

The Dynamics of Public Procurement of Legal Services in Kenya

By: Prof. Tom Ojienda, SC *

* LL.D. (University of South Africa), LL.M. (King's College), LL.B. (UoN). Prof. Tom Ojienda, SC is a practising Advocate of the High Court of Kenya of the rank and status of Senior Counsel with over 25 years of law practice, an Associate Professor of Public Law at Moi University, and a Member of the Committee on Senior Counsel. He is a former Chair (President) of the Law Society of Kenya (LSK), former President of the East African Law Society (EALS), former Vice President and Financial Secretary of Pan African Lawyers Union (PALU), and Council Member of the International Bar Association (IBA). He has also served as a Commissioner in the Judicial Service Commission (JSC), Commissioner in the Truth Justice and Reconciliation Commission (TJRC) established after the 2007-2008 post-election violence in Kenya, Chair of the Land Acquisition Compensation Tribunal, member of the National Environment Tribunal, and member of the Board of American Biographical Society, the Council of Legal Education, the Public Law Institute of Kenya, and the Kenya Industrial Property Institute.

Prof. Ojienda, SC has published over 40 articles and 15 books. The books include "Conveyancing: Theory and Practice" published by T.O. Ojienda and A.D.O. Rachier, Faculty of Law Moi University; "Constitution Making and Democracy in Kenya" edited by T.O. Ojienda ISBN: 9966-9611-3-6; "The Dawn of a New Era 2004" edited by Tom Ojienda, ISBN-9811-4-4; "A General Introduction to the New Law of the Sea" Published by T.O. Ojienda and Kindiki Kithure; "The Legal Profession and Constitutional Change in Kenya; Anti-Corruption and Good Governance in East Africa: Laying Foundations for Reform" edited by Tom O. Ojienda and published by Law Africa Publishing (K) Ltd, Co-op Trust Plaza, 1st Floor, ISBN.9966-7121-1-9, 221 pages; "Conveyancing Principles and Practice" by Tom O. Ojienda and published by Law Africa Publishing (K) Ltd, Co-op Trust Plaza, 1st Floor, 521 pages; 'Conveyancing Principles and Practice' by Dr. Tom O. Ojienda and published by Law Africa Publishing (K) Ltd, Co-op Trust Plaza, 1st Floor (Revised edition); "Professional Ethics" by Prof. Tom Ojienda & Katarina Juma published by Law Africa Publishing (K) Ltd, Co-op Trust Plaza, 1st Floor. (Revised Edition) 195 pages; "The Enforcement of Professional Ethics in Kenya" (with Prof. Cox), Amazon Publishers, 2014; "Constitutionalism and Democratic Governance in Africa" (with Prof Mbodyeni), pulp publishers, 2013; "Mastering Legal Research" published by Law Africa, 2013; "Professional Ethics, A Kenyan Perspective" published by Law Africa 2012; "Anti-Corruption and Good Governance in East

Africa” published by *Law Africa*, 2007; and “*Conveyancing Theory and Practice*” published by *Law Africa*, 2002.

