerment presupposes a collaborative effort to achieve certain goals. It also demands a level of determined effort by the participants if they are to benefit from the resources in question. A keen appreciation of the social-political environment is also a key prerequisite if the empowerment initiative is to attain even the lowest level of success.<sup>29</sup>

## **1.8 Literature Review**

### **1.8.1 Introduction**

This is a survey of scholarly sources on the research topic. It provides an overview of current knowledge of the topic and identifies gaps in the existing research, which have inspired this particular research.

The section therefore evaluates and analyses publications, both books and journal articles, that relate to the research topic.

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<sup>28</sup> Yve S. A. “*Youth Participation in Empowerment Planning Studies of Individual, Organizational and Community Change.*” Doctoral dissertation. University of Michigan, (2001).

<sup>29</sup> Zimmerman M., “*Empowerment Theory: Psychological, Organizational and Community Levels of Analysis.*” New York Plenum Press, June 2000, Pp. 511-523.

## 1.8.2 Literature Analysis

**Piga and Treumer**<sup>30</sup> analyze the public policy arguments underpinning the social-economic preferences in the United States federal public procurement. He notes that the federal statutes that establish social economic preferences do so because the government is keen on advancing the interests of small businesses when practical. To achieve this policy, the federal government agencies are encouraged to follow two guiding principles, that is, to offer the highest possible practical opportunity for small businesses to take part in contracts floated by federal agencies, or to incentivize the placement of a fair proportion of their procurements, including direct or 'prime' contracts and sub-contracts (provided that such sub-contracts are necessary for the performance of the federal prime contracts, even though there is no privity of contract between the federal government and the subcontractor), with small business concerns. To achieve this goal, Congress has established contracting and subcontracting goals. the federal law has also established preferences of certain federal public procurements to small businesses such as women owned small businesses. To this end, the federal government has set up various social economic programs, including, the small disadvantaged business program, the historically underutilized business zone, the service-disabled veteran-owned small business program, the women owned small business program, among others.

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<sup>30</sup> G. Piga; S. Treumer, *"The Applied Law and Economics of Public Procurement"*, ProQuest eBook Central, 2012.

**Kathleen Mee**<sup>31</sup> makes a case for preference to be extended to businesses owned by women when awarding procurement contracts. She considers the federal government's initiative to set up a procurement program whose target constituency is small businesses owned by women. While she lauds this scheme, she yet considers certain proposals that need to be implemented if the program is to attain successful implementation. She recommends the implementation of a mentor-apprentice program aimed specifically at women owned small businesses, coordinating outreach programs among agencies, and creating incentives to encourage government contracting officials to choose to contract with women owned small businesses.

On his part, **Max V. Kidalova**<sup>32</sup> undertakes a comparative analysis of small business contracting in the public procurement framework. He analyses the various policy considerations that motivate the preferences that government accords to small businesses in its procurement of goods and services. He also outlines the various tools that have been adopted by governments in the implementation of the preference initiatives.

In "The end of an era? How affirmative action in government contracting can survive after "Rothe.""<sup>33</sup> **Trent Taylor** discusses the United States of America Supreme Court's growing conservatism in its treatment of affirmative action in relation to public procurement, advancing the argument that the Supreme Court's restrictive

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<sup>31</sup> Mee K., "Improving Opportunities for Women-Owned Small Businesses in Federal Contracting: Current Efforts, Remaining Challenges, and Proposals for the Future", Public Contract Law Journal, Vol. 41, No. 3 (2012) Pp. 79 - 93.

<sup>32</sup> Kidolva M. V., "Small Business Contracting in the United States and Europe: A Comparative Assessment", Public Contract Law Journal, Vol. 40, No. 2 (2011), Pp. 117 - 132.

<sup>33</sup> Trent Taylor "The End of an Era? How Affirmative Action in Government Contracting can Survive after "Rothe."", Public Contract Law Journal, Vol. 39, NO. 4 (Summer 2010), Pp. 67 - 94.

approach has led to the decline in opportunities for minority businesses in the government procurement market.

It is worth noting however, that although the thread of the principles underlying affirmative action cuts across all legal jurisdictions, there still remains an obvious divergence in the particularities of what constitutes “Minority Groups” when comparing the two procurement contexts. In the U.S, for instance, unlike in Kenya, affirmative action policies are largely centered and revolve around racial underpinnings with the result that the proposed contextual solutions to the problem at hand may not reasonably – even practically – be inferred or approximated into the Kenyan contextual reality.

**Sean A. Sabin**, in his article, “Rethinking the presumption of social economic disadvantage”<sup>34</sup>, traces back the history of affirmative action within the context of procurement programs in the United States of America and as has already been pointed out, affirmative action in this geographical context assumes a largely racial perspective. He goes further to consider the U.S’s Small Business Act and president Nixon’s Executive Order - 11,518 of 1970, which had as its essential purpose, the objective of facilitating, assisting counselling and protecting the interests of small business enterprises; the said executive order required the Small Business Act to consider the needs and interests of marginalized groups that sought to enter into the mainstream business community. The author then shifts the focus of his mind to address the question of presumption of social and economic disadvantage and lays

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<sup>34</sup> Sean A. Sabin “*Rethinking the presumption of social economic disadvantage*”, Public Contract Law Journal Vol. 33, No. 4 (Summer 2004), Pp. 81 – 103.

down an elaborate discussion of what seems like a systematic attack on the presumption of social and economic disadvantage on a judicial platform.

The research then considers the statutory implementation of the “Small Disadvantaged Business Program” which is a creature of the Small Business Act.

What follows after the discussion is a detailed - blow by blow - analysis of the two major cases (“Adarand” and “Rothe”) that have impactfully sought to challenge affirmative action in government procurement, with considerable success.

The author then, by way of recommendation, puts forth a proposition that suggests that each minority group that the preference programs assist, should be examined in detail in order to establish if indeed, there is compelling interest that should justify a show of special treatment from the government.

**Ayres and Vars** in “Does private discrimination justify public affirmative action?”<sup>35</sup> advance an argument that seeks to undo the undesirable ravages of private discrimination. They propose three justifications for this remedial exercise, all the while, taking care that the corrective venture does not burden “innocent” third parties. The article is a compelling demonstration that pits its core argument against the fast-held, often widespread, beliefs that paint affirmative action as an illogical and implausible strategy when dealing with private discrimination. The article then

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<sup>35</sup> Ayres I., Vars F. E., “Does private discrimination justify public affirmative action?” Columbia Law Review, Vol. 98, N0. 7 (Nov. 1998), Pp. 12 - 23.

narrows down its focus to concentrate on affirmative action in government procurement.

Like the other pieces of literature sourced from beyond the local jurisdiction, the ideas contained in this article also present the all too familiar challenge of unrelatability owing to disparities in the different contextual circumstances and realities of the countries under review.

We now switch gears to navigate the terrain of available literature in our local procurement landscape. In his article, "Factors Influencing Government Procurement Opportunities for Disadvantaged groups in Public Institutions,"<sup>36</sup> **Stephen and Gabriel** explored a variety of contributors albeit at an acutely narrowed down level of resolution – focusing only on one public institution: Kenya Ports Authority.

In much the same way, **Masud, Nzulwa and Kwena** analyzed the challenges facing procurement performance within parastatals in Kenya, with a special eye on the National Construction Authority.<sup>37</sup>

The Hivos report of 2018<sup>38</sup> carries out an analysis intended to assess the effect of the AGPO initiative on the youth. The report also undertakes some level of comparative

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<sup>36</sup> Chepsoiyo S., Lubale G., "Factors Influencing Government Procurement Opportunities for Disadvantaged groups in Public Institutions", International Journal of Advanced Research, Issue No. 2320-5407, Pp. 137 – 159.

<sup>37</sup> Aden M.; Nzulwa J.; Kwena R., "Factors Influencing Government Procurement Opportunities for Disadvantaged groups in Public Institutions", The Strategic Journal of Business & Change Management, Vol. 3, Issue 4, Article 62.

<sup>38</sup> "Kenya's Efforts to Empower Women, Youth and Persons with Disability through Public Procurement", Hivos Report, 2018.

analysis with the other groups of preference, being women and persons with disability, albeit at a very basic level.

Aside from considering the gains of the AGPO program, the report identifies some factors that pose a challenge to its implementation, including, complex procurement procedures; high bid, proposal and compliance costs as well as very technical procurement criteria which require specialized bidding skills that may not be available among members of the preference groups.

The report does not however consider the registration process or eligibility criteria for the groups of preference, which is the special focus of this research.

In '**Participation of Women Entrepreneurs in Government Procurement - Kenya Perspective**'<sup>39</sup> Ms. Ndekei explores the challenges faced by women entrepreneurs in accessing government procurement opportunities in Kenya. Some of the identified challenges include delayed payments which in turn affect cash flow, limited access to public procurement and disposal information, limited market information for some goods, centralization of government office in Nairobi, lack of adequate technical skills required in carrying out certain public procurement contracts as well as cumbersome application processes.

Yet again, this research does not tackle the possible challenges posed by or inherence in the eligibility criteria and the registration process under the AGPO program.

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<sup>39</sup>Ndekei G., "*Participation of Women Entrepreneurs in Government Procurement- Kenya Perspective*", International Journal of Advanced Research, November 2018, Pp. 134 - 152.

In **“Government Procurement and Affirmative Action: Access to Government Public Procurement Opportunities for Women, Youth and Persons with Disabilities”**<sup>40</sup>, Prof. Tabitha K. Nganga analyses the legal and institutional frameworks that anchor the AGPO program. She considers the areas of reservation under the AGPO program, the part played by public procurement entities in achieving the objectives of the AGPO program, as well as the challenges that the AGPO initiative encounters; the research concludes by suggesting possible solutions to the identified challenges. She also singles out financial constraints, bureaucratic and opaque procurement procedures, lack of knowledge of the law by procurement officers, lack of coordination between Treasury and the Public Procurement Regulatory Authority as well as high transport costs, as the challenges facing the implementation of the AGPO initiative.

The research does not however, deal with the eligibility criteria of the preference groups or the registration requirements under the AGPO program.

On his part, Muraguri J. T in **“Implementation of The Youth Preference and Reservations Policy in Public Procurement: The Case of State Owned Enterprises in Nairobi”**<sup>41</sup> discusses the enactment of the of the policy that addresses preference for the youth and youth-owned enterprises in relation to public procurement, in a bid to establish the extent to which the youth preference and reservations policy has been

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<sup>40</sup> Nganga T. K. Prof., *“Government Procurement and Affirmative Action: Access to Government Public Procurement Opportunities for Women, Youth and Persons with Disabilities”*, International Journal of Advanced Research, June 2019, Pp. 15 -27.

<sup>41</sup> Muraguri J. T *“Implementation of the Youth Preference and Reservations Policy in Public Procurement: The Case of State Owned Enterprises in Nairobi”*, Doctoral Thesis 2013.

mainstreamed. Although he considers institutional and legislative challenges that plague the implementation of the preference and reservations policy, he nonetheless does not address his mind to matters that concern eligibility and registration of the special interest groups, nor does he look into the other groups of preference, being women and persons with disability.

