

A PRESENTATION BY THE CHIEF LEGAL OFFICER, MS. REBECCA W. NGONDO, ON INTEGRITY ISSUES AND TENDERING PROCESS FOR THE TENDER COMMITTEE WORKSHOP ON AUGUST 13 2011 AT KISUMU HOTEL, KISUMU CITY

PUBLIC PROCUREMENT

INTRODUCTION

Corruption is a vice that destroys personal, public and business ethics; erodes confidence in our public service; impacts negatively on all investments; costs people jobs and denies us services. It is therefore the responsibility of every public servant to deal with this problem.

The Public Service Integrity Programme (PSIP) has been developed to turn around this trend by restoring integrity, transparency and accountability in the Public Service through training, sensitization and systems improvements.

Every public servant is therefore duty bound to make a daily contribution in the war against corruption beginning from his workplace to his community and to his family.

Fighting corruption is now declared as one of the priorities of the University.

What is the place and role of the Tender Committee in the Integrity Programme?

PROCUREMENT PROCESS

Principles of Public Procurement

- a) It is important to appreciate the basic procurement principles and to apply them in those areas of procurement procedure that demand discretion and judgement. The said principles encompass the following points: -
- b) Separation of authority between procurement initiation, vendor selection, commitment, and receipt inspection and acceptance of procurement object.
- c) Ensuring fairness and equity, and avoiding discrimination in the invitation, evaluation and award of procurement contracts. To promote integrity and fairness of the procedures suppliers/contractors should be treated fairly and without unfair discrimination, including protection of commercial confidentiality where required.

- d) Observance of ethics in all aspects of procurement and ensuring procurement practice is devoid of actual or perceived corruption.
- e) Promotion of transparency and accountability in the whole Procurement and Disposal Process. Suppliers/contractors should all other things being equal, be able to expect the same general procurement policies and procedures to be applied across the board.
- f) To increase public confidence in the procedures by inculcating corporate decision making to ensure that procurement decisions are not biased.
- g) Strict adherence to the use of appropriate documentation for all the steps.
- h) Complete procurement and disposal cycles, and maintaining a comprehensive record of procurement transactions.

The procurement law encourages corporate decision making to ensure that no one individual is responsible for procurement decisions. This is achieved through constitution of various committees responsible for various decisions as well as thresholds. These include: -

(A) Tender Committee

Functions: -

- a) The Tender Committee is the procuring authority of the University in all processes above Kshs. 500,000/= (currently the budget of the transactions are in the range of **Kshs. 7 billion**).
- b) The Tender Committee should be knowledgeable and persons of integrity by keeping abreast with the stipulations of the New Constitution of Kenya alongside the other relevant procurement laws.
- c) The tender committee should therefore ensure the documents which form the basis of any transaction contain enough and appropriate information to allow fair competition among those who may wish to submit tenders as stipulated under section 52 (2) of the Public Procurement and Disposal Act, 2005.
- d) Review, verify and ascertain that all procurement and disposal has been undertaken in accordance with the Act, these Regulations and the terms set out in the tender documents;
- e) Approve the selection of the successful tender or proposal;

- f) Award procurement contracts in accordance with thresholds prescribed in First Schedule;
- g) Ensure that funds are available for the procurement under consideration;
- h) Ensure that the procurement entity does not pay in excess of prevailing market prices;
- i) Review and approve aggregation of procurements where proposed;
- j) Review and approve the use of lots where packaging into lots has been proposed;
- k) Review the selection of procurement method and where a procurement method, other than open tender, has been proposed, to ensure that the adoption of the other procurement method is in accordance with the Act, these Regulations and any guidelines stipulated by the Authority;
- l) Approve the list of tenderers in cases of restricted tendering pursuant to regulation 54 (3);
- m) Approve the list of persons qualified to submit proposals pursuant to section 80 of the Act;
- n) Approve the list of persons to be given requests for quotations pursuant to regulation 59 (2);
- o) Approve negotiations under the Act, these Regulations and as may be stipulated by the Authority;
- p) Approve the amendment of contracts previously awarded by the tender committee, in accordance with the Act and these Regulations;
- q) Review the quarterly reports on quotations that have been awarded by the procurement committee; and
- r) Undertake any other functions and duties as are provided under the Act, these Regulations or as may be stipulated by the Authority.

