

Factors Affecting Compliance of Public Hospitality Entities to Public Procurement Laws and Regulations in Kenya

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Abstract

Using a case study design, this research sought to explore the factors affecting compliance of public hospitality entities to public procurement laws and regulations in Kenya (The Public Procurement and Disposal Act of 2005 And Regulations 2006). The research adopted the conceptual framework by Thai, K. V, which suggested these factors usually include procurement procedures, internal controls, competences and technology. The research considered performance of procurement processes at the Hotel X for the period 1st July 2010 to 30th June 2011. The research scope encompassed key areas of the public procurement and disposal processes from planning to completion undertaken by the hotel. (The name of the hotel is withheld for confidentiality purpose).

Though the procurement procedures were established as per the recommendations of the law, they were not implemented fully. The entity use alternative methods of procurement instead of open tender, Consultants were not involved in tendering process and tenders were not offered on yearly basis. The entity had inefficient inspection and disposal committees. The procurement process was not open to social scrutiny as it was not open to public. These factors weakened the internal control system. The staffs had low levels of competence to public procurement laws and regulations while the utilization of information, communication technology was low. The research concluded that the public entity had failed to comply fully with public procurement laws and regulations.

Key words: *Public Procurement, Compliance, Hospitality Industry*

1. Introduction

1.1 Background

The public procurement system in Kenya has evolved from a crude system with no regulations to an orderly legally regulated procurement system. The Government's procurement system was originally contained in the Supplies Manual of 1978, which was supplemented by circulars that were issued from over to time by the Treasury. The Director of Government Supply Services under the ministry of finance was responsible for ensuring the proper observance of the provisions of the Manual. The Manual created

various tender boards for adjudication of tenders and their awards and subsequent follow-up. However, these boards were not so effective (Aketch, 2005 as quoted by Kipchilat, 2006).

According to Bukhala (2003), a review of the country's public procurement systems was undertaken in 1999 and established that there was no uniform procurement system for the public sector as a whole. The system had more loopholes as it did not have sanctions or penalties against persons who breached the regulations in the Supplies Manual, other than internal disciplinary action. Consequently application of the rules was not strict and many of the norms were not followed. Furthermore, the Supplies Manual did not cover procurement of works; the dispute settlement mechanisms relating to the award procedures as set out in the Manual were weak and unreliable for ensuring fairness and transparency. In extreme cases, records of procurement transactions were found to be inaccurate or incomplete or absent.

In view of the these shortcomings, it was found necessary to have a law to govern the procurement system in the public sector and to establish the necessary institutions to ensure that all procurement entities observed the provisions of the law for the purpose of attaining the objectives of an open tender system. Consequently, there was establishment of the Exchequer and Audit (Public Procurement) Regulations of 2001 which created the Public Procurement Directorate (PPD) and the Public Procurement Regulations of 2001. The scope of public entities was also broadened to include schools, colleges, universities, cooperatives and local authorities under these Regulations. Between 2001 and 2004, the Public Procurement and Disposal Bill was drafted and modified several times. After being assented to by the president, it became the Public Procurement and Disposal Act 2006. This Act contains the Regulations that are meant to effectively ensure that the procurement process is fair and just. The Rules and Regulations, herein known as the Public Procurement Regulations of 2006, became operational on 1 January 2007.

Public procurement is governed by the Public Procurement and Disposal Act, 2005 (PPDA) and the Regulations under this Act 2006. The Act assures adherence to basic principles of sound procurement practices. The objective of public procurement is the management of sustainable acquisition of goods, works and services to optimize value for money through professional and auditable framework.

The objectives of PPDA includes ; (a) fostering efficiency and economy in public procurement, (b) promoting transparency and accountability in public procurement, including the prevention of malpractices in public procurement;(c)maximizing competition and provide a fair opportunity to all prospective contractors of goods, works and consultancy services;(d) developing social and economic capacity in Kenya, including providing opportunities for small enterprises and individuals to participate as suppliers, contractors and subcontractors in public procurement;(e)ensuring that procurement is consistent with the objectives of the budget and kept within the expenditure ceilings set within the budget, and (f) increasing public confidence in Government's procurement practice.