Prof. Ojienda, SC's published articles include: “Sustainability and The Ivory Trade. Whither the African Elephant?” published in the 2002 issue of the East African Law Review; “Pitfalls in the Fight against Corruption in Kenya: Corruption or Inertia?” in “Anti-Corruption and Good Governance in East Africa: Laying Foundations for Reform” by T. O. Ojienda (eds) pages 95 – 131; “Exploring New Horizons in the Discipline of Advocates, Towards a Review of the Existing Regime of Law” published in “The Advocate; Learning Law by Doing Law: The Theoretical Underpinnings and Practical Implications of Clinical Legal Education in Kenya”; and “An Inventory of Kenya’s Compliance with International Rights Obligations: A Case Study of the International Covenant on Civil and Political Rights” the East African Journal of Human Rights and Democracy Vol. 1, Issue No. 1, September 2003 at page 91-104; “Sectoral Legal Aid in Kenya: The Case of the Rift Valley Law Society Juvenile Legal Aid Project”, published in various journals including the Advocate, the Lawyer, and the Newcastle Law Bulletin; “Surrogate Motherhood and the Law in Kenya: A Comparative Analysis in a Kenya Perspective”; “Polygamous Marriages and Succession in Kenya: Whither “the other woman?”; “Reflections on the Implementation of Clinical Legal Education in Moi University, Kenya” published in the International Journal of Clinical Education Edition No. 2, June 2002 at page 49-63; “Taking a Bold Step Towards Reform: Justifying Calls for Continuing Legal Education and Professional Indemnity” published in Law society of Kenya Publication (2003); “Terrorism: Justifying Terror in Kenya?” published in The East African Lawyer, Issue No. 5 at pages 18-22; “Land Law and Tenure Reform in Kenya: A Constitutional Framework for Securing Land Rights”; “A Commentary on Understanding the East African Court of Justice” published in the East African Lawyer, Issue No. 6 at pages 52-56; “Where Medicine Meets the Law: The Case of HIV/AIDS Prevention and Control Bill 2003” published in The Advocate at page 36-40; “The Advocates Disciplinary Process-Rethinking the Role of the Law Society” published in The Lawyer, Issue No. 78 at pages 15-16; “Ramifications of a Customs Union for East Africa” published in The East African Lawyer, Issue No. 4 at pages 17-25; “Gender Question: Creating Avenues to Promote Women Rights after the Defeat of the proposed Constitution” published in the Moi University Journal Vol. 1 2006 No.1, pages 82–92; “Of Mare Liberum and the Ever Creeping State Jurisdiction: Taking an Inventory of the Freedom of the Seas” published in the Moi University Journal Vol. 1 2006 No. 1, pages 105 – 131; “Legal and Ethical Issues Surrounding HIV and AIDS: Recommending Viable Policy and Legislative Interventions” published in The East African Lawyer, Issue No. 12 at pages 19-24;

“Implementing the New Partnership for Africa’s Development (NEPAD): Evaluating the Efficiency of the African Peer Review Mechanism” published in the Kenya Law Review, 2007 Vol. 1, pages 81-119; “Protection and Restitution for Survivors of Sexual and Gender Based Violence: A case for Kenya” (with R. A. Ogwang and R. Aura) 90 Pages, ISSN:1812–1276; “Legal and Institutional Framework of the TJRC - Way Forward” published in the Law Society of Kenya Journal Vol. 6 2010 No. 1, pages 61 – 95; “A Critical Look at the Land Question in the New Constitution” published in Nairobi Law Monthly, Vol. 1, Issue No. 1 of 2010 at pages 76 – 81; “Access to Justice in the Era of COVID-19: Adaptations and Coping Mechanisms of the Legal Services Industry in Kenya’ (with Lydia Mwalimu Adude) published in Journal of Conflict Management & Sustainable Development, Vol. 6, Issue 2, 2021, ISBN: 978-9966-046-15-4, pages 1-46; “Criminal Liability of Corporate Entities and Public Officers: A Kenyan Perspective” (with Lydia Mwalimu Adude) published in Journal of Conflict Management & Sustainable Development, Vol. 6, Issue 2, 2021, ISBN: 978-9966-046-15-4, pages 117-212; “Changes to Civil Litigation and Mediation Practice Under the Mediation Bill, 2020: What of the Right of Access to Justice and the Independence of the Judiciary?” published in Alternative Dispute Resolution Journal (CIArb-Kenya), Vol. 9, Issue 2, 2021, ISBN: 978-9966-046-14-7, pages 44-65; “Access to Justice: A Critique of the Small Claims Court in Kenya’ (with Lydia Mwalimu Adude) Alternative Dispute Resolution Journal (CIArb-Kenya), Vol 9, Issue 2, 2021, ISBN: 978-9966-046-14-7, pages 170-201; and a book Chapter entitled “Land Law in the New Dispensation” in a book edited by P.L.O. Lumumba and Dr. Mbondenyei Maurice.

