

**THE EXPERIENCE IN KENYA- PUBLIC  
PROCUREMENT ADMINISTRATIVE  
REVIEW BOARD**

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# Presentation Outline

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- ❑ **Reform Era on public procurement practice in Kenya**
- ❑ **Post Constitution 2010**
- ❑ **Public Procurement and Asset Disposal Act, 2015**
- ❖ **Role of Public Procurement Administrative Review Board**
- ❑ **Procurement and Asset Disposal Disputes**

# ❖ Reform Era on public procurement practice in Kenya

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- ❑ In 1997, the World Bank benchmarking study assessed and reviewed the practice of public procurement in several countries including Kenya which revealed the following weaknesses:
  - Reduced effectiveness of Public Financial Management;
  - Government's inability to deliver goods and services effectively;
  - Conflicting/Obscure rules on public procurement not based on fair competition and transparency subjecting the system to abuse; and
  - Absence of an institutional and legal framework to enforce the practice of public procurement.
- ❑ During this time the most famous procurement policy document was the Blue Book that regulated procurement in the era of District Focus for Rural Development Strategies and complaints from the Central Tender Committee were handled by a Procurement Appeals Board at the National Treasury.

# Cont.

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- ❑ World Bank findings motivated Parliament to enact the Exchequer and Audit (Public Procurement) Regulations, 2001 that abolished the Central Tender Committee and established the Public Procurement Directorate and Public Procurement Complaints, Review and Appeals Board as a unit at the National Treasury.
- ❑ Corporations and parastatals were for the first time subjected to the Public Procurement Regulations just as was the Central Government. Corporations and parastatals were for the first time subjected to the Public Procurement Regulations just as was the Central Government.
- ❑ There was still need for legislation that establishes independent oversight bodies that are not constantly influenced by the Executive.

# Public Procurement and Disposal Act, 2005 (2005 Act)

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- The 2005 Act was approved and gazetted in 2005 but came into operation in 2007 after the Public Procurement and Disposal Regulations, 2006 (2006 Regulations) were gazetted by the then Minister for Finance, who is our current President, H.E. Uhuru Muigai Kenyatta.
- The 2005 Act and 2006 Regulations saw the establishment of the Public Procurement Oversight Authority (PPOA).
- The Public Procurement Complaints, Review and Appeal Board established under the Exchequer and Audit (Public Procurement) Regulations, (L.N. 51/2001) continued under this 2005 Act as the Public Procurement Administrative Review Board and its secretariat was transferred from the National Treasury to PPOA.

# The Constitution of Kenya, 2010

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- Introduced public finance principles, one of which requires public money to be used in a prudent manner.
- Introduced a requirement that state organs and other public entities must procure for goods and services using a system that is fair, equitable, transparent, competitive and cost-effective.
- Imposed a requirement that Parliament enacts legislation prescribing a framework within which policies relating to procurement and asset disposal are implemented

# The Public Procurement and Disposal (Preference and Reservations) Regulations 2011 (2011 Regulations)

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- 2011 Regulations covered groups or regions that have been disadvantaged over time and could not compete favourably with more established firms thus had to be given preference. E.g SMEs, Women, Youth, PLWD, Citizen & Local Contractors and Citizen Contractors in joint venture with Foreign Contractors
- The objective was to promote local firms/industries and disadvantaged groups or individuals.

# Public Procurement and Disposal (County Governments) Regulations, 2013 (2013 Regulations)

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- The 2013 Regulations focused on Procurement and disposal within the newly established County Governments.
- The purpose was to operationalise the application of the Public Procurement and Disposal Act, 2005 in County Governments and promote local industries the Constituents 2010 having created a system of devolved government.



# Public Procurement and Asset Disposal Act, 2015 (2015 Act)

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- Established the Public Procurement Regulatory Authority ("the Authority") with wider functions among them to; monitor, assess and review the public procurement and asset disposal system to ensure that they respect the national values and other provisions of the Constitution, and make recommendations for improvements.
- Established the Public Procurement Regulatory Board ("the Regulatory Board") that manages the Authority to ensure proper and effective performance of the functions of the Authority.
- Established the Public Procurement Administrative Review Board ("the Review Board") with jurisdiction to review, hear and determine tendering and asset disposal disputes in public procurement.