The Tender Committee Members' Mandate in relation to the Tendering Process

As you adjudicate the whole procurement process, you must take cognizance of the fact there are a number of guidelines and regulations to be adhered to. They include but not limited to the following: -

- 1) The Constitution
- 2) The University of Nairobi Act Cap. 210;
- 3) The Anti-Corruption and Economic Crimes Act, 2003;
- 4) The Public Officer Ethics Act;
- 5) The University of Nairobi Anti-Corruption Policy;
- 6) The Code of Conduct and Ethics for Public Universities;
- 7) The University of Nairobi Code of Conduct and Ethics.

(A) The University of Nairobi Act Cap. 210

(B) Anti-Corruption and Economic Crimes, 2003

This particular legislation gives guidance on instances can lead to an agent being deemed to have engaged in interests that give rise to a Conflict of Interest and the Penalties that might befall the person (s): -

Section 42 (3) Conflict of Interest

An agent of a public body who knowingly acquires or holds, directly or indirectly, a private interest in any contract, agreement or investment emanating from or connected with the public body is guilty of an offence.

The Penalty for any malpractices are stipulated under the following section:-

Section 48 (1) Penalty for Offence

A person convicted of an offence shall be liable to –

- a) A fine not exceeding one million (Kshs. 1 Million) shillings, or to imprisonment for a term not exceeding ten (10) years, or to both; and
- b) An additional mandatory fine if, as a result of the conduct that constituted the offence, the person received a quantifiable benefit or any other person suffered a quantifiable loss.

Section 48 (2) Penalty for Offence

The mandatory fine referred to in subsection (1)(b) shall be determined as follows –

- a) The mandatory fine shall be equal to two times the amount of the benefit or loss described in subsection (1)(b);

- b) If the conduct that constituted the offence resulted in both a benefit and loss described in subsection (1)(b), the mandatory fine shall be equal to two times the sum of the amount of the benefit and the amount of the loss.

(C) *Public Officer Ethics Act, 2003*

Public Officers are expected to conduct both public and private affairs with professionalism as indicated below:-

Section 9 Professionalism

A public officer shall –

- a) Carry out his duties in a way that maintains public confidence in the integrity of his office;
- b) Treat the public and his fellow public officers with courtesy and respect;
- c) To the extent appropriate to his office, seek to improve the standards of performance and level of professionalism in his organization;
- d) If a member of a professional body, observe the ethical and professional requirements of that body;
- e) Observe official working hours and not be absent without proper authorization or reasonable cause;
- f) Maintain an appropriate standard of dress and personal hygiene; and
- g) Discharge any professional responsibilities in a professional manner.

A public officer is also expected not to engage in activities that will lead his/her improper enrichment as captured under: -

Section 11 (1) Improper Enrichment

“A public officer shall not use his office to improperly enrich himself or others.”

Section 11 (2) Improper Enrichment

Without limiting the generality of the subsection (1), a public officer shall not –

- a) Except as allowed under subsection (3) or (4), accept or request gifts or favours from a person who: -

- i. has an interest that may be affected by the carrying out, or not carrying out, of the public officer's duties;
 - ii. carries on regulated activities with respect to which the public officer's organization has a role; or
 - iii. has a contractual or similar relationship with the public officer's organization.
- b) Improper use of his office to acquire land or other property for himself or another person, whether or not the land or property is paid for; or
 - c) For the personal benefit of himself or another, use or allow the use of information that is acquired in connection with the public officer's duties and that is not public.

Section 11 (3) Improper Enrichment

“A public officer may accept a gift given to him on his official capacity but, unless the gift is a non-monetary gift that does not exceed the value prescribed by regulation, such a gift shall be deemed to be a gift to the public officer's organization.”

Section 11 (4) Improper Enrichment

“Subsection (2)(a) does not prevent a public officer from accepting a gift from a relative or friend given on a special occasion recognized by custom.”

Under the Public Officer Ethics Act, 2003, the law prohibits public officers from engaging in personal interests that conflict with one's official duties and gives appropriate guidance as stipulated under: -

Section 12 (1) Conflict of Interest

“A public officer shall use his best efforts to avoid being in a position in which his personal interests conflict with his official duties.”