## 1.9 Research Methodology and Approaches

This thesis employed non-numerical research methods which do not involve statistical analyses of data.

A brief description of each method is given below:

The doctrinal approach: at this stage, the thesis describes in detail the available foundational legal underpinnings of the chosen area of study. Here, this research analyzes constitutional provisions, specific pieces of legislation and relevant procurement regulations. In the end, this section provides a comprehensive statement of the law.

Upon analysis of the provisions in the Constitution, legislation and regulations that govern this study's research area, the thesis then seeks to identify and single out the particular provisions in law, including any gaps therein, to point out possible deficiencies and problematic areas - with specific regard to the AGPO eligibility criteria and registration requirements - that might be in need of review and amendment.

Case study analysis: the thesis also looks to the preference and reservation legal frameworks in other jurisdictions in a bid to get different perspectives concerning the different ways that other legal systems have addressed the various problems - touching on eligibility and registration under the preferential systems - identified in Kenya's procurement (preference and reservation) legal regime. The research then suggests possible lessons to be learned from the selected case study jurisdictions, that is, what useful items could be borrowed and what potential pitfalls should be avoided.

The primary sources of data in this research include, the Constitution of Kenya, 2010, various local legislations, various legislations from South Africa and the United States of America. The research also obtained data and information from other secondary sources, including reports and journal articles. Access to these resources was made possible by visits to various physical and online institutional libraries, relevant websites and general desktop research.

## **1.10 Chapter Breakdown**

Over and above outlining the structure, this chapter has also captured the substance of the research proposal. It has developed the research problem, the hypotheses, research questions, conceptual framework, theoretical framework, literature review and the research methodology.

Chapter two provides a thorough evaluation of the legal framework upon which the Kenyan public procurement regime is anchored. The chapter examines the constitutional provisions relating to procurement, the provisions contained in

procurement statutes as well as the regulations included in other subsidiary legislation and the special part they play in putting the AGPO initiative into operation, noting to identify the various implementation gaps and certain other areas of concern, with a special focus on the eligibility criteria and the registration requirements and processes under the AGPO program.

Chapter three is a case study of selected procurement legal systems and how these regimes have implemented their preferential public procurement systems. The chapter considers the preferential procurement systems of the United States of America and that of South Africa. The United States of America jurisdiction was selected because of its rich and elaborate history of affirmative action programs centred around public procurement. It therefore provides a tested, mature and concrete statutory outlook into public procurement (preference and reservation) schemes.

South Africa, although it does not pride itself with a long history of affirmative action practices, has nonetheless adopted a very aggressive public procurement (preference and reservation) program. Further, Kenya looked to South Africa in its quest to amend its constitution; as a matter of fact, the public procurement principles enshrined in Article 227 of Kenya's constitution were borrowed from South Africa's constitution.

It is because of these reasons that the South African jurisdiction was selected for this research.

Chapter four discusses the various complexities in the AGPO eligibility and registration processes that have emerged in the course of conducting this research, in a bid to explore possible solutions to the identified difficulties.

Finally, aside from concluding the study, chapter five also offers a summary of the findings of the research and makes possible recommendations and suggestions for improvement.



## 2 CHAPTER TWO: KENYA'S PUBLIC PROCUREMENT (PREFERENCE AND RESERVATION) LEGAL AND REGULATORY FRAMEWORK

### 2.1 Introduction

The Constitution of Kenya, 2010 requires that when engaging in any form of procurement activity, the Government should do so in manner that is congruent with the principles of good financial governance, that is, guided by a system that is cost efficient, accountable and transparent.<sup>42</sup>

Accordingly, following the entrenchment of public procurement principles in the Constitution of Kenya 2010, there was necessity to review the public procurement legal regime with a view to aligning it with the constitutional imperative.<sup>43</sup> The review culminated in the enactment of the Public Procurement and Asset Disposal Act, 2015 and the attendant Public Procurement and Disposal Regulations (PPDR), effectively repealing the Public Procurement and Disposal Act, 2005 and all other laws that had hitherto, governed public procurement in Kenya. Also affected by the wave of review, were the Public Procurement and Disposal (Preference and Reservations) Regulations, 2011. These were amended in 2013 by the Public Procurement and Disposal (Preference and Reservations) (Amendment) Regulations, 2013.

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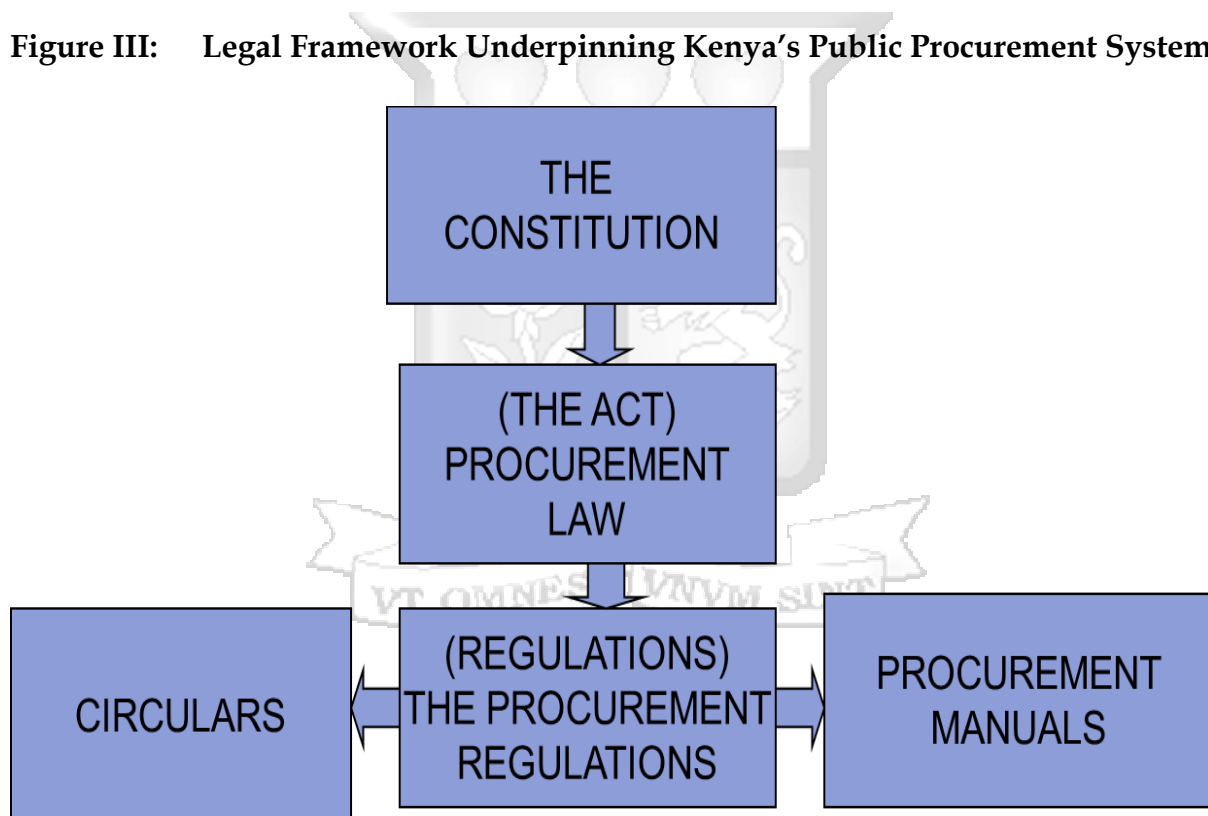
<sup>42</sup> Constitution of Kenya, 2010, Chapter 12.

<sup>43</sup> Ochieng J.; Muehle M., "Development and Reform of the Kenyan Public Procurement System" Public Law Journal, 2014, Pp. 90 - 105.

The new regime was intended to usher in a strong legal framework upon which sound public procurement processes could find firm anchorage.<sup>44</sup> The aim of this chapter is therefore to analyze each of the identified legal instruments in a bid to interrogate how, and to what extent, they seek to improve access to public procurement opportunities by women, persons with disability and the youth.

The diagram below serves to illustrate the interplay of the various legal instruments within Kenya’s public procurement system.

**Figure III: Legal Framework Underpinning Kenya’s Public Procurement System**



<sup>44</sup> Kiarahu M., “Participation of minorities and marginalised groups in the Kenyan economy: reforming public procurement law” International Journal of Advanced Research, June 2013, Pp. 67 - 74.

## 2.2 The Constitution

The current Kenyan Constitution<sup>45</sup>, replaced the 1969 Constitution; this had in turn taken the place of the 1963 Independence Constitution. The Constitution provides that use of public money should be informed by prudence and responsibility, in addition to making provisions that require special regard to be had to marginalized groups and areas.<sup>46</sup>

Part XII of the Constitution is titled *Public Finance* and it deals with procurement of public goods and services.<sup>47</sup> It enjoins every state organ or any other public entity, when contracting for goods and / or services, to do so in accordance with a system that is fair equitable, transparent competitive and cost effective. It goes further to require that the National Assembly pass legislation that would prescribe a structure within and around which policies relating to procurement and asset disposal shall be implemented. The constitution requires the said legislation to make provision for certain classes that will benefit from and enjoy formal preference in the allotment of contracts, as well as providing for the protection and progress of persons or groups that had previously been the subject of discrimination and unfair competition.<sup>48</sup>

Parliament dutifully heeded the constitutional call and in 2015, enacted a new procurement law<sup>49</sup> that came into effect in 2016. We consider this legislation in the discussion that follows.

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<sup>45</sup> Constitution of Kenya, 2010.

<sup>46</sup> Constitution of Kenya, 2010, Article 201.

<sup>47</sup> Constitution of Kenya, 2010, Article 227.

<sup>48</sup> Constitution of Kenya, 2010, Article 227 (2).

<sup>49</sup> The Public Procurement and Asset Disposal Act, 2015.

Public procurement entails the use and application of public funds. The constitutional tenets of good governance, integrity, transparency and accountability particularly in public finance are also demanded of public institutions under Art. 201 of the Constitution which requires that the use of public funds must at all times be prudent, responsible and strictly for public good.

Also relevant in this research, is Article 27 of the Constitution. It requires the State to take, among others, legislative interventions to remedy any prejudice suffered by individuals or groups as a result of historical bias and discrimination. Article 56 further requires the state to put in place affirmative action programmes designed to ensure that minorities and marginalized groups are accorded special opportunities in, among other spheres, the economic field.

### **2.3 The Public Procurement and Asset Disposal Act**

The current legislative framework for public procurement is the Public Procurement and Asset Disposal Act (PPADA), 2015 and the relevant regulations<sup>50</sup>.

The shift from the earlier regime – the Public Procurement and Disposal Act – to the PPADA was mainly driven by the need to ensure that the procurement legislation was brought into conformity with the Constitutional requirements<sup>51</sup>.

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<sup>50</sup> Public Procurement and Disposal Regulations and the Public Procurement and Disposal (Preference and Reservations) (Amendment) Regulations.