# The relationship between the Authority/Regulatory Board and the Review Board

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- The Authority has a Complaints, Investigations, Enforcement and Debarment department that receives complaints from procuring entities, suppliers and the general public.
- However, the Regulatory Board cannot commence or continue with investigation in relation to an issue the Review Board is reviewing or has reviewed unless the Review Board has completed its review and information comes to the attention of the Regulatory Board that was not brought before the Review Board in the course of its review.
- The Authority provides secretariat and administrative services to the Review Board.

# Composition of the Review Board

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- Comprises of 15 members who are appointed by the Cabinet Secretary for the National Treasury and Planning including a Chairperson whose qualifications and experience is as that of a Judge of the High Court.
- 7 members whose qualifications include, possession of a University degree, knowledgeable and experienced for at least 7 years in the relevant field, in good standing with his or her professional body and meets the requirements of leadership and integrity outlined in Chapter Six of the Constitution.
- 7 other members drawn from the Law Society of Kenya (2), Chartered Institute of Arbitrators Kenya(1), Kenya Institute of Supplies Management(1), Institute of Certified Public Accountants of Kenya(1), Institute of Engineers of Kenya(1) and the Architectural Association of Kenya(1).
- The specialized nature of the membership of the Review Board makes it better equipped to keep pace with and adapt to dynamic developments in procurement law which allows for timely and efficient handling of proceedings and improves the consistency of jurisprudence developed by the Review Board through its decisions.

# Jurisdiction of the Review Board

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- The Review Board reviews, hears and determines tendering and asset disposal disputes by an aggrieved candidate or tenderer who claims to have suffered or risks suffering loss or damage due to breach of duty imposed on a procuring entity by the 2015 Act or the Public Procurement and Asset Disposal Regulations 2020 (2020 Regulations) within 14 days of notification of award or date of occurrence of alleged breach at any stage of the procurement process. The administrative review application must:
  - Be by a candidate or tenderer;
  - Demonstrate how a procuring entity has breached a duty imposed on it by the 2015 Act and 2020 Regulations;
  - Demonstrate how such breach has caused the candidate or tenderer to suffer or to risk suffering damage; and
  - Be made within 14 days of notification of award or date of occurrence of alleged breach.

# Exclusion of the Review Board's Jurisdiction

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- the choice of a procurement method;
- a termination of a procurement or asset disposal proceedings in accordance with Section 63 of the 2015 Act; and
- where a contract is signed in accordance with Section 135 of the 2015 Act.

# Powers of the Review Board

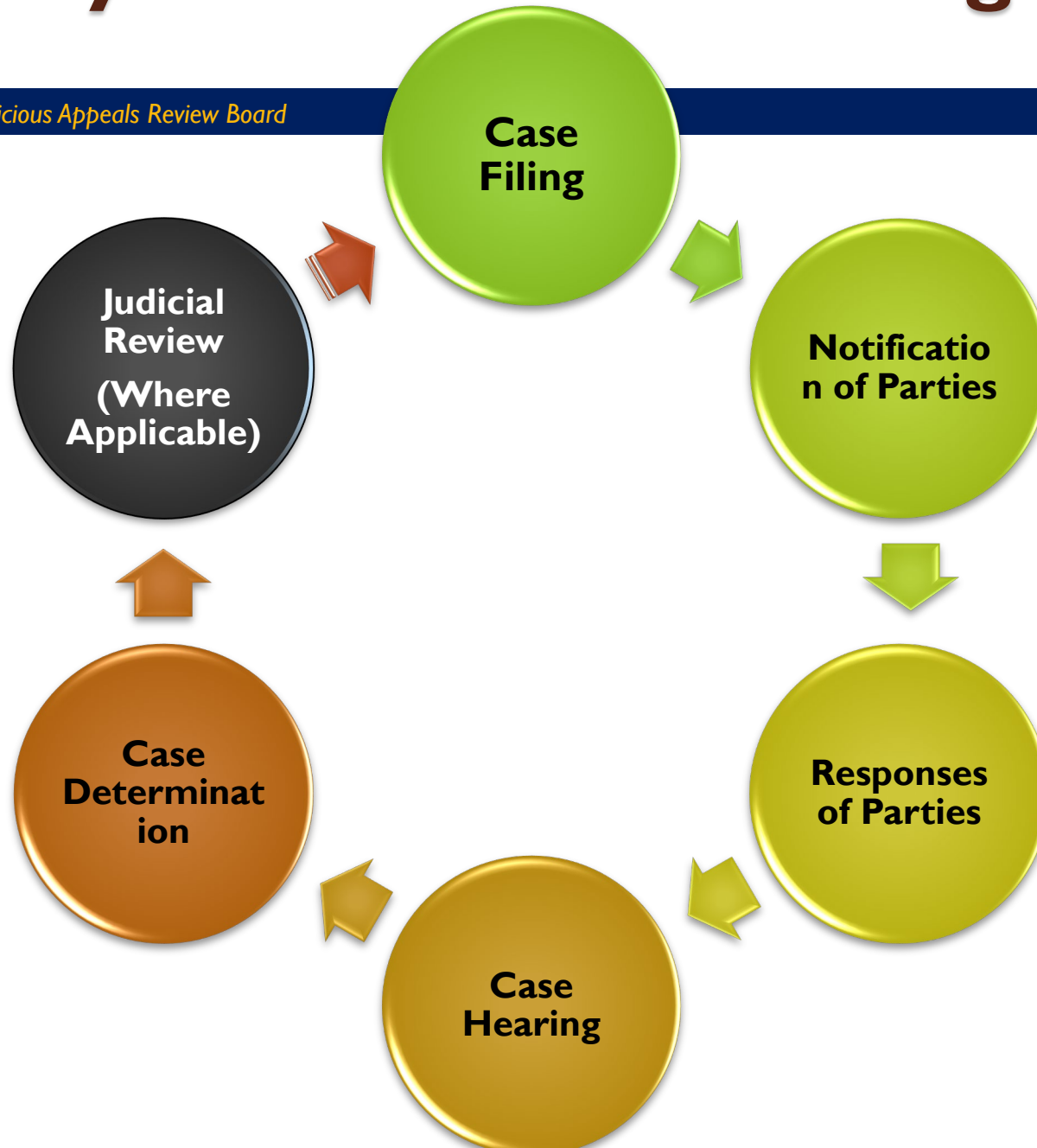
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Upon completing a review within 21 days from the date a Request for Review was filed, the Review Board may:-