Principally the Public Procurement and Disposal Act was enacted to, *inter alia*, to ensure:

- i. Public entities get value for money spent on acquisition of goods, works or services.
- ii. Accountability in the entire procurement process.
- iii. Transparency in the procurement process and
- iv. Equity/fairness in the procurement process.

Procurement in hospitality industry is very sensitive issue as it determines the quality of products and/or services the facility offer to the diversity of its clients from international as well as local clients. Hospitality industry also faces stiff competition from local and international firms that may have more resources and flexible management systems. However, these public hotels are not exempted from public

procurement and Disposal Acts and regulations. This may provide a serious challenge in making quick, timely and flexible decisions in procurement when faced by micro and macroeconomic challenges and opportunities. Limited research exists in this area to guide policy makers in formulation appropriate policy for public hospitality industry

2. The Objective of the Study

The objective of the study was to investigate the factors affecting compliance with public procurement law by public hospitality entities.

3. The Research Methodology

The purpose of the study was to establish the factors affecting the implementation of Public Procurement and Disposal Act (2005) and regulation Act (2006) by public hospitality entities in Kenya. The target population was the procurement officers of the Hotel and members of the hotel tender committee. The finance director headed the finance department and procurement department fall under his docket. Under the finance director, the other officers were the chief procurement officer, who headed the procurement functions of the hotel, the senior procurement officer, procurement officers, receiving clerks and store clerks. Fifteen (15) respondents were randomly identified for the study in various departments as follows:

Table 1: Target Population

<u>JOB TITLE</u>	<u>POPULATION</u>
Finance director	1
Chief Procurement officer	1
Senior Procurement officer	8
Procurement officer	10
Receiving clerks	10
Store clerks	10
Total	40

Table 2: Sample size and Sampling frame

<u>JOB TITLE</u>	<u>POPULATION</u>
Finance director	1
Chief Procurement officer	1
Senior Procurement officer	4
Procurement officer	4
Receiving clerks	4
Store clerks	4
Total	15

The data was collected a period of one month. Initial meeting was held with senior procurement team and where the sampling frame was agreed upon. The researchers were allowed the access to secondary data and the permission to randomly distribute questionnaires for primary data. A meeting was held after data

collection to discuss any unclear information with the chief procurement officer. This helped in cleaning the data to reliability and validity purposes.

The study used both primary and secondary data. Primary data was the information the researcher obtained from the field. Primary data was collected using semi-structured questionnaires. The questionnaires was administered using drop and pick method. The questionnaires was used because it allows the respondents to give their responses in a free environment and help the researcher gather information that would not have been given out if interviews was used. A 5 point Likert scale was used. Secondary data was collected from journal and news papers as well as magazines.

On ethical issues, the researcher sought permission to carry out the study from the University. The study attempted not to infringe on the individuals rights of the respondents by treating them fairly and cautiously. They were also explained to the purpose of the study and how the information obtained was to be used. This however was used with caution and respondents were assured that the given information was only to be used for the purpose of achieving the research objective. Any personal information used for research purposes was kept strictly confidential. To ensure anonymity, the hotel's name is withheld and henceforth referred to as hotel X.

The research adopted four main independent variables that affect compliance of public entities to public procurement laws and regulations from conceptual framework of Thai, K.V. (2001) as below.

3.1.1 Public Procurement procedures

Public procurement is governed by the Public Procurement and Disposal Act 2005 (PPDA) and the Regulations (2006) under this Act. There is a Public Procurement Oversight Authority established under the Act mandated to ensure that procurement procedures are complied with, and to generally monitor and assist with the implementation and operation of the public procurement system. In general, the main steps are as follows: invitation to tender, preparation of tender documents in accordance with the PPDA, submission and receipt of tenders before set deadline, opening of tenders and the evaluation of tenders.