<sup>51</sup> Ochieng J.; Muehle M., “Development and Reform of the Kenyan Public Procurement System” Public Law Journal, 2014, Pp. 90 - 105.

The PPADA is premised upon certain guiding principles<sup>52</sup> – most of which can trace their source and origin to the Constitution. These include, national values and principles of governance<sup>53</sup>; equality & freedom from discrimination, which includes affirmative action programs and policies aimed at remedying any form of unfairness and / or disadvantage occasioned by individuals as well as groups of people by reason of historical discrimination;<sup>54</sup> affirmative action programs designed so as to uplift the youth as well as minority and disadvantaged groups<sup>55</sup>; principles of integrity<sup>56</sup>; principles of public finance<sup>57</sup> which emphasizes the need to take certain deliberate action to empower marginalized groups and areas; and principles of public service.<sup>58</sup>

The application of the PPADA is far reaching. It encompasses all state organs and public entities throughout the course of the procurement process.<sup>59</sup> It enjoins the Public Procurement Regulatory Authority (PPRA) a body created under the Act, to create a data base that contains information relating to complaints made on procuring entities; price comparisons for goods, services and works; a record of those prohibited from participating in tenders or those debarred; State organs and public entities that are non-compliant with procurement laws; market prices of goods, services and

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<sup>52</sup> The Public Procurement and Asset Disposal Act, 2015, Section 3.

<sup>53</sup> Constitution of Kenya, 2010, Article 10.

<sup>54</sup> Constitution of Kenya, 2010, Article 27.

<sup>55</sup> Constitution of Kenya, 2010, Article 55 and 56.

<sup>56</sup> The Leadership and Integrity Act, No. 19 of 2012.

<sup>57</sup> Constitution of Kenya, 2010, Article 201.

<sup>58</sup> Constitution of Kenya, 2010, Article 232.

<sup>59</sup> Public Procurement and Asset Disposal Act, Section 4.

works; benchmarked prices; statistics related to public procurement and asset disposal; and any other relevant procurement information.

Regrettably though, the PPRA does not maintain the required database, especially as concerns public entities which have failed to comply with the requirement that all public entities reserve 30% of their procurement opportunities to special interest groups, being women, persons with disability and the youth. In the same vein, important procurement statistics and reports maintained by the Authority are not up to date, the last published annual report being for the year 2016.

The PPADA also contains particular provisions on preference and reservations of public procurement contracts. These provisions trace their origin to the authority conferred by the Constitution under Article 227(2). The preference and reservations provisions are stated to take preeminence over all other provisions contained in the PPADA with an injunction that all procurement entities shall comply with them.<sup>60</sup> However, as will be discussed later in this study, the Public Procurement Regulatory Authority (PPRA) which is the institutional regulator of public procurement matters, is not endowed with enforcement powers; its role is limited to monitoring and reporting compliance and this, without a doubt, undermines the achievement of the PPADA's objectives.

The PPADA enjoins the Cabinet Secretary of Treasury to formulate and publish modalities of preferences and or reservations in public procurement and asset disposal which preferences shall take into account, social and economic development

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<sup>60</sup> Public Procurement and Asset Disposal Act, Section 155.

factors<sup>61</sup>. The Act requires every public procuring entity to ensure that not less than 30% of the finances set aside for procurement during each financial year is reserved for the benefit of women, persons with disability and the youth.<sup>62</sup> Within the meaning of the PPADA, the following institutions, among others, qualify as public procuring entities: both the national and county government as well as their various departments and organs; courts and the Judiciary; Independent Offices and Constitutional Commissions and parastatals.<sup>63</sup>

To monitor compliance with the above requirements, the PPADA requires all procuring entities to provide data, every six months, to the PPRA; the data should be disaggregated to indicate the number of youth, women and persons with disability whose goods and services have been procured by the procuring entity<sup>64</sup>. The PPRA is then required to compile a report, based on the data presented by the procuring entities, and table it before Parliament, every six months. Included in the report, should be particulars the procuring entities and their compliance levels with the preference and reservation requirements.

Unfortunately, as has already been mentioned and as will be discussed in chapter 4 of this research, the first and last published annual report by the PPRA relates to the period covering the first year of the PPADA coming into effect, that is, the year 2015 / 2016.

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<sup>61</sup> Public Procurement and Asset Disposal Act, Section 157(2).

<sup>62</sup> Public Procurement and Asset Disposal Act, Section 157(10).

<sup>63</sup> Public Procurement and Asset Disposal Act, Section 2.

<sup>64</sup> Public Procurement and Asset Disposal Act, Section 157(12) (b).

The Cabinet Secretary is further empowered by the PPADA<sup>65</sup> to come up with prescribed preferences that will help in attaining the statutory 30% quota. Such prescription by the Cabinet Secretary is geared towards achieving the goals of Article 55 as read together with Article 227(2) of the Constitution. The Cabinet Secretary, acting pursuant to this power, prescribed five registration categories under which the youth, women and persons with disabilities would obtain preferential treatment in public procurement, namely: General Supplies, ICT Services, Professional Services and Consultancy, Small works and Engineering as well as Fresh Produce & Agricultural Produce<sup>66</sup>. Although the special interest group entities are limited to submitting bids for tenders only in the specified categories, interestingly enough, neither the PPADA nor the PPADR specify the categories for which they cannot submit bids; as a matter of fact, these are undefined. This limitation locks the special interest groups from participating in a wide range of procurement opportunities.

While the intention of prescribing the five categories was noble and aimed at promoting the economic and social welfare of members of the special interest groups, it has been argued that it has, regrettably, been counterproductive in its implementation. This categorization has created unnecessary impediments that have prevented the registered entities from taking full advantage of tendering opportunities which do not fall under their registered category but which they, nonetheless, have the capacity to undertake successfully<sup>67</sup>.

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<sup>65</sup> Public Procurement and Asset Disposal Act, Section 157(15).

<sup>66</sup> Public Procurement and Disposal (Preference and Reservations) (Amendment) Regulations, 2013.

<sup>67</sup> Ochieng J.; Muehle M., "Development and Reform of the Kenyan Public Procurement System" Public Law Journal, 2014, Pp. 90 - 105.

This aspect of the mode of registering special interest groups has been fronted as a contributor to the low compliance levels, by public entities, with the specified 30% reservation quota.

## **2.4 Procurement Regulations and the AGPO Program.**

### **2.4.1 The Public Procurement and Disposal (Preference and Reservations) Regulations.**

In 2013, H. E the President of Kenya, Uhuru Kenyatta issued a directive that saw the amendment of the procurement rules, so that 30% of all government procurement contracts would be set aside for women, persons with disability and the youth, thereby shielding them from the competition that would be posed established firms. Following this directive, the Public Procurement and Disposal (Preference and Reservations) Regulations, 2011, were amended in 2013 by the Public Procurement and Disposal (Preference and Reservations) (Amendment) Regulations of 2013.

The Regulations require all public procuring entities to set aside and allocate at least 30% of the finances that they have earmarked for procurement, and to use that money to obtain services and procure goods from enterprises that belong to women, the youth and persons with disability. In order to implement this directive, procurement entities are required to make appropriate provision for it not only in their budgets, but also in their procurement plans. The PPRA further requires the said procuring entities to submit reports detailing their compliance, after every quarter.<sup>68</sup>

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<sup>68</sup> Public Procurement and Disposal (Preference and Reservations) (Amendment) Regulations, 2013, Regulation 31 (1).

The Regulations also prescribe a formal qualification criterion for entities that wish to be registered under the AGPO preference program. As pertains business entities owned by women, youth and persons with disability, the regulations require that such enterprises shall be legal entities (that is to say, companies, partnerships or sole proprietorships) that are registered with the government body responsible for such matters and that have at least 70% membership - either in terms of partners or shareholders - of women, youth or persons with disabilities. The leadership, that is to say, management and directorship posts, of the said entities shall be 100% women, youth and persons with disability, respectively<sup>69</sup>.

Notwithstanding the elaborate eligibility and registration requirements, it is however acknowledged that the system is susceptible to abuse. A great number of unscrupulous traders have been known to manipulate the registration structure by procuring counterfeit documents and using these forged documents to register their companies in the names of women, persons with disability and the youth so as to gain access to the reserved opportunities.<sup>70</sup> This practice deprives genuine and deserving members of the specified minority groups of the benefits that would rightfully accrue to them by virtue of their membership to the preference and reservation schemes.

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<sup>69</sup> Public Procurement and Disposal (Preference and Reservations) (Amendment) Regulations, 2013, Regulation 32

<sup>70</sup> Ochieng J.; Muehle M., "Development and Reform of the Kenyan Public Procurement System" Public Law Journal, 2014, Pp. 90 - 105.

## 2.4.2 The AGPO program

The Access to Government Procurement Opportunities (AGPO) Program is a government - initiated program that seeks to facilitate target groups, being, women, persons with disability and youth-owned enterprises and place them at a position where they would be enabled to take part in public procurement with ease.

The AGPO initiative is anchored on the affirmative action provisions of the Constitution<sup>71</sup> which enjoin government to put in place both legislative as well as policy measures that will serve to address the economic conditions of marginalized or discriminated groups.

Further, the PPADA donates powers to the National Treasury to set up and put in place a secretariat - the preference and reservations secretariat - that will be charged with the responsibility of implementing the preferences and reservations provided under the Act.<sup>72</sup> It is the responsibility of the said secretariat to prequalify, register and certify the persons and / or categories of persons or groups that are beneficiaries to the preference and reservation schemes; in addition, the secretariat is also expected to train and build the capacity of the target groups as well as to provide technical and advisory support to procuring entities as they endeavor to implement the preferences and reservations specified under the PPADA; further still, it falls to the secretariat to evaluate and monitor how the preferences and reservations specified under the Act are being implemented.<sup>73</sup> The AGPO program is managed by the said secretariat.

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<sup>71</sup> Constitution of Kenya, 2010, Article 27 (8).

<sup>72</sup> The Public Procurement and Asset Disposal Act, 2015, section 157 (17).

<sup>73</sup> Public Procurement and Asset Disposal Act, Section 157 (17).

The program was created in response to a directive that was issued by H. E the President of Kenya, Uhuru Kenyatta. This saw the amendment of the procurement rules, so that 30% of all government procurement contracts would be held in reserve for women, persons with disability and the youth, thereby shielding them from competition that would be posed by established firms.

The AGPO program provides a platform on which eligible enterprises undertake mandatory registration before they could qualify as beneficiaries under the preference and reservation schemes. The requirement that such entities have at least 70% membership of women, persons with disability or youth and the leadership be 100% women, persons with disabilities or youth respectively, applies here.

As such, those wishing to register their entities must present their national identity cards or Kenyan passport to act as proof of citizenship as well as proof of age with regard to youth enterprises; business registration certificate (in the case of sole proprietorships) or certificate of incorporation (in case of companies); CR12 for Limited Company from Registrar of Companies (this provides particulars of directors and shareholders of the company); partnership deed (for partnership businesses); tax compliance certificate (for all businesses); and certificates from the Energy Regulatory Commission, the National Construction Authority, or any other Authorized Public Technical Body for entities wishing to be registered under the construction category.