As a robust litigation counsel, Prof. Ojienda, SC, has successfully handled numerous landmark cases at the Supreme Court of Kenya, on Land and Environment Law, Electoral Law, Commercial Law, Family Law, and other areas of law. Prof. Ojienda, SC represents various individuals, State agencies, private entities, county governments and multinational agencies. He has represented these entities before Kenyan courts, from the subordinate courts, all the way to the Supreme Court of Kenya. Some of his landmark cases at the apex Court include, Independent Electoral and Boundaries Commission & 2 others v. Evans Kidero (Petition 20 of 2014); Justus Kariuki Mate & another v. Hon. Martin Nyaga Wambora (Petition 32 of 2014); In the Matter of the National Land Commission - National Land Commission v. Attorney General & 5 others (Advisory Opinion Reference No 2 of 2014); Speaker of the Senate & another v Attorney-General & 4 others [2013] eKLR; Lemanken Aramat v. Harun Meitamei Lempaka & 2 others [2014] eKLR; Cyprian Awiti & another v. Independent Electoral and Boundaries Commission & 2 others [2019] eKLR; Mohamed Abdi Mahamud v. Ahmed Abdullahi Mohamad & 3 others; Martin Wanderi & 106 others v. Engineers Registration Board & 10 others [2018] eKLR; Moi v. Rosanna Pluda

[2017] eKLR; Town Council of Awendo v. Nelson O. Onyango & 13 others, among many others which are available at www.proftomojiendaandassociates.com. Prof. Ojienda, SC can be reached through tomojienda@yahoo.com.

Abstract

This article looks into the dynamics of public procurement of legal services in Kenya, in view of the reality that the legal profession is a self-regulating profession with internal professional laws, rules and regulations that dictate the extent and limits of legal practice in Kenya. The article, therefore, interrogates the unique features of the legal profession that have immense impact on public procurement of legal services and how that in turn affects the process, legislation, rules and regulations that pertain to public procurement generally. The aim is to assert the unique position regarding the procurement of legal services by public entities, and the need for the public procurement legal framework and procuring public entities to accommodate the unique tenets of the legal profession in the public procurement process.

I. Introduction

Procurement is the acquisition of goods, works, services, or any combination thereof, through contractual means such as purchase, rental, lease, hire purchase, license, tenancy, or franchise. Procurement may be done through various methods,¹ including open tendering,² two-stage tendering,³ restricted tendering,⁴ direct procurement,⁵ request for quotations,⁶ competitive negotiations,⁷ and request for proposals.⁸ Moreover, procurement may be done by a private or public entity. This article is concerned about public procurement, by public entities, particularly the public procurement of legal services in Kenya. Under PPADA, 2015, open tendering is the preferred procurement method for public procurement and an alternative procurement procedure or method may only be used if allowed and upon satisfaction of the conditions for its use as provided under the Act.⁹

¹ See Public Procurement and Asset Disposal Act, 2015 (No 33 of 2015), Laws of Kenya (PPADA, 2015) s 92.

² *ibid* ss 96-98.

³ *ibid* s 99.

⁴ *ibid* s 102.

⁵ *ibid* ss 103-104.

⁶ *ibid* ss 105-106.

⁷ *Ibid* ss 131-132.

⁸ *ibid* s 116.

⁹ *ibid* s 91.

The legal framework on public procurement of goods and services and asset disposal in Kenya is founded on article 227 of the Constitution of Kenya, 2010 (the Constitution)—procurement by State organs and other public entities in the national and county governments. According to the Constitution, when a State organ or any other public entity procures or contracts for goods or services, it is to do so in accordance with ‘a system that is fair, equitable, transparent, competitive and cost-effective’.¹⁰ The Constitution also mandates Parliament to enact legislation to prescribe a framework through which policies on public procurement of goods and services and asset disposal are to be implemented, including provisions on:

- (a) categories of preference in the allocation of contracts;
- (b) the protection or advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination;
- (c) ***sanctions against contractors that have not performed according to professionally regulated procedures, contractual agreements or legislation***; and
- (d) sanctions against persons who have defaulted on their tax obligations, or have been guilty of corrupt practices or serious violations of fair employment laws and practices.¹¹

Pursuant to article 227(2) of the Constitution, Parliament enacted the Public Procurement and Asset Disposal Act, 2015 (PPADA, 2015),¹² to give effect to article 227 of the Constitution and to provide procedures for efficient public procurement of goods and services and asset disposal by public entities.¹³ Under the Act, public procurement is to be done in accordance with the guiding principles and values drawn from the Constitution and relevant statute, including:

- (a) the national values and principles provided for under Article 10;

¹⁰ Constitution of Kenya, 2010, art 227(1).

¹¹ *ibid* art 227(2).

