

## **PUBLIC PROCUREMENT AND DISPOSAL ACT (2005) ON THE COMPLETION OF ENERGY PLANT PROJECTS IN KENGEN, KENYA**

**David Mwangi<sup>1</sup>, Willy Muturi<sup>2</sup> and Robert Nzulwa<sup>3</sup>**

School of Human Resource Management,  
Jomo Kenyatta University of Agriculture and Technology

### **ABSTRACT**

**S**urvey design was used in this study. The study will be conducted at the head office of KenGen in Nairobi and will involve members of projects implementation teams from the Finance, Business Development and Strategy, Operations, Supply Chain and Legal divisions/departments. The target population was 446 employees who were participating in the implementation of energy plant projects in KenGen in the last 20 years. The population was drawn from five divisions/departments that form part of the project implementation teams. Qualitative data was used to give descriptions of events and also to give good understanding of the industry. The data collection tool that was used was questionnaires. The study used both descriptive and content analysis to analyze the collected data. All the respondents stated that KenGen has faced challenges with the Public Procurement and Disposal Act. These ranged from the lengthy procurement process, the winning bidder though the lowest not necessarily being the best or most competent, interference by senior management in the bid evaluation process (vested interests), expiration of bid securities before evaluation was done, delays in completing evaluations within the legal time limits and lack of cohesion in the evaluation teams.

**Keywords-** Public procurement, Disposal act, completion of energy plant, and Projects in Kengen

## 1. Introduction

Most capital projects are costly to the organization undertaking them in terms of both funds and time spent. This is due to the risky and complex nature of such projects and examples are to be found in the oil, gas, electricity and transport sectors among others. The failure to complete a large project on time could have a negative impact on the revenues of the company which were expected to flow to it once the project comes on-stream. For instance, KenGen signs a Power Purchase Agreement in advance with Kenya Power for every power plant that the former is setting up and if it does not complete the project as planned, it will not only lose revenue but also incur penalties (KenGen, 2013). Since an organization does not operate in a vacuum, there are competitors, regulators, financiers and other stakeholders who are often keenly following the implementation of the project. Thus, the fact that an organization is doing a project could result in its competitors coming up with a similar project targeting the same market as the first organization or coming up with an innovation to neutralize the effects of the pace setter's project. In delivering a large project, the organization and the persons involved in the project put their reputations at risk. This further raises the already high stakes and there is pressure to deliver on the assignment as promised to the stakeholders. Owing to the sheer size and complexity of large capital projects, the organization usually obtains external funding for its project. In doing so, it must meet certain criteria set by the financiers. The providers of capital want to ensure that the funds will not only be used for the intended purpose but also that the organization will be able to repay the loans plus a return on their investment once the project is completed. In this regard, the financiers may impose certain obligations on the organization like to maintain a certain level of debt coverage. Complying with such demands from providers of capital involves a further cost to the organization. Connected with external funding is the reality that the organization has to compete for funds with other persons who may be looking for funds from the same financiers.

Further, the effects of implementation of a project may have wide implications over a wide geopolitical area or state. For example, the expansion of Thika Road in Kenya into a superhighway has significantly reduced the cost of transport between Nairobi and Thika. It has also opened up the areas along the highway for investment especially real estate thus enabling land owners and estate developers to unlock the value of their investments. Esty (2004) states that the 1997 implementation of the Mozal aluminum smelter in Mozambique at a cost of \$ 1.4 billion which amount was about the GDP of the country then, led to a further investment of about \$ 1 billion in the country. Other infrastructure projects followed and these investments positively impacted not only the areas where they were implemented, but also the country as a whole. However, despite project management being put in place, studies have shown that most large projects do not meet the expectations of those undertaking them. From a study of 60 large engineering projects with an average capital value of \$1 billion undertaken between 1980 and 2000, Miller and Lessard (2000), showed that about 40% of them performed so badly from a financial perspective that they were either wholly abandoned or restructured. After studying 47 huge projects, Merrow et al (1988) discovered that only four were completed on budget with the rest having overrun their budgets by 88%. 72 % of the projects did not meet their profit objectives. The researchers concluded that projects with a big fraction of public ownership perform poorly. Considering that there have been few studies on the factors affecting implementation of projects in the public sector as opposed to the private sector, it is necessary to carry out this research in order to establish the factors affecting the completion of energy projects in Kenya. Towards this end, the researcher wishes to focus on KenGen which is a State Corporation with large projects in the energy industry.

## 2. Statement of the Problem

The usual parameters used to determine whether a project has been a success are: the time it has taken; cost of the project and its performance. It is noted that although KenGen expends huge resources in energy power projects in an attempt to generate enough electricity to meet demand, it has had mixed success in those projects. Thus, while Kipevu III was completed on time, Sondu Miriu was not. The failure to complete the projects on time has some serious implications. First, KenGen is a public corporation financed by taxpayers. The fact that there are time and cost overruns increases the capital costs of the project. Hence, financial and other resources that could have been meaningfully used to do other public projects are wasted. Some of the funds used on the projects are borrowed and this leads to higher public debt. The government may borrow from the market to meet the loan repayments leading to higher interest rates and squeezing out the private sector from borrowing. Further, the delays rob the company the benefits of the projects especially revenue. The economy is also forced to pay more for energy as the expected electricity fails to come on stream in time to meet the rising demand. This forces the government to get expensive electricity from other sources like diesel powered plants. The prices of goods and services increase to reflect the high cost of electricity. The Kenyan consumer ultimately ends up paying more not just for electricity, but also for goods and services. The research therefore seeks to examine projects that have or are being executed by the company to identify and analyze factors that affect the completion of energy plant projects in Kenya with KenGen as the case study.