An additional requirement applies to persons with disability and establishments formed by persons with disability. These will require a special registration certificate from the National Council for Persons with Disabilities. Obtaining this certification

can prove to be cumbersome for many as one is required to fill in specified forms and tender a medical report to the Council. The costs involved in obtaining a medical report may prove to be prohibitive and out of the reach of many persons with disability.

What is also evident, is that this structure creates a two-tier and sometimes three-tier registration process consisting of normal business registration requirements for companies, partnerships or sole proprietorships; industry specific registration requirements and finally, the AGPO program registration at the National Treasury. These processes are by no means simple or straightforward. This difficulty is accentuated by the fact that the special interest groups – which are the specific target of the AGPO program – are not particularly endowed with adequate capacity, both in terms of finances and awareness, to obtain the required registration uninhibited. Registration necessarily entails obtaining money to pay the requisite fees for obtaining business registration certificates and the technical, industry-specific certification.

In addition, most business enterprises run by special interest groups, are based in the rural or sub-urban areas. This presents difficulties and challenges in terms of the practical feasibility for them to comply with requirements such as the timely filing of annual returns, which in turn militates against these enterprises' ability to secure a tax compliance certificate – a mandatory document that is tied to the AGPO registration.

## 2.5 The Public Procurement Regulatory Authority

Prior to the enactment of the PPADA in 2016, the Public Procurement Oversight Authority was the body tasked with overseeing the regulatory function of public procurement in Kenya. However, with the coming into effect of the PPADA, the situation changed massively and the regulatory function was assumed by the Public Procurement Regulatory Authority (PPRA).

The functions of the PPRA are specified in the PPADA,<sup>74</sup> and to the extent that they relate to this research topic, include to: monitor, assess and review the public procurement and asset disposal systems in a bid to ensure that they are congruent with the national values and other constitutional provisions and to make recommendations for possible improvement; report to the Cabinet Secretary and the county executive member for finance in each county on the overall functioning of procurement systems; apply any standards developed under the PPADA; monitor the application of the preference and reservation schemes by procuring entities; be advice at hand to offer any counsel and technical assistance that may be required; investigate and take other necessary action concerning grievances that may be lodged on procurement and asset disposal procedures from tenderers, procuring entities, contractors or the general public that are not subject of administrative review; conduct research on the public procurement and asset disposal structure and any improvements attributable to it; monitor and evaluate the preference and reservations provided for under the Act and prepare routine reports as prescribed; create a central

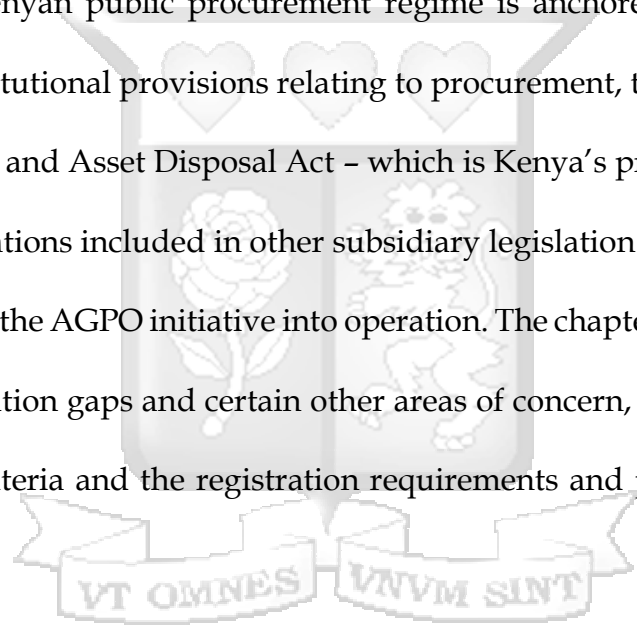
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<sup>74</sup> Public Procurement and Asset Disposal Act, No. 33 of 2015, Section 9 (1).

repository with up to date information as prescribe; liaise with state and non-state performers with the intention of obtaining recommendations on how public procurement and disposal can be enriched; and ensure that procurement entities implement the prescribed preferences and reservations and provide data on compliance to the PPRA.

## **2.6 Conclusion**

This chapter has given an in-depth evaluation of the legal and regulatory framework upon which the Kenyan public procurement regime is anchored. The chapter has examined the constitutional provisions relating to procurement, the provisions of the Public Procurement and Asset Disposal Act - which is Kenya's procurement statute - as well as the regulations included in other subsidiary legislation and the special part they play in putting the AGPO initiative into operation. The chapter has also identified various implementation gaps and certain other areas of concern, with a special focus on the eligibility criteria and the registration requirements and processes under the AGPO program.



# 3 CHAPTER THREE: LESSONS FROM OTHER JURISDICTIONS

## 3.1 Introduction

There are points, both of intersection and divergence, between the legal framework governing preference and reservations in the context of public procurement in Kenya and the legal frameworks obtaining in other jurisdictions. In conducting this research, two public procurement legal regimes, that is, the United States of America and South Africa have been selected as case studies in analysing the various registration requirements within their procurement (preference and reservation) regimes.

As shall be discussed in this chapter, the United States of America has had a rich and elaborate history of affirmative action programs centred around public procurement. This jurisdiction was selected because it provides a tested, mature and concrete statutory outlook into public procurement (preference and reservation) schemes.

On the other hand, South Africa, although it does not pride itself with a long history of affirmative action practices, it has nonetheless adopted a very aggressive public procurement (preference and reservation) program. An important fact that should also be highlight at this juncture, is that Kenya looked to South Africa in its quest to amend its constitution; as a matter of fact, the public procurement principles enshrined in Article 227 of Kenya's constitution were borrowed from South Africa's constitution. It therefore, makes great academic and practical sense to look to the South African legal regime in a bid to borrow important lessons on the implementation of its public procurement system.

This chapter will therefore discuss the salient registration characteristics of the procurement (preference and reservation) legal frameworks in the two selected jurisdictions to determine whether they can provide any lessons for our Kenya procurement (preference and reservation) legal regime.

### **3.2 The United States of America's Small Business Administrative Initiative**

The public procurement (preference and reservation) regime in the United States is governed by the Small Business Act which was enacted by Congress in 1953.

In setting procurement preferences, the United States Federal Government was motivated by the general philosophy of stimulating growth and providing protection for small businesses by seeking to boost their economic welfare.<sup>75</sup> These preferences are also aimed at maintaining the spirit of competition within the public procurement system by adding to the pool of suppliers in the market and taming the dominance of the market by few established firms.<sup>76</sup> While the United States Competition in Contracting Act, would normally require that federal public procuring entities obtain uninhibited and open competition when awarding contracts, the reservations prescribed under the Small Business Act take precedence; the reservation provisions under the Small Business Act step in to moderate the application of the full and open

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<sup>75</sup> Moore N.; Grammich C. A.; Mele J. D., "Small Business and Strategic Sourcing", Rand Corporation, (2014), Pp. 57 - 68.

<sup>76</sup> Moore N.; Grammich C. A.; Mele J. D., "Small Business and Strategic Sourcing", Rand Corporation, (2014), Pp. 57 - 68.

competition rule by requiring that this rule only apply after the reservation quota for small businesses has been excluded.<sup>77</sup>

The Small Business Act created the Small Business Administration which is the implementing arm of the small business reservation program. The program is aimed at ensuring that small businesses obtain a certain prescribed ratio of contracts from the federal government.<sup>78</sup>

Within the definition of 'small business' there are five specific categorizations, namely, Historically Underutilized Business Zones, small disadvantaged businesses, service-disabled veteran-owned small businesses and women owned small businesses.<sup>79</sup>

Currently, the prescribed reservation proportion stands at 23% with regard to small businesses, 5% with regard to small disadvantaged businesses, 5% with regard to women owned small businesses, 3% with regard to Historically Underutilized Business Zones and 3% with regard to service-disabled veteran-owned small businesses.<sup>80</sup>

The Small Business Act enjoins the Small Business Administration to report to Congress and the President on the federal agencies' and departments' achievement of the prescribed reservation targets.<sup>81</sup> To this end, the Small Business Administration

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<sup>77</sup> Snider K. F., Kidalov M. V., Rendon R. G., "Diversity Governance by Convenience? Federal Contracting for Minority-owned", Public Administration Quarterly, Vol. 37, No. 3 (Fall 2013), Pp. 87 - 101.

<sup>78</sup> Small Business Act, 15 U.S.C. Chapter 14A

<sup>79</sup> Snider K. F., Kidalov M. V., Rendon R. G., "Diversity Governance by Convenience? Federal Contracting for Minority-owned", Public Administration Quarterly, Vol. 37, No. 3 (Fall 2013), Pp. 87 - 101.

<sup>80</sup> N.Y Moore, C.A Grammich, J.D Mele, "Identifying Specific Opportunities for Strategic Sourcing and Implications for Small-Business Procurement", Rand Corporation (2014), Pp. 98 - 111.

<sup>81</sup> Small Business Act, 15 U.S.C 633, Section 4 (b) (2) A.

has adopted a scorecard monitoring system. Agencies that do not meet the set preference targets must tender a justification report for the non-compliance to the Small Business Administration along with a corrective plan of action detailing how the agency in question intends to ensure the reservation goals for the following fiscal year are achieved.<sup>82</sup>

### **3.2.1 Eligibility and Registration Requirements**

The question of whether or not an entity qualifies for admission under the preference and reservation scheme is determined by the Small Business Administration. The baseline criterion is set by the Small Business Act.<sup>83</sup> For a firm to be categorized as a small business concern, it has to conform with certain set standards in terms of size and socio-economic status.<sup>84</sup> Under the Small Business Act, businesses are categorized differently according to specific industry standards.

### **3.2.2 Certification Procedure**

#### **3.2.2.1 Stage I**

The United States model of preference uses a self-certification mechanism where entities are required to present a written self-certification declaration to the federal public procuring entity. The only qualification attached to the self-certification declaration being, that the entity must represent – in good faith – that at the time of its written self-certification, it qualified as a small business. In making out the written self-certification, the owners of the entity should be guided by the definition of the

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<sup>82</sup> Sweet M. J., “Minority Business Enterprise Programmes in the United States of America: An Empirical Investigation”, *Journal of Law and Society*, Vol. 33, No. 1 (2016), Pp. 89 - 100.

<sup>83</sup> Small Business Act, 15 U.S.C Section 632 (a) (2006).