The invitation to tender must be advertised at least twice in a newspaper of nationwide circulation. For international tendering, all tender documents must be in English. Advertising must include one or more English language newspaper or other publications that together, have sufficient circulation outside Kenya to allow effective competition. 86.7% of the respondents agreed that the procurement procedures in their Hotel affect compliance with procurement laws and a small percentage of 13.3% disagreed to the fact.

The PPDA provide a number of rules of conduct for the whole procurement process. The aims of the directives are, firstly, to avoid discrimination (for instance, on grounds of nationality) by providing a set of coherent rules (for instance, on objective specifications, types of award procedures and time limits), and secondly to ensure transparency by requiring publication in the *public media*. The directives should contribute to the Single market, because there is a built-in competition, which ensures a more effective allocation of resources. However, this supposed effectiveness of the directives is often questioned.

The rules are criticized because they are not in line with best practices relating to private purchasing practices (Cox and Furlong, 1995). The prohibition to negotiate during and after the tender procedure is an often mentioned example of the inefficiency of the rules. For complex procurements it is argued that there are good commercial reasons for carrying out negotiations with firms at all stages of the purchasing process (Arrowsmith, 1998). Many believe that the most efficient purchasing mechanism may not be open to competitive tendering (Lian and Laing, 2005). Hotel X, prefer appropriate alternative methods of procurement to open tender.

The directives from PPDA forbid that contracts are extended without going to the market. In contrast, there is empirical evidence that public buyers prefer to renew a contract rather than issue new contracts (Jones, 1997). Professional purchasers may find it further odd and counterproductive that poor performing suppliers cannot be excluded from the (public) tendering procedure. This was evidence from Hotel X procurement system. While the entity adopted drawing annual procurement plan, this plan was not implemented at the beginning of the financial year. This was to allow the scrutiny of the performance of the suppliers and take advantage and precaution of fluctuating micro and macroeconomic business factors.

The cost to the government of running a tender competition is considerable. The (transaction) costs may exceed any likely efficiency benefits (Bohan and Redonnet, 1997). Transaction costs are estimated at least 0.5 per cent of the contract value (Parker and Hartley, 1997). The main reasons for not adopting the directives could be the expected administrative burden and time-consuming procedures in combination with much paperwork (De Boer and Telgen, 1998). The costs for legal assistance can be substantial and additional costs for consultancy can mount up to huge per public tender (Clingendael, 2003). Hotel X had properly constituted tender and procurement committees which carried out procurement and tendering processes with minimal assistance from consultants. The table below shows this summary.

Table 3: Procedures on Hotel Descriptive Statistics

Procurement Procedure	N	Mean	Std Deviation
Annual procurement plan is prepared	15	1.80	1.014
Plan is implemented at the beginning of FY	15	2.40	1.056
Open tender is the most popular procurement method	15	1.93	1.033
Appropriate alternate procurement method are used	15	1.87	.352
Tender committee is properly constituted	15	1.33	.488
Procurement committee is properly constituted	15	1.80	.775
Specification drawn by user	15	1.80	.561
Specification drawn by procurement unit	15	2.47	.990
Specification drawn by consultant	15	3.53	.915
Total	15	2.10	.798

3.1.2 Internal Control

The integrity and transparency of a public procurement system rely on a number of control mechanisms, including an effective control and audit system, an efficient appeals mechanism, a comprehensive information sharing system enabling civil society and interested stakeholders to conduct social audit, and effective ethics and anti-corruption measures. Without such control mechanisms, flaws in the procurement system may not be detected and addressed.

The identified factors by PPDA that contribute positively to strengthening the control systems of Kenya's procurement system in recent years included: Sound internal audit mechanism established and complied with the Internal Auditor General (IAG) procurement requirement (IAG, Internal Audit Manual; 2005) and well-functioning independent complaints review and appeals mechanism has been established.