Section 12 (3) Conflict of Interest

A public officer whose personal interest conflicts with his official duties shall –

- a) Declare the personal interest to his superior or other appropriate body and comply with any directions to avoid the conflict; and
- b) Refrain from participating in any deliberations with respect to the matter.

Section 20 (1) Conduct of Private Affairs

“A public Officer shall conduct his private affairs in a way that maintains public confidence in the integrity of his office.”

(D) The University of Nairobi Anti-Corruption Policy

The University, in its commitment to Zero Tolerance for Corruption, has implemented the policy to ensure that staff members embrace appropriate behavior and attitude in the quest to eradicate corruption in the University. The code states as follows: -

Article 13 Disciplinary Measures

“Staff members, students and other outsourced service providers who contravene this policy will face disciplinary action as provided for in the Terms of Service, the student regulations governing the conduct and discipline of students and/or the Contract Agreement as the case may be.”

(E) The Code of Conduct and Ethics for Public Universities;

More emphasis is laid under this legislation on the issue of integrity as captured in Section 5 (2), Section 9 (1) & (2) and Section 10 (a) as follows: -

Section 5 (2) Integrity and Impartiality

“An officer shall at all times uphold the dignity of the University by conducting his official duties and his private affairs with integrity and in a dignified, honest and impeccable manner.”

Section 9 (1) Gifts and Donations

“An officer shall not solicit for any property or benefit of any kind, for himself or for any person, on account of anything to be done or omitted by him in discharge of his duties or by virtue of his official position.”

Section 9 (2) Gifts and Donations

“An Officer shall ensure that no member of his family solicits or accepts any gift, money, hospitality, free passage or favours from any person or organization that might reasonably be thought to influence or be intended to influence the officer in discharging his official duties and responsibilities.”

In ensuring compliance to the New Constitution and with the relevant statutes and regulations in regard to conflict of interest, the following section exemplifies the need for a public officer to conduct his/her private life with integrity and decorum: -

Section 10 (a) Private Life

“An officer shall not in any way trade with his employer or allow his spouse or relatives to do so, or trade with any other institution where he is likely to have an advantage by virtue of his office.”

(F) University of Nairobi Staff Code of Conduct and Ethics

The code brings out the general rules to be observed by staff members to maintain integrity and professionalism in carrying out one’s duties. The same has been elaborate under: -

Article 11 Professionalism

A member of staff shall: -

- a) Carry out his/her duties in a way that maintains public confidence in the integrity of his/her office;
- b) Treat other members of staff, students and other members of the Public with courtesy and respect;
- c) To the extent appropriate to his/her office, seek to improve the standards of performance and level of professionalism;
- d) If a member of a professional body, observe the ethical and professional requirements of that body;
- e) Discharge his/her responsibilities in a professional manner and not allow his/her emotions to interfere with his/her work;
- f) Strive to carry out his/her work in a manner befitting his/her profession;
- g) Be efficient in the discharge of his/her duties and strive to improve ones productivity at all times;
- h) Be calm, dependable, reliable, consistent and committed to his/her work.

A member of staff shall be expected to show initiative and, those in leadership positions should lead by example and assist their subordinates to realise their potential.

Article 12 Integrity

It is paramount that every staff member conducts himself/herself with integrity as to uphold the dignity of self and that of University. This is as follows: -

- a) A member of staff shall, to the best of his/her ability, carry out his/her duties efficiently, honestly and with integrity, and to ensure that the services are delivered honestly.
- b) A member of staff in carrying out his/her duties shall not violate the right and freedoms of other members of staff, students and members of the public.
- c) A member of staff who has a duty to give advice shall do so with impartiality and without fear or favour.
- d) A member of staff shall not knowingly give false or misleading information to members of the public or to any University employee or students.
- e) A member of staff shall conduct his/her private affairs in a way that maintains public confidence in the integrity of his office.
- f) A member of staff shall not neglect his or her financial obligations or neglect to settle them so as to avoid causing ridicule to the University.

Article 13 Conflict of Interest

- a) A member of staff shall make every effort to avoid situations where personal interest conflict with his/her position.
- b) A member of staff whose personal interest conflicts with his/her official duties shall declare such interest to the appropriate office or committee.
- c) A member of staff who has a personal interest in a subject matter shall refrain from participating in any deliberations/activities related to the matter.

THANK YOU