<sup>84</sup> Small Business Act, 15 U.S.C Section 637 (b) (6) (2006).

small business concern that is relevant to the industry where the entity seeks to be contracted, provided that the Small Business Administration has not previously determined the entity in question to be other than small.<sup>85</sup>

### 3.2.2.2 *Stage II*

Upon submission of the self-certification declaration by the small business entity, the federal public procuring entity is required to accept it and interact with it at face value unless:

- a. There is protestation against the certification, lodged by another bidder; or
- b. The federal procuring entity has in its possession, credible information, on whose basis the veracity and soundness of the self-certification declaration can be questioned.<sup>86</sup>

### 3.2.2.3 *Stage III*

An entity that successfully goes through the two stages (above) is for all intents and purposes considered to be a small business enterprise as concerns that specific procurement and will be accorded the applicable preference, taking into consideration its specific categorization and the specific industry of the federal public procuring entity. Thereupon, the entity in question will be awarded the contract, subject to a successful evaluation process.<sup>87</sup>

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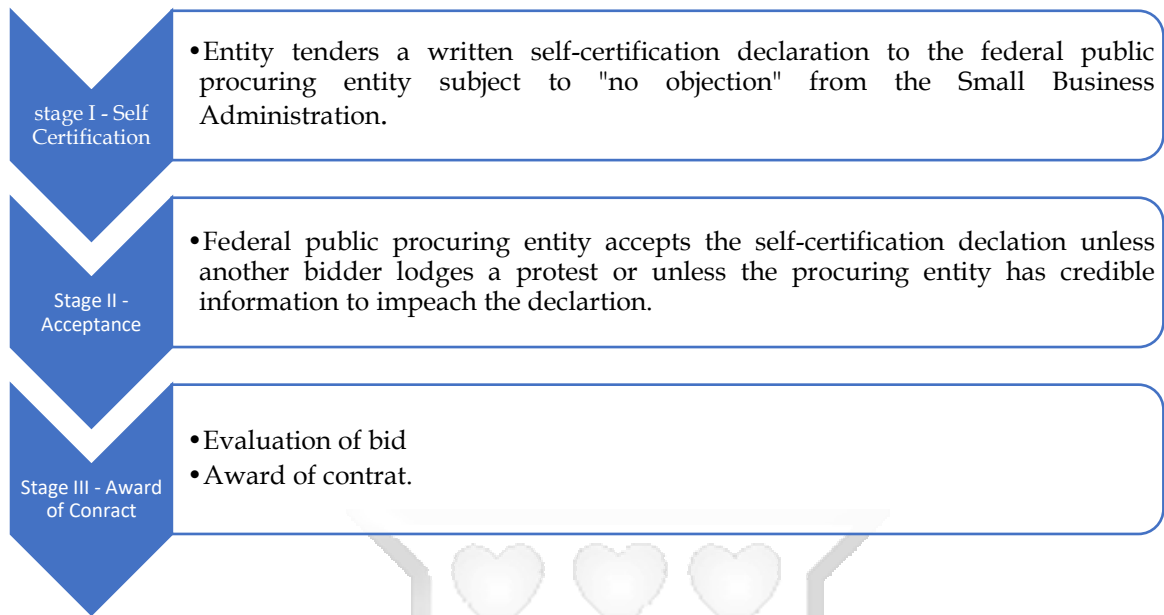
<sup>85</sup> Federal Acquisition Regulation 19. 301-1 (a).

<sup>86</sup> Federal Acquisition Regulation 19. 301-1 (a).

<sup>87</sup> Federal Acquisition Regulation 19. 301-1 (a).

See also Mee K., *“Improving Opportunities for Women-Owned Small Businesses in Federal Contracting: Current Efforts, Remaining Challenges, And Proposals for the Future”*, Public Contract Law Journal, Vol. 41, No. 3 (Spring 2012), Pp. 112 - 129.

**Figure IV – Certification Procedure.**



### 3.2.3 Recertification

Following much discussion and debate around the issue of re-certification by small business entities, the Small Business Administration adopted a time-based, option-based re-certification system in 2006.<sup>88</sup> Under this regime, all merging entities and those entities that are subsequently acquired by other firms subsequent to being contracted by the federal government on the basis of their small business status, must file a recertification with the federal public procuring entity and with the Small Business Administration, indicating their changed status.<sup>89</sup>

<sup>88</sup> Code of Federal Regulations, Section 121.404 (g).

<sup>89</sup> Code of Federal Regulations, Section 121.404 (g). See also Sweet M. J., "Minority Business Enterprise Programmes in the United States of America: An Empirical Investigation", *Journal of Law and Society*, Vol. 33, No. 1 (2016) Pp. 89 - 100.

Entities that are performing long term contracts are also required to tender a re-certification before the sixth year of the contract, and thereafter, before any option is exercised by the contracting parties.<sup>90</sup>

### **3.3 South Africa's Broad-Based Economic Empowerment Strategy**

Much like the Kenyan scenario, the South African public procurement system is anchored on principles that are enshrined in the Constitution.<sup>91</sup> It requires that all public procurement must be conducted in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.<sup>92</sup> It further enjoins State organs to adopt a procurement policy that champions preferential treatment for persons or entities that, by reason of unjust discrimination in the past, have previously been disadvantaged.<sup>93</sup> To achieve this goal, the Constitution enjoins parliament to enact legislation that will bring this provision into operation through the prescription of a framework within which the implementation of the preference and reservation policy in public procurement shall be founded.<sup>94</sup>

Pursuant to the above constitutional imperative, the South African Legislature enacted the Preferential Procurement Policy Framework Act of 2000 (PPPFA). This was followed by the promulgation of the Preferential Procurement Policy Framework Regulations (PPPFR) in 2011, which were subsequently amended in 2017; these provide guidelines for Black Economic Empowerment with regard to state tenders.

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<sup>90</sup> 13 Code of Federal Regulations, Section 121.404 (g).

<sup>91</sup> Constitution of the Republic of South Africa, 1996.

<sup>92</sup> Constitution of the Republic of South Africa, 1996, Section 217.

<sup>93</sup> Constitution of the Republic of South Africa, 1996, Section 217 (3).

<sup>94</sup> Constitution of the Republic of South Africa, 1996, Section 217 (3).

Therefore, the substantive legal regime that governs the preference and reservations policy for public procurement is the PPPFA and the Regulations made thereunder, being, the PPPFR. These enjoin State organs to establish, execute and administer a public procurement system that adopts certain targeted mechanisms aimed at achieving the specific goal of contract reservation in favour of disadvantaged and / or marginalised individuals and / or groups.<sup>95</sup>

Also relevant in this regard, is the Public Finance Management Act<sup>96</sup> which charges accounting authorities for national and provincial entities as well public entities to maintain, within their respective departments or entities, an appropriate procurement system which is fair, equitable, transparent, competitive and cost-effective.<sup>97</sup> The implementing regulations under this Act are the National Treasury Regulations.

Working closely with the Preferential Procurement Policy Framework Act, is the Broad-Based Black Economic Empowerment Act of 2003 (B-BBEEA). This is a sector-specific legislation which contains binding guidelines on how to boost the involvement of historically marginalized or disadvantaged groups in public procurement, generally, but also in particular sectors. The B-BBEEA contains mathematical formulations for the calculation of a special rating of black empowerment, dubbed, the Broad-Based Black Economic Empowerment (B-BBEE) score.<sup>98</sup>

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<sup>95</sup> Preferential Procurement Policy Framework Act, 2000, Section 3; Preferential Procurement Policy Framework, 2017, Regulations 6 and 7.

<sup>96</sup> Public Finance Management Act, No. 1 of 1999.

<sup>97</sup> Public Finance Management Act, Section 51 (1) (a).

<sup>98</sup> Phoebe Bolton, "The Public Procurement System in South Africa: Main Characteristics", Public Contract Law Journal, Vol. 37, No. 4 (Summer 2017), Pp. 76 - 89.

It is this score mark that is used by public procuring entities in the evaluation of bids under the Preferential Procurement Policy Framework Act. When evaluating bids, public procuring entities must give due regard to the preferential rating system which stipulates three levels of evaluation, being functionality – that is, technical evaluation, price – that is, financial evaluation and finally, specific preferential goals – that is the B-BBEE score, which is intended to deal with South Africa’s unique socio-economic conditions owing to its historical political background which was planted thick with apartheid policies.<sup>99</sup> This level of evaluation therefore, gives preference to people or groups that have endured great historical disadvantage and unfair discrimination owing to disability, gender and / or race.

For evaluation purposes, public procurement contracts are divided into two broad categories, that is, contracts below One Million Rand and those above One Million Rand. Concerning those contracts that fall within the former category, eighty (80) points are assigned to technical and financial evaluation while the remaining twenty (20) points are accounted for in the specific-goals evaluation. With regard to the latter category, ninety (90) points are assigned to technical and financial evaluation while the remaining ten (10) points cover the specific-goals evaluation.<sup>100</sup>

The alignment of the Preferential Procurement Policy Framework Act with the Broad-Based Black Economic Empowerment Act has achieved the purpose of ensuring that a party who submits his bid and has attained a level 1 status in terms of the B-BBEEA

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<sup>99</sup> Phoebe Bolton, “The Public Procurement System in South Africa: Main Characteristics”, *Public Contract Law Journal*, Vol. 37, No. 4 (Summer 2017), Pp. 76 - 89.

<sup>100</sup> Bolton P., “*Government procurement as a policy tool in South Africa*”, *Journal of Public Procurement*, (2017), Pp. 94 - 119.

rating system, should be awarded the maximum number of points available (being, either 20 or 10, taking into consideration the value of the contract, as discussed above) for the specified goals evaluation category under the preference point system.<sup>101</sup>

The tender is then awarded to the bidder with the highest evaluated score unless there are compelling reasons – considered on the basis of an objective criteria – that would warrant the tender being awarded to a different bidder.<sup>102</sup>

### 3.3.1 B-BBEE Compliance and Certification

The preferential rating system under the B-BBEEA is divided into different levels – eight in number. An entity's B-BBEE status level is determined by way of calculation, by applying the mathematical formulation prescribed under the Act. The manner in which particular businesses take up and mainstream the B-BBEE agenda is left to the individual enterprises as the Act does not impose legal obligations (by way of sanctions, or however) on the compliance with the specified targets.<sup>103</sup>

Notwithstanding the fact that compliance with the B-BBEE targets is not legally demanded, a compliance certification however, lends businesses credibility and will no doubt impact an entity's level of participation in the market, very by inevitably affecting that entity's ability to attract business with regard to tenders from the Government and other State agencies.<sup>104</sup>

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<sup>101</sup> Bolton P., "Government procurement as a policy tool in South Africa", *Journal of Public Procurement*, (2017), Pp. 94 - 119.

<sup>102</sup> Bolton P., "Government procurement as a policy tool in South Africa", *Journal of Public Procurement*, (2017), Pp. 94 - 119.

<sup>103</sup> Ratuva S., "Black empowerment policies: Dilemmas of Affirmative Action in South Africa", ANU Press. (2017), Pp. 111 - 127.

<sup>104</sup> Phoebe Bolton, "The Public Procurement System in South Africa: Main Characteristics", *Public Contract Law Journal*, Vol. 37, No. 4 (Summer 2017) Pp. 94 - 119.