- (a) annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;
- (b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;
- (c) substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;
- (d) order the payment of costs as between parties to the review in accordance with the scale as prescribed; and
- (e) order termination of the procurement process and commencement of a new procurement process
- (f) Dismiss with costs a request if it is of the opinion that the request is frivolous or vexatious or was made solely for purpose of delaying procurement proceedings or performance of a contract

# Cycle Of Case Handling

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# Judicial Review

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- A person aggrieved by a decision of the Review Board may seek judicial review by the High Court within 14 days from the date of the Review Board's decision, failure to which the decision of the Board becomes final and binding.
- The High Court is expected to determine the judicial review application within 45 days of such application.



# Appeal

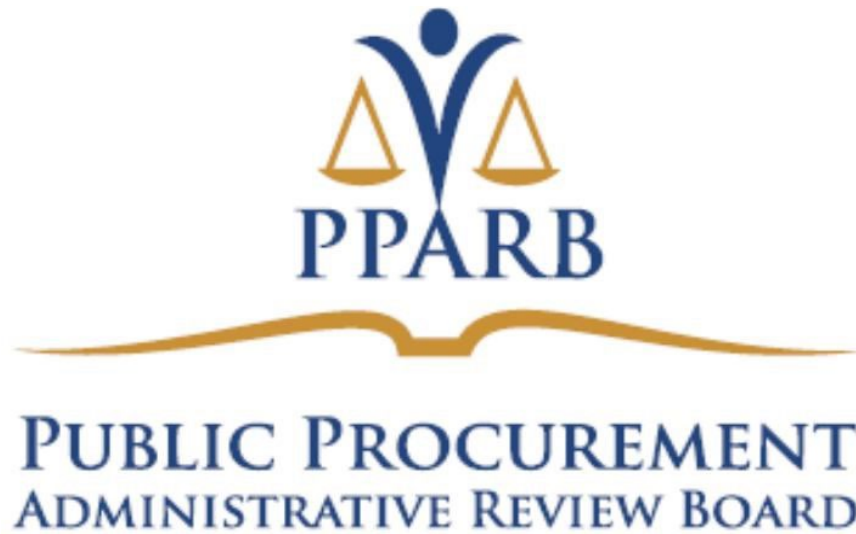
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- A person aggrieved by the decision of the High Court may appeal to the Court of Appela within 7 days of such decision and the Court of Appeal has to make a decision within 45 days which decision shall be final

# Challenges faced by the Review Board

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- Funding
- Authority supporting with secretariat and administrative services
- Inadequate human resource
- Excess Workload requiring full time engagement



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