¹² Act No 33 of 2015, Laws of Kenya (assented to on 18 December 2015 and entered into force on 7 January 2016).

¹³ PPADA, 2015, preamble.

- (b) the equality and freedom from discrimination provided for under Article 27;
- (c) affirmative action programmes provided for under Articles 55 and 56;
- (d) principles of integrity under the Leadership and Integrity Act, 2012 (No. 19 of 2012);
- (e) the principles of public finance under Article 201;
- (f) the values and principles of public service as provided for under Article 232;
- (g) principles governing the procurement profession, international norms;
- (h) maximisation of value for money;
- (i) promotion of local industry, sustainable development and protection of the environment; and
- (j) promotion of citizen contractors.¹⁴

The PPADA, 2015, which repealed the Public Procurement and Disposal Act, 2005,¹⁵ was applied alongside the Public Procurement and Disposal Regulations, 2006¹⁶ before the coming into force of the Public Procurement and Asset Disposal Regulations, 2020 (PPADR, 2020).¹⁷ This article is a reaction to the PPAADR, 2020, a subsidiary legislation made under PPADA, 2015. PPAADR, 2020 was first published on 22 April 2020,¹⁸ and later came in force on 2 July 2020.¹⁹ Both PPADA, 2015 and PPAADR, 2020 contain provisions on public procurement of consultancy services, which includes public procurement of legal services. This article looks into the dynamics of public procurement of legal services in Kenya, in view of the reality that the legal profession is a self-regulating profession with internal professional laws, rules and regulations that dictate the extent and limits of legal practice in Kenya.

¹⁴ *ibid*, s 3.

¹⁵ Act No 3 of 2005, Laws of Kenya (repealed); see PPADA, 2015, s 182.

¹⁶ Legal Notice No 174 of 2006 (revoked).

¹⁷ Legal Notice No 69. Regulation 224 of PPAADR, 2020 revokes Legal Notice No 174 of 2006 through which the Public Procurement and Disposal Regulations, 2006 (PPADR, 2006) came into legal existence.

¹⁸ Kenya Gazette Supplement No 53; Legislative Supplement No 37.

¹⁹ Gazette Notice No 4957 of 2020, dated 9 July 2020, but published on 24 July 2020 (by the Cabinet Secretary for the National Treasury and Planning, Ukur Yatani) The Kenya Gazette, Vol. CXXII—No. 142.

The article interrogates the unique features of the legal profession that have immense impact on public procurement of legal services and how that in turn affects the process, legislation, rules and regulations that pertain to public procurement generally. The aim is to assert the unique position regarding the procurement of legal services by public entities, and the need for the public procurement legal framework, under PPADA, 2015 and PPADR, 2020, and procuring public entities to accommodate the unique tenets of the legal profession in the public procurement process.

Consequently, the article makes a number of arguments as concerns public procurement of legal services. One, legal professionals, that is, advocates, should not participate in any bidding process relating to public procurement for legal services, including the price competition that comes with it. Two, legal services providers should not be selected on the basis of fees to be charged for the intended legal services because at the end of the day the charging of legal fees follows the Advocates Act, the Advocates (Remuneration) Order, the Advocates (Practice) Rules, and the Advocates (Marketing and Advertising) Rules. Three, the public entity seeking legal services should choose from a list of pre-selected legal services providers (that is, a list of law firms) on its roster, paying attention to expertise, fairness, rotation, and professional skills.²⁰ This means that the pre-qualification procedure to obtain a roster of law firms that can be engaged by the public entity from time to time is in itself sufficient in the public procurement of legal services, hence no further need for a bidding process.

II. General Framework on Public Procurement of Consultancy Services

PPADA, 2015 sets the rules and principles on procurement of goods and services and disposal of assets by State organs and public entities.²¹ Under the Act, public entities include:

- (a) the national government or any organ or department of the national government;
- (b) a county government or any organ or department of a county government;

²⁰ Sections 57 and 71 of PPADA, 2015 make provision for the keeping of lists of registered (and the registration thereof) of suppliers, contractors and consultants by procuring public entities, according to their procurement needs.

²¹ See PPADA, 2015, s 53(1).