Majority (93.3%, 14) of the respondents in the study believed that internal control system affect the compliance with public procurement laws. The hotel conduct market survey before bid adjudication(2.13), which reveals that price surveyed do not compare well with quoted bids(2.60). The evaluation of such bids is conducted as per PPDA law (1.93).

The PPDA provides the PPOA with the mandate to inspect and audit procurement contracts, and includes in the functions of the PPOA to monitor the public procurement system and report on the overall functioning. However, the PPDA does not confine any specific responsibility or right on the PPOA to conduct regular procurement audits, hence leaving the system with a serious gap. To deal with this external weakness, the hotel established various committees as the procurement law (1.64). Though the performance of these committees were above average but key committees were rates lowest; inspection and acceptance committee (2.33) , Disposal committees (2.20) and procurement committee(2.0).This is summarized in Table 4 that follows.

Due to lack of procurement proficiency among auditors (both internal and external) auditors were trained in procurement as part of their regular in-house training. However, they were not procurement experts, and currently procurement specialists were not called in to form part of the control and audit teams. In effect, the audits conducted were reportedly not always adequately sensitive to procurement related issues.

There was limited access to ARB and PPRCB decisions. Although complaint review decisions were available at the PPOA/ARB premises, they were not published in any official gazette nor on the PPOA website or any other government websites. In practice, this made it very difficult for interested parties (or anyone else) to access the ARB decisions and seriously limits transparency of the ARB.

Table 4: Committee’s performance

Committees	N	Mean	Std deviation
Tender committee	15	1.40	.507
Procurement committee	15	2.00	.756
Tender opening committee	15	1.80	.561
Evaluation committee	15	1.80	.862
Inspection and acceptance committee	15	2.33	.976
Disposal committee	15	2.20	1.014
Valid N (List wise)	15	1.92	

3.1.3 Competence of the Staffs

The PPOA has a mandate to ensure capacity development initiatives across government (central and local). The PPOA was in the process of developing a comprehensive capacity building strategy, including training program. A strategic element would be to link up with already established training institutions across the country.

A common complaint against the PPDA was that purchasers are not completely clear about the rules. Lack of clarity was believed to increase the possibilities for (un)deliberate non-compliance. De Boer and Telgen (1998) reported that many procuring entities at the time were simply not familiar with or not fully aware of the legal obligation to follow the rules (legal issues) and the possible exceptions. In addition, to many practitioners it was not exactly clear in which cases the rules were applicable. There was a significant uncertainty over the application of the “aggregation rules”, both regarding the level at which

goods and services should be aggregated and the treatment of discrete operating units within the same public agency (European Commission, 1996). Procuring entities might not comply with the rules or they might be stimulated to get round the rules or to work with own interpretations of the rules. To conclude, the perceptions with respect to the clearness of the rules would influence the chance that public purchasers would comply with the rules. The purchaser's familiarity with the rules has a positive impact on the compliance with the Procurement rules.

The available expertise at PE level did not meet the need for specialized procurement knowledge. Despite the above mentioned steps taken towards developing a professional procurement workforce, the overall lack of procurement knowledge remained a major weakness to the efficiency of procurement operations. It should be noted that the need for additional (or any) procurement expertise varies between different types of procuring entities, with major procurers often possessing the necessary competence levels, while local level PEs often have little or no access to internal procurement expertise. Massive upgrading of qualifications through training as well as an increase in the supply of specialized graduates would be required to fill this gap. In addition, procurement staff retention strategies would be needed in the future to address the severe brain-drain of procurement capacities reportedly taking place in these years. Majority (93.3%) Hotel X staffs had diploma and certificate level of education in procurement. This was inadequate level for the highly specialized and competitive hospitality industry. This is summarized in table 5 below.