A firm's B-BBEE status is measured having regard to five BBEE compliance factors, namely: ownership; management and control; socio-economic development; new enterprise and supplies development; and finally, management control. In practice, B-BBEE appraisals are done annually by an accredited B-BBEE verification agent who then releases a BBEE certificate indicating the entity's B-BBEE rating.<sup>105</sup> Each of these factors are weighted differently, as follows:

**Figure V: B-BBEE Certification Factors**

<i>Item</i>	<i>Factor</i>	<i>Maximum available Number of weighting points</i>
1	Ownership	25
2	Management Control	15 plus 4 bonus points
3	Skills Development	20 plus 5 bonus points
4	New Enterprise & Supplier Development	40 plus 4 bonus points
5	Socio-economic Development	5

**Figure VI: The B-BBEE Score Card**

<b>BBBEE STATUS</b>	<b>REQUIRED WEIGHTING POINTS</b>
<b>LEVEL - 1</b>	100 points or above
<b>LEVEL - 2</b>	Between 95 and 100 points
<b>LEVEL - 3</b>	Between 90 and 95 points
<b>LEVEL - 4</b>	Between 80 and 90 points
<b>LEVEL - 5</b>	Between 75 and 80 points
<b>LEVEL - 6</b>	Between 70 and 75 points
<b>LEVEL -7</b>	Between 55 and 70 points
<b>LEVEL - 8</b>	Between 40 and 55 points
<b>NON-COMPLIANT</b>	Below 40 points

<sup>105</sup> Phoebe Bolton, "The Public Procurement System in South Africa: Main Characteristics", Public Contract Law Journal, Vol. 37, No. 4 (Summer 2017) Pp. 94 - 119.

### 3.3.2 Other Considerations

Besides the five compliance factors discussed above, certain other considerations – as pertains to the size and duration of existence – of the entity, also play a pivotal role when assessing a firm’s B-BBEE ranking. In this category, business entities can either be small or medium-sized; start-ups and large enterprises.<sup>106</sup>

All Exempted Micro-Enterprises (EMEs) irrespective of the arrangement of their ownership structure and / or composition, are invariably regarded to have a Level 4 B-BBEE status. What then is an EME establishment? These have been defined as enterprises that have an aggregate annual revenue of Ten (10) Million Rand or less. Furthermore, all start-up enterprises are treated as EMEs for purposes of the B-BBEE rating during their first year of registration or incorporation.<sup>107</sup>

There is yet another category of entities referred to as the Qualifying Small Enterprise (QSEs). For an entity to be eligible under his head, it needs to have a total annual revenue of between Ten (10) Million and Fifty (50) Million Rand. These entities do not however receive any preferential treatment in the determination of their B-BBEE status; their B-BBEE score is measured strictly by reference to the five B-BBEE factors. Finally, business establishments with an annual total revenue of, or in the excess of, fifty (50) Million Rand are categorized as Large Enterprises.<sup>108</sup>

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<sup>106</sup> Bolton P., “Government procurement as a policy tool in South Africa”, *Journal of Public Procurement*, (2017) Pp. 94 - 119.

<sup>107</sup> Sweet M. J., “Minority Business Enterprise Programmes in the United States of America: An Empirical Investigation”, *Journal of Law and Society*, Vol. 33, No. 1 (2016) Pp. 89 - 100.

<sup>108</sup> Sweet M. J., “Minority Business Enterprise Programmes in the United States of America: An Empirical Investigation”, *Journal of Law and Society*, Vol. 33, No. 1 (2016) Pp. 89 - 100.

The B-BBEE Regulations establish a further level of preference based on a firm's ownership structure. EMEs and QSEs that are wholly (100%) owned by black people are – by that fact alone – considered to have an automatic Level 1 B-BBEE rating; while EMEs and QSEs that have a majority black ownership (above 51%) are considered to have an automatic Level 2 B-BBEE rating. No doubt, this accords black-owned EMEs and QSEs a significantly substantial advantage over other EMEs and QSEs.<sup>109</sup>

This policy can however be justified on affirmative action grounds, the argument being that this form of preferential treatment seeks to eradicate or ameliorate the historical inequalities of the apartheid regime.<sup>110</sup>

It is also interesting to note that EMEs and QSEs are not required to obtain a certificate from a B-BBEE verification agent to verify their B-BBEE category. They need only swear an affidavit that speaks to the firm's total annual income and percentage of black ownership. This is a commendable cost saving mechanism for all EMEs and QSEs.<sup>111</sup>

A unique feature of the B-BBEE system is that it uses incentives to encourage business enterprises to aspire to attain the highest level of B-BBEE compliance. Under this scheme, businesses are allowed to claim back a defined percentage of the money that they spend on procurement. These claims are pegged to and derive from a firm's B-BBEE rating.

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<sup>109</sup> Preferential Procurement Regulations, 2017, Regulation 4.

<sup>110</sup> Tangri R.; Southall R., *"The Politics of Black Economic Empowerment in South Africa"*, Journal of Southern African Studies, Vol. 34, No. 3 (Sep. 2018), Pp. 97 - 113.

<sup>111</sup> Nkosi M. *"New Bee Legislation – Further Amendments to The Codes of Good Practice"*, Journal of Southern African Studies, Vol. 34, No. 3 (June, 2018), Pp. 45 - 57.

The figure below gives a summary of the allowed percentages of the total procurement expenditure, that a firm can claim back, expressed as a function of the firm’s B-BBEE status.<sup>112</sup>

## Uncompliant

**Figure VII: Percentage of procurement expenditure that can be claimed back.**

BBBEE Status	Number of Weighting Points Required	Claim-back percentage
Level - 1	100 points or above	135%
Level - 2	Between 95 and 100 points	125%
Level - 3	Between 90 and 95 points	110%
Level - 4	Between 80 and 90 points	100%
Level - 5	Between 75 and 80 points	80%
Level - 6	Between 70 and 75 points	60%
Level - 7	Between 55 and 70 points	50%
Level - 8	Between 40 and 55 points	10%
Noncompliant	Below 40 points	NIL

### 3.4 Discussion and Case-Study Analysis

Kenya, the United States of America and South Africa, all have comprehensive and well-established affirmative policies and schemes, firmly entrenched in the respective countries’ procurement laws, aimed at providing assistance to small businesses established by persons considered to have been historically marginalised or disadvantaged. Although each country’s preference and reservation programs are unique to itself – bearing in mind unique historical differences and peculiar socio-economic circumstances of each – yet the philosophy underlying these programs is

<sup>112</sup> Nkosi M. “New Bee Legislation – Further Amendments to The Codes of Good Practice”, *Journal of Southern African Studies*, Vol. 34, No. 3 (June, 2018), Pp. 45 - 57.

similar: that of achieving inclusivity by promoting the participation - by all - in the economic activities of the country.

There are, however, major notable differences in the mode of registration or certification adopted by the three legal regimes, for the recognition of eligible business enterprises in order for them to benefit from the reservation and preference schemes. As already discussed in chapter two of this thesis, the Kenyan regime operates a two-tier, and sometimes three-tier registration system for all the three categories of preference, being, persons with disability, women and the youth. Firms in Kenya have, as of necessity, to go through the business registration service, obtain industry-specific certification before they can then obtain registration under the AGPO program. For those firms owned by persons with disability, there is yet an additional requirement to obtain certification from the Council for Persons with disabilities.

If an entity successfully goes through the rigors of this process, it obtains an AGPO registration. This registration is however valid for a period of five years after which those entities which still qualify for recognition under the preference program must submit a fresh application for registration.

The Kenyan scenario is contrasted with the U.S regime which advocates for a self-certification process, where entities which qualify under the preference scheme (as define in the U.S Small Business Act) merely submit a self-certification declaration which states, in good faith, that the firm is eligible under the scheme.

Recertification under the U.S regime is only applicable for entities which – owing to a merger or acquisition – gain an enhanced status and become, other than small. These entities must file a recertification indicating their changed status.

Recertification under the U.S regime also affects entities that are performing long-term contracts. These are required to submit a re-certification before the sixth year of the contract, and thereafter, before any option is exercised by the contracting parties.

On its part, the South African regime, may be said to adopt a two-pronged approach; while it is based on a formal registration system under the B-BBEE preference scheme, it allows for certain firms to be exempted from registration: EMEs and QSEs are not required to obtain a certificate from a B-BBEE verification agent to endorse their B-BBEE status. They need only swear an affidavit that speaks to the firm's total annual income and percentage of black ownership.

Furthermore, and as has already been discussed earlier in this chapter, the South African system introduces yet another novel concept aimed at encouraging businesses to strive to attain the highest B-BBEE compliance - that of using incentives. Businesses are allowed to claim back a defined percentage of the money that they spend on procurement. This claim is pegged to the firm's B-BBEE rating.

### **3.5 Conclusion**

This chapter has considered the preferential procurement systems of the United States of America and that of South Africa. It has contrasted the eligibility criteria and the registration requirements under the preference programs in the selected jurisdictions with the those obtaining in Kenya's AGPO program.

Finally, the chapter gives a discussion and provides a summary of the lessons learnt from the selected jurisdictions.



# 4 CHAPTER FOUR: NAVIGATING THE AGPO ELIGIBILITY AND REGISTRATION REQUIREMENTS

## 4.1 Introduction

Having considered the legal and regulatory framework governing preference and reservation schemes in the two selected foreign jurisdictions, this chapter engages in a discussion of the various complexities - other than the ones identified and discussed in the preceding chapter - in the AGPO eligibility and registration processes that have emerged in the course of conducting this research, in a bid to explore possible solutions to the identified difficulties.

## 4.2 Abuse of the Corporate Form

As has already been discussed in chapter two of this study, the Public Procurement and Disposal (Preference and Reservations) Regulations, prescribe a formal qualification criterion for entities that wish to be registered under preference and reservation schemes. As pertains to enterprises owned by persons with disability, women and the youth, the regulations require that such entities shall be legal entities (that is to say, companies, partnerships or sole proprietorships) which have been registered with the various government bodies responsible for such purposes and that have at least 70% membership of persons with disability, women or the youth. The leadership of the said entities shall be 100% persons with disability, women or the youth, respectively.<sup>113</sup>

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<sup>113</sup> Public Procurement and Disposal (Preference and Reservations) (Amendment) Regulations, 2013, Regulation 32.

There have however been instances where certain unscrupulous traders have been known to manipulate the registration structure by procuring counterfeit documents and using these forged documents to fraudulently register companies in the names of women, the youth and persons living with disability so as to unfairly gain access to the reserved opportunities.<sup>114</sup> This practice diverts resources and undermines affirmative action efforts. It deprives genuine and deserving members of the minority groups of the chance to benefit from the procurement opportunities available under the preference and reservation scheme.

The unscrupulous traders would normally be persons who are restricted from AGPO registration by reason of ineligibility, usually because they are neither women, youth or persons with disability. By incorporating a sham company, which from the outside look meets all AGPO eligibility requirements, but whose actual ownership and control lies in the hands of ineligible persons, the concerned persons do so with deceptive intent to undermine or defeat the objectives of the AGPO program.