- (c) the Judiciary and the courts;
- (d) the Commissions established under the Constitution;
- (e) the Independent Offices established under the Constitution;
- (f) a state corporation within the meaning of the State Corporations Act (Cap 446);
- (g) the Central Bank of Kenya established under the Constitution;
- (h) a public school within the meaning of the Basic Education Act, 2013 (Act No 14 of 2013);
- (i) a public university within the meaning of the Universities Act, 2012 (Act No 42 of 2012);
- (j) a city or urban area established under the Urban Areas and Cities Act, 2011 (Act No 13 of 2011);
- (k) a company owned by a public entity;
- (l) a county service delivery coordination unit under the National Government Co-ordination Act, 2013 (Act No 1 of 2013);
- (m) a constituency established under the Constitution;
- (n) a Kenyan diplomatic mission under the state department responsible for foreign affairs;
- (o) a pension fund for a public entity;
- (p) a body that uses public assets in any form of contractual undertaking including public private partnership;
- (q) a body in which the national or county government has controlling interest;
- (r) a college or other educational institution maintained or assisted out of public funds;
- (s) an entity prescribed as a public entity for the purpose of this paragraph; or
- (t) any other entity or a prescribed class of public entities or particular public entities that uses public money for purposes of procurement or any other entity as declared under sections 4 and 5 of the Public Finance Management Act, 2012 (No 18 of 2012).

The PPADR, 2020, like any other subsidiary legislation, compliments and gives practical effect to the provisions of PPADA, 2015. **Part X in both PPADA, 2015 and PPADR, 2020** provide for procurement of consultancy

services. Section 2 of PPADA, 2015 defines ‘consultancy services’ to mean ‘services of predominantly an intellectual, technical or advisory nature, and includes services offered by all professionals’ In addition, the section defines a ‘professional’ as ‘a person who has professional qualifications in a specialized field and who is engaged in the practice of a skill or trade, having undertaken the relevant formal academic and professional training including undertaking practical learning in the form of apprenticeship or tutelage under the guidance of a suitably qualified and experienced person in the field of training or tutelage.’ The public procurement of consultancy services, therefore, entails the procurement of professional services by public entities.

It is not in doubt that advocates are professionals, learned professionals to be precise. The academic and professional qualifications for one to be admitted as an advocate of the High Court of Kenya are well engrained under part IV of the Advocates Act, and consist of a combination one having to pass university examinations towards the conferment of a university degree in law, having to undergo professional training and passing professional examinations administered by the Council of Legal Education in Kenya, and having to undertake practical learning termed pupillage under a practicing advocate of not less than five years in law practice.²² The public procurement of consultancy services, therefore, also entails the procurement of the legal services of legal professionals, that is, advocates.

The rules, principles and regulations on public procurement drawn from PPADA, 2015 and PPADR, 2020 include those that pertain to pre-qualification procedure, pre-qualification documents and approval of pre-qualified candidates. The general procedure for procurement of consultancy services encompasses the registration of suppliers and the maintenance of a list of registered suppliers by procuring public entities,²³ a pre-qualification

²² See sections 12-15 of the Advocates Act, Cap 16. See also part III (sections 9-11) of the Act as concerns the right to practice as an advocate.

²³ See PPADA, 2015 ss 2, 57 and 71 regarding registration of suppliers and lists of registered suppliers.

process,²⁴ and/or an invitation of tenders or request for proposals from potential services providers,²⁵ followed by a bidding process.

A. List of Registered Suppliers

PPADA, 2015 allows for the registration of suppliers and for the maintenance of a list of registered suppliers by procuring public entities. Under the Act, registration of suppliers refers to;

[T]he process of identifying and obtaining a list of prospective providers of a specified category of goods, works or services by a procuring entity for a specified period of time but not exceeding more than two years, and maintaining them for the purpose of inviting them on rotational basis for subsequent tendering proceedings such as request for quotations or restricted tendering, that may arise during the period of listing.²⁶

Section 57 of PPADA, 2015 allows a public entity to keep a list of registered suppliers. The person in charge of procurement in a procuring public entity is to maintain and update lists of registered suppliers, contractors and consultants in the categories of goods, works or services, per its procurement needs.²⁷ The names of prospective suppliers of goods, works or services are to be submitted on a continuous basis and the list of registered suppliers is to be updated periodically as provided in PPADA, 2015 and PPADR, 2020.