Table 5: Highest professional level

Profession level	Frequency	Percent	Valid (%)	Cumulative (%)
CIPS /KISM	8	53.3	53.3	53.3
Diploma in supplies management	6	40.0	40.0	93.3
Any other	1	6.7	6.7	100.0
	15	100.00	100.0	

Short-term procurement training was in short supply. The PPOA was not offering training programs, although a series of sensitization sessions targeting both public and private sector participants had been held. Many stakeholders reported that this type of information programs was in short supply. In light of the low availability of procurement expertise at PE level (see above), the lack of short-term procurement training constitutes a key obstacle to the continued professionalization of PEs' procurement practices. Since majority (86.7%) of the respondents belonged to professional organizations, these trainings could be channeled through professional organization as. However this would remain a short term remedy than a solution.

The limited private sector training supply remained a major constraint to the unfolding of the procurement market potential, as many private bidders lack adequate procurement knowledge to take part in procurements. This conclusion was supported by the CPI survey, which showed that among the assessed procurement cases, 37% of the suppliers who received the tender specifications did not submit a tender. Of the submitted tenders 29% were rejected in the preliminary evaluation and 45% in the technical evaluation.

Table 6 shows the result obtained from the survey on how the respondent rated the performance of procurement committee show that the average mean response was 2.04 which implies a level of

competence given the scale range from 1 to 5, 1 being very competent while 5 very incompetent. Means for each questions ranged from 1.73 to 2.33.

Table 6: **Rating of procurement officers/ committees**

Officer	N	Mean	Std. Deviation
Procurement unit staff	15	1.80	.561
Tender committee	15	1.73	.458
Procurement committee	15	2.07	.799
User departments	15	2.20	.676
Evaluation committee	15	2.07	.594
Inspection and acceptance committee	15	2.33	.724
Disposal committee	15	2.27	.704
Tender opening	15	1.87	.516
Valid N (List wise)	15	2.04	

3.1.4 Technology

In order to promote public access to procurement information, the PPOA had established a website (www.ppoa.go.ke) with the intention of publishing a broad range of information about the procurement system, including legal and policy documents, procurement statistics, and procurement plans, notices, manuals and contract awards. The PPOA had upgraded the website and all the above mentioned information was available. As public access to all relevant procurement information is a cornerstone to the development of a transparent procurement system, this should be a key priority to the PPOA.

As part of an e-procurement drive, the PPOA already was in the process of developing a web-based system for collecting and disseminating procurement information, including tender invitations, requests for proposals, and contract award information for all central government contracts above 5,000,000 KES. Technology development would ensure that there exists System for collecting and monitoring procurement statistics. At the time of the study, the government of Kenya was implementing an electronic Integrated Financial Management Information System (IFMIS), which included a procurement module rolled out in 24 ministries. The system would enable users to collect and monitor procurement information and statistics at all stages of the procurement process. Being newly implemented, however, the tool was not being broadly used for analysis of information by the Public Hotels, and the reliability of data collected through IFMIS yet remained untested. The fact that IFMIS only targeted the central government level presented an additional weakness in terms of collection and monitoring of procurement statistics.

The implementation of an e-procurement system in Kenya was part of the public procurement reform program, which aimed at putting in place a national procurement system for use by procuring entities. The objective of the E – Procurement system was to provide a framework that would guide the creation of a holistic electronic public procurement environment to improve the level of transparency and efficiency.

The system aimed at;

- Supporting an integrated approach to procurement across public sector agencies.
- Minimizing transaction costs associated with procurement.
- Enhancing buying power of the public sector.

- Promoting competition among suppliers while maintaining reliable sources of supply.
- Optimizing inventory levels through the adoption of efficient procurement practices.
- Making effective use of human resources in the procurement process.
- Promoting the use of ecommerce in the wider economy; and
- Improving the audit ability of public procurement expenditures.

Majority of respondents (93.3%) of Hotel X believed that technology affected the compliance to public procurement laws by the hotel. As shown in the table 7 below, the implementation of technology (like other public entities in Kenya) remained underdeveloped, hence failing to accrue the above benefits.