## 3. Literature Review

In order to implement a project, the sponsoring organization will need to procure some goods and services. In Kenya, the procurement of goods and services by a public entity is governed by the Public Procurement and Disposal Act (2005) and Regulations made there under. That law seeks to ensure that the government and the public obtain value for money throughout the supply chain in respect of: 1]Procurement by a public entity 2]Contract management 3]Supply chain management, including inventory and distribution; and3]Disposal by a public entity of stores and equipments which are unserviceable, obsolete or surplus. The Public Procurement Oversight Authority is the government agency set up to ensure compliance with the public procurement and disposal legal framework. Thus any person who is dissatisfied by the procurement process of a public entity including a decision to award a contract for the supply of any goods and services, may refer the matter to PPOA for adjudication. An appeal or request for review by a participant in a tender under the PPDA must be lodged within fourteen days of the procuring entity's decision. PPOA is required to make a decision within thirty days of the appeal or review request being filed. It may turn out that the decision of the procuring entity is overturned and the tender has to be redone. During this process, the project is held in limbo and may incur additional costs due to lawyers and other experts being hired to support the procuring entity's decision, not to mention delays. Since the PPDA regulates the procurement process of KenGen, the study will examine how that process affects the implementation of energy projects in KenGen. For a project to be implemented, the sponsoring organization must identify the source of funds for the project. If it does not have the funds, it may examine various ways of raising the funds required including using debt, joint ventures overdrafts, selling part of its stock among other methods (Cleland & Ireland, 2002). It is not only the sponsoring organization that has an interest in how the project is being funded. Contractors and suppliers of goods and services often take a keen interest in how the project is to be funded as the lack of project funding may occasion them loss due to non-payment or late payment of their dues. It could even lead the contractor or supplier into insolvency when it becomes unable to service its financial obligations due to non-payment by the project sponsor (Lock, 2000). The lack of funding for the project could mean that the project either runs behind schedule or is actually terminated (Cleland & Ireland, 2002). According to Esty (2004), the building of a power plant is a fairly complex matter that involves a large capital expenditure. It is therefore necessary at the project planning stage to properly estimate the cost of the project. If the scope of the project changes, the cost should be varied accordingly. Further, there are other costs like feasibility studies, environmental impact assessments, approvals or licences that are conditions precedent to the project being undertaken. These may become sunken costs if the project never takes off yet they must be budgeted for. The study seeks to examine the effect of funding on the completion of energy plant projects in KenGen.

#### **4. Research Methodology**

Survey design was used in this study. The study will be conducted at the head office of KenGen in Nairobi and will involve members of projects implementation teams from the Finance, Business Development and Strategy, Operations, Supply Chain and Legal divisions/departments. The target population was 446 employees who were participating in the implementation of energy plant projects in KenGen in the last 20 years. The population was drawn from five divisions/departments that form part of the project implementation teams. Qualitative data was used to give descriptions of events and also to give good understanding of the industry. The data collection tool that was used was questionnaires. The study used both descriptive and content analysis to analyze the collected data.

#### **5. Findings**

All the respondents stated that KenGen has faced challenges with the Public Procurement and Disposal Act. These ranged from the lengthy procurement process, the winning bidder though the lowest not necessarily being the best or most competent, interference by senior management in the bid evaluation process (vested interests), expiration of bid securities before evaluation was done, delays in completing evaluations within the legal time limits and lack of cohesion in the evaluation teams. On the question of whether KenGen experienced delays in obtaining the goods and/or services from suppliers, the respondents unanimously (100%) stated that delays were encountered. They attributed the delays to the lengthy procurement process and the time taken to resolve disputes arising from the procurement decision. 100% of the respondents also agreed that procurement decisions made by KenGen in energy plant projects had been challenged before the PPOA. The length and cost of challenging procurement decisions by interested parties was not planned for thus leading to delays in completing the projects and increased costs. All the respondents indicated that where the commencement of the project was delayed but completion was achieved on time, the project incurred cost overruns. The company had to pay more to contractors to speed up the work. Lastly, all the respondents agreed that KenGen has had disputes with suppliers and/or contractors. According to the respondents, the disputes led to loss of revenue, time and cost overruns.

#### **6. Conclusion and Recommendation**

The PPDA seems to add undue technicalities and time to the procurement process. This is largely due to the fact that the company has to wait for those aggrieved by its decision to get redress at the PPOA. Once the company has made a tender award, it has to wait for twenty one days to see whether its decision will be challenged. Once a challenge is mounted, the parties have to exchange papers which take another fourteen days. The PPOA then gives a decision within thirty days of hearing the dispute. That lengthy process adds not less than two months of uncertainty to the project. If the worst happens and the tender is cancelled, the project is jeopardized. The other aspect is that the PPDA favours the lowest bidders. However, they may not always be the best qualified as pointed out by the respondents which means that the project may not meet the technical requirements envisaged. Time and cost overruns then become inevitable. The findings by Muindi (2011) are therefore corroborated.

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