Registration of suppliers is to be done in accordance with section 71 of PPADA, 2015. An application to be included in the list of the registered suppliers of a procuring entity may be made at any time and at no cost. The application must contain *proof of eligibility criteria* as provided in PPADA, 2015, and *proof of capability criteria* comprising necessary qualifications, experience, resources, equipment and facilities to provide what is being procured.²⁸ The lists of registered suppliers are applied on the alternative

²⁴ See *ibid* ss 2, 93, 94 and 95 regarding pre-qualification procedure, pre-qualification documents and approval of pre-qualified candidates.

²⁵ See *ibid* ss 2, 74, 118, and 123 regarding tenders, invitation to tender, request for proposals inviting expression of interest, and request for proposals to qualified persons, as concerns consultancy services.

²⁶ *ibid* s 2.

²⁷ See also *ibid* s 71(1).

²⁸ *ibid* s 71(2).

procurement methods, other than open tendering, as specified and appropriate and the list will: be generated through portal, websites and people submitting hard copies of their intention to supply; allow for continuous applications and hence updating; be evaluated leading to registration on a bi-annual basis; be generated through market knowledge and survey; and be as may be prescribed.²⁹

B. Pre-qualification process

Pre-qualification refers to the procedure used to identify and shortlist tenderers that are qualified, before invitation for tenders.³⁰ Pre-qualification procedure is thus a procedure whereby candidates are invited to demonstrate their qualifications prior to, and as a condition for, being invited to tender or submit proposals.³¹ Pre-qualification procedure—used for complex and specialized goods, works and services whose procurement entails complex and specialized contracts with terms and conditions that are different from those in standard commercial contracts—is provided for under section 93 of PPADA, 2015.

An accounting officer of a procuring public entity may conduct a pre-qualification procedure as a basic procedure, prior to adopting an alternative procurement method other than open tender, for the purpose of identifying the best few qualified firms for the subject procurement.³² The accounting officer is to publish an **invitation notice** to candidates to submit applications to be pre-qualified.³³ The invitation notice will include:

- (a) the name, address and contact details of the procuring entity;
- (b) outline of the procurement requirement, including the nature and quantity of goods, works or services and the location and timetable for delivery or performance of the contract;
- (c) statement of the key requirements and criteria to pre-qualify;

²⁹ *ibid* s 71(4).

³⁰ *ibid* s 2.

³¹ *ibid*.

³² *ibid* s 93(1).

³³ *ibid* s 93(3).

- (d) instructions on obtaining the pre-qualification documents, including any price payable and the language of the documents; and
- (e) instructions on the location and deadline for submission of applications to pre-qualify;
- (f) applicable preferences and reservations or any conditions arising from the related policy;
- (g) declaration that it is open to bidders who meet the eligibility criteria; and
- (h) requirement that only bidders with capacity to perform can apply.³⁴

An accounting officer of a procuring public entity is to issue pre-qualification documents to all candidates upon request and maintain a record of all candidates issued with the documents.³⁵ The pre-qualification document must contain all the information necessary for the potential candidates to prepare and submit applications to be pre-qualified.³⁶ Such information include all that information already highlighted in section 93 above plus: instructions on the preparation of applications to pre-qualify, including any standard forms to be submitted and the documentary evidence and information required from candidates; instructions on the sealing, labelling and submission of applications to pre-qualify; and information on how applications will be evaluated.³⁷ The candidates should be allowed at least fourteen days to prepare and submit their applications to be pre-qualified.³⁸ Moreover, the accounting officer of a procuring public entity must promptly provide clarification on the pre-qualification document upon requests made before the deadline for submission.³⁹

Following the evaluation of the applications for pre-qualification, the evaluation committee must record, in writing, the results of its evaluation of the applications using the evaluation criteria in the pre-qualification documents, and must state which candidates were found to be qualified and the reasons why any candidates were not qualified.⁴⁰ The record of the

³⁴ *ibid* s 93(4).

³⁵ *ibid* s 94(1).

³⁶ *ibid* s 94(2).

³⁷ *ibid* s 94(3).

³⁸ *ibid* s 94(4).