Table 7: Compliance with procurement law Descriptive statistics

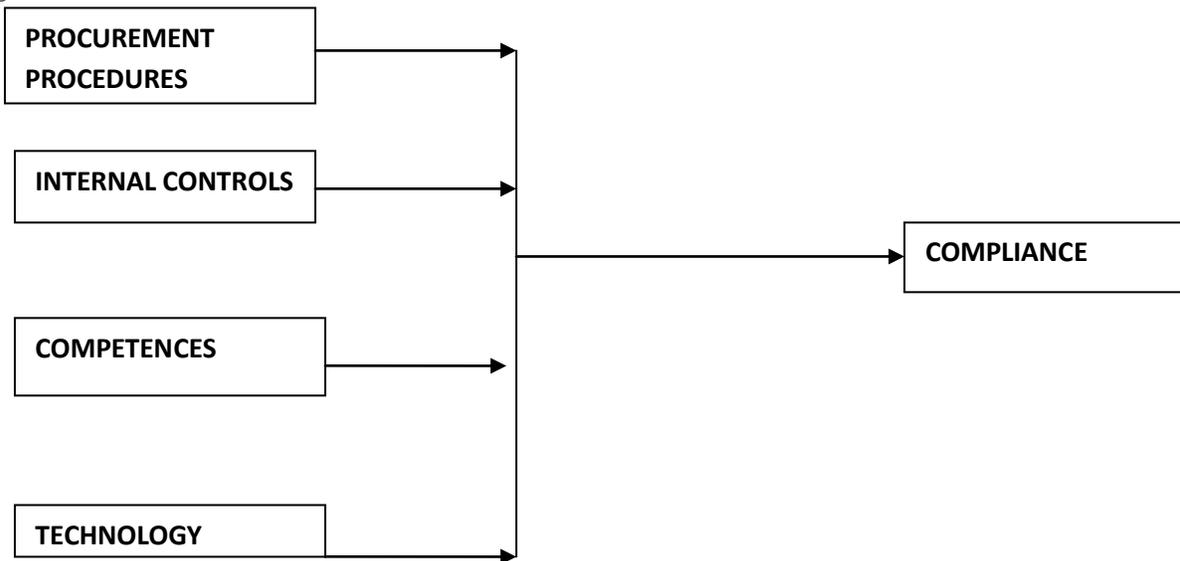
Compliance	N	Mean	Std. Deviation
Procurement processes are computerized	15	2.60	1.454
Communication with user through electronic media(emails, EDI)	15	3.00	1.512
Communication with supplier through electronic media (emails EDI)	15	3.07	1.335
Procurement staff trained on e-procurement	15	3.07	1.280
Hotel has modern infrastructures	15	2.87	1.407
Valid	15	2.92	

The finding shows that the mean for the entire 5 technological aspects was 2.92 showing a relatively high level of disagreement. The highest ranked responses of the level of compliance were procurement are computerized and hotel modern infrastructures with a mean of 2.60 and 2.87 respectively. Those ranked lowest included communication with suppliers through electronic media (emails, EDI) and procurement staff trained on e-procurement.

3.2 Conceptual Framework

The research adopted conceptual framework by Thai, K.V (2001), which identified independent variables affecting compliance to public procurement laws as procurement procedures, internal control, competence of the staffs and adoption of ICT.

Figure 1



3.3 Discussion

This study represents a careful and systematic effort to examine the factors that affect compliance with the public law by the Hospitality industries in Kenya. The majority of the respondents believed that the procedure (86%), internal controls (93.3%), competence of the staffs on procurements policies (93.3%) and technology (86.7%) affected the compliance with public procurement law by their institution. This was in line with the previous studies done. For example, De Boer and Telgen (1998), as cited by Gelderman et al.,(2006) asserts that compliance is a problem in both third world countries as well as European Union. Adhiambo and Kamau, (2003) warns the institutions about failure to comply with such regulations due to the increasing trend of non compliance. Ntayi (2009) observes further that millions of dollars are wasted due to non compliance. However, it is important to note that most of these public institutions face many challenges in following the public procurement laws. Sewanyana (2009) asserts that goods and services procured sometimes influence the degree of compliance with procurement regulations. These negative effects were also highlighted by other researchers in the past (Kelma, 1958, Hunt et al., 1987 and Yukl, 1989).