#### **4.2.1 Piercing of the Corporate Veil**

This study therefore argues that in order to circumvent, forestall and / or dismantle this fraudulent practice, the administrators of the AGPO program should, upon reasonably suspecting the existence of such fraudulent scheme, be empowered – through appropriate judicial process – to pierce the corporate veil of the concerned entity. Lifting and or piercing the veil of incorporation as is popularly known, is a company law concept that means looking through the corporate form, to a company's

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<sup>114</sup> Kiarahu M., "Participation of minorities and marginalised groups in the Kenyan economy: reforming public procurement law" International Journal of Advanced Research, June 2013, Pp. 67 - 74.

shareholders.<sup>115</sup> Although this principle is accepted under law, the law however recognises that lifting of the corporate veil can only be resorted to in exceptional and limited circumstances. This concept is a fall-back principle, as it were, that has been developed pragmatically to offer practical solutions to very particular sets of circumstances.

The misuse of the company structure so as to orchestrate or perpetuate fraud by undermining the very objective of the AGPO program, this research argues, can find ready accommodation in the exceptions of the application of the principle of piercing the corporate veil. This is a justifiable basis that should trigger the administrators of the AGPO program to move to obtain leave to look deeper, beyond the corporate form, to the actual shareholders and directors of the company under consideration.

Kenya's Companies Act recognises the concept of piercing the corporate veil. The Act empowers the Attorney-General, upon satisfying himself that there are reasonable grounds to warrant the launching of an investigation into the membership of any company, to appoint such number of inspectors as is necessary to undertake the required investigation. Upon the conclusion of the investigation, the inspector (s) shall report back to the Attorney-General. The report shall contain particulars of the members of the company in question and provide details of persons who would appear to be financially keen either on the failure or success of such company, as well as the people who influence and / or materially hold sway over the company's policies.<sup>116</sup>

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<sup>115</sup> Ferran E.; Ho L. C. *"Principles of Corporate Finance Law"* Oxford University Press, 2014.

<sup>116</sup> The Companies Act, No 17 of 2015, Section 800.

For the purpose of that investigative exercise, the Act also confers on the inspector (s), power to investigate the membership of any other company that may be connected to the company under investigation for the same purpose.<sup>117</sup>

This thesis therefore calls for the establishment of joint, collaborative and concerted efforts between the Office of the Attorney-General and the National Treasury, which is the mother ministry of the AGPO program, so as to circumvent the illegal and fraudulent dealings of those bad actors who seek to undermine the objectives of the AGPO program through the establishment of sham companies which they use as a front to fraudulently secure or gain access to the preferential procurement opportunities reserved for genuine members of the special interest groups.

#### **4.2.2 Beneficial Ownership Requirements**

Recently in Kenya, by way of amendment,<sup>118</sup> the Companies Act of 2015 was revised to introduce new provisions pertaining to beneficial ownership of companies. The Companies Act has now incorporated a new definition for the concept of beneficial ownership.”<sup>119</sup>

A new section 93A which was introduced through the Statute Law (Miscellaneous Amendments) Act, obligates all companies to keep a register of beneficial owners with the relevant information relating to the said beneficial owners as will be prescribed by the Companies (Beneficial Ownership Information) Regulations.

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<sup>117</sup> The Companies Act, No 17 of 2015, Section 801.

<sup>118</sup> The Companies (Amendment) Act, 2017; a further amendment to the Companies Act was carried in the Statute Law (Miscellaneous Amendments) Act, No. 12 of 2019.

<sup>119</sup> The Companies Act, No 17 of 2015, Section 2.

The move to make it obligatory for all companies to register the relevant information concerning their beneficial owners can be interpreted as intended to promote and increase transparency standards in the ownership of companies.

The said amendments also stipulate timelines within which companies are to comply with the new provisions as well as introducing offences for non-compliance. However, the new amendments contemplate the publication of regulations that will help concretize the application and operation of the provisions that relate to beneficial ownership of companies. Regrettably, however, as at the date of conducting this research, the said regulations were yet to be finalized and published. It is expected however, that the regulations will stipulate what relevant information concerning the beneficial owners of companies should be contained in the register as well as defining conditions that natural persons must meet in order to be disclosed as persons wielding significant control over the company.

In addition, it is expected, indeed hoped, that the regulations should also lay down and stipulate the procedure to be followed in order to access particulars and information concerning the beneficial owners of a company. This is particularly important especially considering that the relevant information might include personal details of individuals that may generally be considered to be confidential.

This research therefore suggests that whatever process will be defined by the regulations as constituting the proper procedure to gain access to the said relevant information, should be such as is readily accessible to the administrators of the AGPO program, either directly or indirectly - through collaboration and / or the requirement to share information with other regulatory agencies. Having ready access to information concerning the beneficial owners of companies will enable administrators of the AGPO program to detect sham companies used by fraudulent actors to undermine the objectives of the program. Administrative and judicial action can then be taken against such entities and their beneficial owners.

### **4.3 Adequacy of the Institutional Regulatory Framework**

The mandate of the PPRA has already been discussed under chapter two (Kenya's Public Procurement (Preference and Reservation) Legal and Regulatory Framework) of this thesis. What is interesting to note however, is that despite the very expansive roles assigned to it, the PPRA lacks the requisite commensurate power of enforcement. As a matter of fact, the PPADA envisages a situation where the PPRA engages in no enforcement duties. The PPADA rather requires the PPRA, upon forming an opinion that proceedings - be they civil or criminal - should be commenced against a public entity, state organ, state officer or public officer - to defer all such enforcement to the relevant authorities.<sup>120</sup>

This thesis therefore proposes that the PPADA be amended with a view to clothing the PPRA with the necessary investigative and enforcement powers. An entrenched

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<sup>120</sup> Public Procurement and Asset Disposal Act, No. 33 of 2015, Section 9 (2).

enforcement mechanism within the PPRA's structure will boost the Authority's execution faculties, leading to improved compliance with the AGPO's standards and in the long term, lead to the overall attainment of the AGPO objective.

Another emerging point of concern is that regrettably, the PPRA does not maintain the required database, especially as concerns public entities that fail to adhere to the requirement that all public entities reserve 30% of their procurement opportunities to members of special interest groups, being women, persons with disability and the youth. In the same vein, important procurement statistics maintained by the PPRA are not up to date, the last published annual report being for the year 2016. This situation has been blamed on the lack of adequate financial and human resource capacity to discharge these monitoring and reporting functions adequately.

The PPRA depends, for its financing, majorly on distributions from the exchequer. The quantum of the disbursements is stated to be based on determinations made by the PPRA's board regarding the Authority's capital and recurrent expenditure, as well as any reserves that the Authority may be in need of from time to time.<sup>121</sup> In the recent past however, the Government has increasingly adopted austerity measures in its financial distributions to state agencies, including the PPRA. This scaling down of financial resources, no doubt, negatively impacts service delivery by affecting the degree of efficiency with which the entities concerned deploy and discharge their assigned mandate.

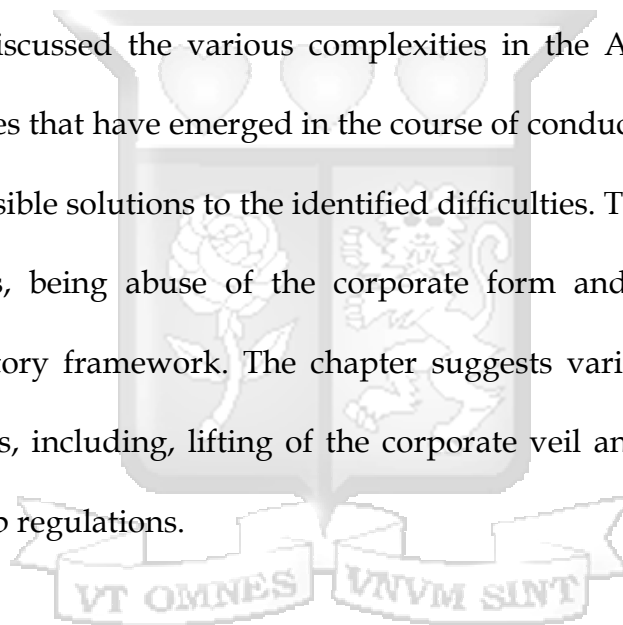
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<sup>121</sup> Public Procurement and Asset Disposal Act, No. 33 of 2015, Section 12 (1) (e).

This study therefore advocates for an increase in the PPRA's annual budgetary allocation. This will fortify the Authority's financial base which will in turn translate into an empowered human resource pool as well as the deployment of effective systems that all work together in order to ensure that delivery of services is achieved in an efficient manner and that there is improved compliance with the AGPO's monitoring and reporting standards.

#### **4.4 Conclusion**

This chapter has discussed the various complexities in the AGPO eligibility and registration processes that have emerged in the course of conducting this research, in a bid to explore possible solutions to the identified difficulties. The chapter identified two key challenges, being abuse of the corporate form and inadequacy of the institutional regulatory framework. The chapter suggests various solutions to the identified challenges, including, lifting of the corporate veil and the publication of beneficial ownership regulations.



# 5 CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

## 5.1 Introduction

A system that achieves the proper (effective and efficient) identification of entities that should form the object of preference under any legal regime's procurement (preference and reservation) program is very critical to the success of such program.

This research has had the benefit of looking into two chosen procurement legal regimes, being, the United States of America and South Africa, the basis upon which, the current chapter now seeks to outline – by way of recommendations - the important lessons that the Kenya procurement (preference and reservation) legal regime can learn from the selected jurisdictions, in order to improve (in terms of achieving enhanced efficiency and effectiveness) the eligibility criteria and registration processes under the AGPO program.

Some recommendations contained in this chapter also arise out of the findings that the study has discovered through the analysis of Kenya's procurement legal regime and practice.

## 5.2 Conclusion

This thesis set out to examine the eligibility and registration requirements under Kenya's AGPO program; it interrogated the registration process's appropriateness and the impact (if any) that the current AGPO registration system has on the achievement of the overall objectives of the AGPO program. The research has

succeeded in showing that there indeed exists an intricate connection between the AGPO registration requirements for special interest groups and the success of the AGPO program.

The study has also demonstrated, in detail, how the AGPO registration requirements have contributed to the non-compliance by Government and public institutions to the 30% statutory reservation quota in the AGPO initiative. Finally, borrowing of the United States' and the South African legal systems, the research has put forward certain recommendations, most of which can be achieved through legislative amendments, that will see the introduction of reforms to the AGPO eligibility criteria and registration requirements in a bid to first, achieve the AGPO's objective, and then to ensure continued sustainability of the AGPO compliance levels.

### **5.3 Recommendations**

This study proposes that Kenya's procurement (preference and reservation) program should be restructured to adopt a self-certification system, after the United States model or to adopt a South African-like system that exempts small businesses from the formal registration requirements. Entities that are seeking preferential treatment under the AGPO program should rather be encouraged / expected to swear an affidavit that speaks to their eligibility under the program, according to the predetermined eligibility criteria defined under the Public Procurement and Asset Disposal Act. As noted in chapter two of this study, the special interest entities face great financial constraints that have proved to be major impediments to their registration under the AGPO program. Self-certification will act as a cost saving

mechanism that helps lift this heavy financial burden from the shoulders of the special interest entities.

This research further recommends that the Public Procurement and Asset Disposal Act (PPADA) be amended to introduce new offences – both for individual persons and for companies that engage in the unscrupulous and fraudulent conduct that frustrates and / or undermines the very objective of the AGPO preference system.

