

A PRESENTATION BY THE CHIEF LEGAL OFFICER, MS. REBECCA W. NGONDO, ON ETHICS AND INTEGRITY ISSUES IN TECHNICAL EVALUATION FOR THE TECHNICAL EVALUATION COMMITTEE WORKSHOP ON SEPTEMBER 28 -29 2011 AT MAANZONI LODGE, LUKENYA, MACHAKOS

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) Technical Evaluation Committee

The Public Procurement and Disposal Act, 2005 and the Public Procurement and Disposal Regulations, 2006 stipulate the establishment and functions of the Technical Evaluation Committee in the Procurement Process as follows: -

Section 16 (1) - Evaluation Committees (Public Procurement and Disposal Regulations, 2006)

For each procurement within the threshold of the tender committee, the procurement entity shall establish an evaluation committee for the purposes of carrying out the technical and financial evaluation of the tenders and proposals.

Section 16 (2) of the said regulations dictate that an Evaluation Committee may comprise of the following: -

- a) A separate financial evaluation committee and a separate technical evaluation committee; or
- b) A combined financial and evaluation committee.

Under Section 16 (3) of the said Public Procurement and Disposal Regulations, 2006, entails that an evaluation committee shall consist of a chairman and at least two (2) other members all appointed by the accounting officer or the head of the procuring entity upon recommendation by the procurement Unit

The regulations under Section 16 (4) further prescribe that no person shall be appointed to the evaluation committee if such a person is a member of the tender committee of the procuring entity.

Section 16 (5) - Evaluation Committees (Public Procurement and Disposal Regulations, 2006)

The following are the function of a Technical Evaluation Committee: -

- a) The Technical Evaluation of the Tenders or proposals received in strict adherence to the compliance and evaluation criteria set out in the tender documents;
- b) Performing the evaluation with all due diligence and within a period of thirty days after the opening of the tenders.

Each member of the Technical Evaluation Committee shall evaluate independently from the other members prior to sharing his or her analysis, questions and evaluation including his or her rating with the other members of the technical evaluation committee as stipulated under Section 16 (6) of the Public Procurement and Disposal Regulations, 2006.

Section 16 (8) of the said regulations directs that under no circumstances may any member of an evaluation committee enter into direct communication with any of the tenderers participating in a tender or proposal that such evaluation committee is considering.

An Evaluation Committee shall prepare a report on the analysis of the tenders received, and final ratings assigned to each tender and submit the report to the tender committee as captured under Section 16 (9) of the regulations.

The said report by the Evaluation Committee shall include the following as stipulated under Section 16 (10) of the regulations: -

- a) Minutes of the opening of the tenders or proposals;
- b) The results of the preliminary evaluation with reasons why any tenders or proposals were rejected;
- c) The scores awarded by each evaluator for each tender or proposal;
- d) A summary of the relative strengths and weaknesses of each tender or proposal;
- e) The total score for each tender or proposal; and

- f) A recommendation to award the tender to the lowest evaluated tenderer or to the person who submitted the proposal with the highest total score.

The Procuring entity shall, for purposes of section 66 (6) of the Act, evaluate the tenders within a period of thirty days (30) after the opening of the tender. Upon opening of the tenders under section 60 of the Act, the evaluation committee shall first conduct a preliminary evaluation to determine whether: -

- i. The tender has been submitted in the required format;
- ii. Any tender security submitted is in the required form, amount and validity period;
- iii. The tender has been signed by the person lawfully authorized to do so;
- iv. The required number of copies of the tender have been submitted;
- v. The tender is valid for the period required;
- vi. All required documents and information have been submitted; and
- vii. Any required samples have been submitted.

Section 47 (2) stipulates that the Evaluation Committee shall reject tenders, which do not satisfy the requirements as set out above under paragraph (1).

Upon completion of the preliminary evaluation under Regulation 47, the evaluation committee shall conduct a technical evaluation by comparing each tender to the technical requirements of the description of goods, works or services in the tender document as captured under Regulation 49 (1).

Regulation 50 (1) indicates that the Evaluation Committee shall conduct a financial evaluation and comparison to determine the evaluated price of each tender upon completion of the technical evaluation under Regulation 49.

The Technical Evaluation 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 Economics 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