3.3.1 Procedure and Processes

Analysis of the process and procedure of procurement in the institution above suggested the following findings. Although the mechanisms of procurements were in place, they were not followed to the letter. For example, more respondents indicated that alternative methods of procurement were more preferred than open tender. This fact is in agreement with Smyth (1997) who states that in public sector purchasing, competition is more rhetoric than reality. Lian and Laing (2005) suggested that the most efficient purchasing mechanisms may not be open to competitive tendering. Public buyers have the tendency to renew contracts rather than issue new ones (Jones, 1997) probably to reduce administrative, time, legal and consultancy costs related to such exercises(Bohan and Reonnet, 1997; De Boers and Telgen, 1998 and Clingendael, 2003).

The institution rarely utilised consultants and procurement staffs when purchasing and drawing orders. This was inconsistent with PPOA and regulation which required utilisation of such people in order to ensure compliance with the law and avoid technical failures of procured goods and services. This probably was the attempt of the management to lower the cost of tendering to be more competitive. De Boer and Telgen (1998) reported that many procuring entities are not familiar with legal obligations to follow when procuring. The tenders at Hotel X were not offered yearly, hence confirming Konkurrencestyrelsen (1997) assertion that the public rules are being circumvented by public buyers through: Dividing contracts into smaller amounts in order to avoid publication in the media, Unnecessary use of the accelerated procedure, Early notification of local/national suppliers; and Delayed procurement procedures and faulty or unreasonable standardisation requirements.

3.3.2 Internal Control

The internal controls at the institution affect compliance with public procurement laws (93.3%). Despite well established teams in the institution, inspectorate and disposal teams were less efficient. This is very important especially where other alternative methods of procurement other than open tender system are applied. Low utilisation of consultants and procurement experts created vulnerability of the system to misuse and corruption.

Although most of the procurement teams were constituted as per public procurement system, the procurement system was not open to public scrutiny for social audit. This was because of limited use of ICT and e procurement system that were easily accessible to public domain.

In terms of performance, the inspection and acceptance committee, disposal committee and procurement committee recorded higher inefficient as compared to the tendering committees. This was an internal control weakness that may affect integrity and transparency of the whole process. The problem may be compounded by inadequate competencies of both internal and external auditors on procurement laws as highlighted in previous literatures.

Weak internal controls may lead to increasing non compliance and loss of substantial public revenue due to inefficient and ineffective procurement structure, policies and procedures and failure to impose sanctions for violation of such rules resulting to poor service delivery (Adhiambo and Kamau, 2003 and Ntayi, 2009).

3.3.3 Competencies

Majority of the respondents (93.3%) agreed that competencies in procurement affect compliance with the laws. Although majority (80%) had acquire degree(40%) and post graduate (40%) studies, none of the respondents had acquired these level of education in procurement field. This was compounded by the fact that consultants and procurement officers were less consulted when drafting the procurement tenders. This could lead to non compliance due to non familiarity or not fully aware of the legal and technical issues related to such goods and services. De Boer and Telgen (1998) affirm this fact that many of the procuring entities at the time were simply not familiar with or not fully aware of the legal obligations to follow the rules and possible exceptions.

Many of the respondents were not aware of the PPOA website despite majority (93.3%) having acquired diploma and professional certificates in procurement.

3.3.4 Technology

The entire technology implementation score below average. The worst performance was lack of training of procurement staffs on e-procurement and failure to communicate to both the suppliers and users using electronic media. This could further be explained by the fact that Hotel X lacked computerized modern infrastructure leading low level of computerization of procurement process. This eroded the many benefits identified by PPOA as benefits of a computerized e-procurement system.

4. Conclusion

In conclusion, the study confirms that public hospitality institutions in Kenya faced many constrains which affect compliance with public procurement laws. These factors included staff competencies with public procurement laws, weak internal controls and inadequate applications of ICT process and systems.

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