These offences, the study suggests, should be so couched as to bring within their ambit, all conceivable illegal practices while at the same time, leaving enough room for enforcement agencies to infer other innovative criminal practices (that may lie within the penumbra zone of the express offences) as and when they arise. The latitude of the defined offences should be so wide as to include the very obvious wrongs, like the outright fraudulent misrepresentation of a firm's AGPO status as well as to cover the more subtle forms of manipulation that involve using certain members of the special interest groups merely as a front, disguise or façade to gain the AGPO certification, whereas, in actual sense, the firm in question is owned and run by people who are not eligible to be accorded preference under the program; for greater effectiveness, it is suggested that the offences should be accompanied by hefty penalties – both civil and criminal in nature – to serve as a deterrent measure against such fraudulent conduct exhibited by bad actors.

In line with the above, this thesis also proposes that the Public Procurement Regulatory Authority (PPRA) be empowered, through the amendment of the PPADA to enhance its investigative powers as well as to increase its annual budgetary allocation.

These measures will prove useful in PPRA's efforts aimed at expanding its financial base and building its human resource capacity. This will boost the Authority's enforcement faculties, leading to improved compliance with the AGPO's standards and in the long term, lead to the overall attainment of the overall AGPO objective.

Further, in order to attain the aim of achieving the 30% reservation quota for the special interest groups, the study proposes that the eligibility criteria for the target groups be expanded to cover the economic position of the firms seeking a preferential advantage from the AGPO reservation system. The registration process should therefore be reviewed with a view to requiring the entities seeking registration under the program to provide proof of economic disadvantage or marginalization.

This research has indicated that both the United States' and the South African preferential systems are inextricably linked to firms' total annual revenue. This is unlike the Kenyan situation whose preference system makes no reference to a firm's economic situation. Often times, economically sound persons with disability, women and youth have exploited this loophole to expand their business empires at the expense of the economically marginalized groups whose social and economic welfare the AGPO program was intended to improve and uplift. These economically well-to-do firms, for instance, do not experience the financial difficulties that are associated with the current AGPO registration requirements; they meet the registration requirements quite easily and effortlessly and this gives a false / distorted impression to the administrators of the AGPO program that the requirements are attainable, when in actual fact, the requirements are unduly burdensome to the intended genuine beneficiaries of the preference program.

The requirement to provide proof of economic status, the research suggests, will help seal the identified loophole thereby improving the efficiency of the AGPO initiative.

This study further suggests that to help mitigate the financial constraints experienced by the special interest groups, the PPADA should be amended to compel the Government and other public procuring entities to promptly settle bills for goods and services already supplied pursuant to procurement contracts that were awarded to members of special interest groups under the AGPO program. As already pointed out, the AGPO registration requirements are financially prohibitive and any statutory amendments and legal interventions that could have the effect of improving the cash-flow situation of the special interest groups, should be embraced.

This study also proposes the imposition of sanctions upon those public entities that fail to submit their quarterly AGPO compliance reports to the Public Procurement Regulatory Authority (PPRA). This can be achieved through legislative reform, by the amendment of the PPADA. The PPRA is expected to rely on the data and information contained in these reports to make important administrative judgments. The success or failure of the AGPO program can only be assessed upon analysing the said compliance reports but if no reports are availed to the PPRA, the functions of the Authority - including the Authority's ability to monitor the AGPO registration process - are significantly curtailed. The danger that lurks herein is that if compliance reports are not submitted in time, or at all, non-functioning processes will not be flagged out in time, or at all; this in turn means that remedial measures will not implemented and this will eventually and inevitably lead to the overall failure and collapse of the entire AGPO system.

Lastly, this thesis recommends the abolition of categorizations under which the special interest entities can submit tenders for public procurement opportunities. The current categorizations have created unnecessary impediments that have prevented the AGPO registered entities from taking full advantage of tendering opportunities which do not fall under their registered category but which they, nonetheless, have the capacity to undertake successfully.



## 6 BIBLIOGRAPHY

### 6.1 Books and Journal Articles

Aden M.; Nzulwa J.; Kwena R., *"Factors Influencing Government Procurement Opportunities for Disadvantaged groups in Public Institutions"*, The Strategic Journal of Business & Change Management, Vol. 3, Issue 4, Article 62.

Ayres I.; Vars F. E., *"Does private discrimination justify public affirmative action?"* Columbia Law Review, Vol. 98, NO. 7 (Nov. 1998).

Bolton P., *"The Public Procurement System in South Africa: Main Characteristics"*, Public Contract Law Journal, Vol. 37, No. 4 (Summer 2017).

Chepsoiyo S., Lubale G., *"Factors Influencing Government Procurement Opportunities for Disadvantaged groups in Public Institutions"*, International Journal of Advanced Research, Issue No. 2320-5407.

Redondo E. D., *"United Nations Approach to Temporary Special Measures"*, Journal of Law, 2018.

Ferran E. and Ho L. C. *"Principles of Corporate Finance Law"* Oxford University Press, 2014.

Hellmers, Kimberly, *"Affirmative Action: A Contradiction of Theory and Practise"*, Centre for the Study of Ethics in Society Papers, (1998).

Kaspar L.; Puddephatt A., *"Benefits of Transparency in Public Procurement for SMEs: General Lessons from Egypt."* Global Partners and Associates, March 2012.

Kiarahu M., *"Participation of minorities and marginalised groups in the Kenyan economy: reforming public procurement law"* 2013.

Kidolva M. V., *"Small Business Contracting in the United States and Europe: A Comparative Assessment"*, *Public Contract Law Journal*, Vol. 40, No. 2 (2011).

Landau I., *"Are You Entitled to Affirmative Action?"* *International Journal of Applied Philosophy*, (1997) vol. 11. No. 2.

Mee K., *"Improving Opportunities for Women-Owned Small Businesses in Federal Contracting: Current Efforts, Remaining Challenges, and Proposals for the Future"*, *Public Contract Law Journal*, Vol. 41, No. 3 (2012).

Nkosi M. *"New Bee Legislation – Further Amendments to the Codes of Good Practice"*, *Journal of Southern African Studies*, Vol. 34, No. 3 (June, 2018).

Moore N.; Grammich C. A.; Mele J. D., *"Small Business and Strategic Sourcing"*, Rand Corporation, (2014).

Ochieng J.; Muehle M., *"Development and Reform of the Kenyan Public Procurement System"*, 2014.

Piga G.; Treumer S., *"The Applied Law and Economics of Public Procurement"*, ProQuest eBook Central, 2012.

Rappaport J. *"In Praise of Paradox: A Social Policy of Empowerment over Prevention."* *American Journal of Community Psychology* (1987) 9 (1).

Rappaport J. *"Terms of Empowerment/Exemplars of Prevention: Towards a Theory for Community Psychology"* *American Journal of Community Psychology* (1987), 15(2).

Ratuva S., *"Black empowerment policies: Dilemmas of Affirmative Action in South Africa"*, ANU Press. (2017).

Rozali N. et al. *“Challenges faced By People with Disability for Getting Jobs: Entrepreneurship Solution for Unemployment”*, International Journal of Academic Research in Business and Social Sciences: 2017, Vol. 7 No.3.

Sabin S. A. *“Rethinking the presumption of social economic disadvantage”*, Public Contract Law Journal Vol. 33, No. 4 (Summer 2004).

Snider K. F., Kidalov M. V., Rendon R. G., *“Diversity Governance by Convenience? Federal Contracting for Minority-owned”*, Public Administration Quarterly, Vol. 37, No. 3 (Fall 2013).

Stephen K.; Nataliya B.; Kanishka K., *“Deterring Kickbacks and Encouraging Entry in Public Procurement Markets: Evidence from Firm Surveys in 88 Developing Countries”* (English). Policy Research Working Paper; no. WPS 8078. Washington, D.C. World Bank Group, 2017.

Sweet M. J., *“Minority Business Enterprise Programmes in the United States of America: An Empirical Investigation”*, Journal of Law and Society, Vol. 33, No. 1 (2016).

Tangri R.; Southall R., *“The Politics of Black Economic Empowerment in South Africa”*, Journal of Southern African Studies, Vol. 34, No. 3 (Sep. 2018).

Taylor T. *“The End of an Era? How Affirmative Action in Government Contracting can Survive after “Rothe.””* Public Contract Law Journal, Vol. 39, NO. 4 (Summer 2010.)

Tierno J. T., *“On the Justification of Affirmative Action”* Public Affairs Quarterly Vol. 21, No. 3 (Jul. 2007).

Yve S. A. (2001). *“Youth Participation in Empowerment Planning Studies of Individual, Organizational and Community Change.”* Doctoral dissertation. University of Michigan.

Zimmerman M., *“Empowerment Theory: Psychological, Organizational and Community Levels of Analysis.”* New York Plenum Press, (2000).

## 6.2 Reports

Hivos People Unlimited Report, 2018.

Institute of Economic Affairs, Budget analysis 2018, (June 2018), pg. 4.

State of Food and Agriculture (SOFA) 2011 Report dedicated to Women in Agriculture, pp. 44-45.

The Public Procurement Regulatory Authority Report for 2015/16.



# 7 APPENDICES

## 7.1 Appendix A: Plagiarism Report

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## 7.2 Appendix B: Ethics Clearance Report



**Strathmore**  
UNIVERSITY

21<sup>st</sup> April 2020

Ms Omariba, sarah  
sarah.omariba@strathmore.edu)

Dear Ms Omariba,

**RE: Factors Affecting Access to Government Procurement Opportunities by Minority Groups in Kenya: Eligibility and Registration Requirements**


This is to inform you that SU-IERC has reviewed and **approved** your above research proposal. Your application approval number is **SU-IERC0697/20**. The approval period is **21<sup>st</sup> April 2020 to 20<sup>th</sup> April 2021**.

This approval is subject to compliance with the following requirements:

- i. Only approved documents including (informed consents, study instruments, MTA) will be used
- ii. All changes including (amendments, deviations, and violations) are submitted for review and approval by SU-IERC.
- iii. Death and life threatening problems and serious adverse events or unexpected adverse events whether related or unrelated to the study must be reported to SU-IERC within 72 hours of notification
- iv. Any changes, anticipated or otherwise that may increase the risks or affected safety or welfare of study participants and others or affect the integrity of the research must be reported to SU-IERC within 72 hours
- v. Clearance for export of biological specimens must be obtained from relevant institutions.
- vi. Submission of a request for renewal of approval at least 60 days prior to expiry of the approval period. Attach a comprehensive progress report to support the renewal.
- vii. Submission of an executive summary report within 90 days upon completion of the study to SU-IERC.

Prior to commencing your study, you will be expected to obtain a research license from National Commission for Science, Technology and Innovation (NACOSTI) <https://oris.nacosti.go.ke> and also obtain other clearances needed.

Yours sincerely,

  
Dr Virginia Gichuru,  
Secretary; SU-IERC

Cc: Prof Fred Were,  
Chairperson; SU-IERC