³⁹ *ibid* s 94(5)

⁴⁰ *ibid* s 95(1)

evaluation results must be submitted with recommendations of the evaluation committee and the professional opinion of the head of procurement function to the accounting officer for approval.⁴¹ Thereafter, a procuring public entity must invite tenders from only the approved candidates who have been pre-qualified and must notify every candidate who submitted an application for pre-qualification but did not qualify.⁴²

C. Request for Proposals

Under section 116 of PPADA, 2015, request for proposals (RFP) as a procurement method is used when procuring consultancy services or a combination of goods and services. Besides, RFP may be used in combination with other procurement methods. An accounting officer of a procuring public entity may invite RFPs or expressions of interest (EOI) through advertisement in the dedicated government's advertising tenders' portal, its own website, or in at least one daily newspaper of county-wide circulation.⁴³ The accounting officer may also utilize the list of registered suppliers generated under section 57 of PPADA, 2015, highlighted above.⁴⁴

The notice inviting interested persons to submit EOI will set out: the name and address of the procuring public entity; a brief description of the consultancy services being procured and, where necessary, the goods being procured; eligibility and the qualifications necessary to be invited to submit a proposal; and an explanation of where and when EOI will be submitted.⁴⁵ The accounting officer of a procuring public entity will evaluate the EOI using the evaluation criteria in the EOI notice and documents and record, in writing, the results of its evaluation, and shall state which candidates were found to be qualified and the reasons why any candidates were not qualified.⁴⁶ It is noteworthy that, *for purposes of evaluation of EOI for professional services, regard is to be had to the provisions of PPADA, 2015 and the statutory instruments issued by the relevant professional associations in relation to the regulation of fees chargeable for services rendered.*⁴⁷

⁴¹ *ibid* s 95(2)

⁴² *ibid* s 95(3) and (4).

⁴³ *ibid* s 118(1) and 119(3) and (4).

⁴⁴ *ibid* s 118(1).

⁴⁵ *ibid* s 119(1).

⁴⁶ *ibid* s 121(1).

⁴⁷ *ibid* s 121(2).

Following an evaluation of the EOI, a minimum of six will be shortlisted, but a minimum of three will be shortlisted where less than six were received.⁴⁸ The results of the evaluation will be submitted to the accounting officer for review and approval.⁴⁹ The accounting officer will invite proposals from only those persons who have been shortlisted as qualified to submit their tenders within a specified period.⁵⁰ Each of the persons who are shortlisted will be issued with a RFP setting out:⁵¹

- (a) the name and address of the accounting officer of the procuring entity;
- (b) the general and specific conditions to which the contract will be subject;
- (c) instructions for the preparation and submission of proposals which may require that a proposal include a technical proposal and a financial proposal as prescribed;
- (d) an explanation of where and when proposals shall be submitted;
- (e) the procedures and criteria to be used to evaluate and compare the proposals including—
 - (i) the procedures and criteria for evaluating the technical proposals which shall include a determination of whether the proposal is responsive;
 - (ii) the procedures and criteria for evaluating the financial proposals; and
 - (iii) any other additional method of evaluation, which may include interviews or presentations, and the procedures and criteria for that additional method;
- (f) a statement giving notice of the restriction in section 130 on entering into related contracts; and
- (g) anything else required, under PPADA, 2015 or PPADR, 2020 to be set out in the RFP.

⁴⁸ *ibid* s 121(3).

⁴⁹ *ibid* s 121(4).

⁵⁰ *ibid* ss 118(2) and 122.

⁵¹ *ibid* s 123.

The evaluation and selection of proposals for the provision of consultancy services may be done through a number of selection procedures or methods, which are:⁵²

- (a) Quality-Based Selection (QBS), which focuses on quality and selects the highest quality technical proposal;
- (b) Least-Cost Selection (LCS), which selects the lowest priced financial proposal among the firms which passed the technical evaluation;
- (c) Quality-and-Cost-Based Selection (QCBS) method which requires the participants to submit a technical and a financial proposal at the same time, but in separate envelopes, and then uses a competitive process that takes into account the quality of the proposal (technical proposal) and the cost of the services (financial proposal) in selecting the successful firm;
- (d) Consultants' Qualifications Selection (CQS);
- (e) Individual Consultants' Selection (ICS);
- (f) Fixed Budget Selection (FBS); or
- (g) Single Source Selection (SSS).

QBS method is used for: complex or highly specialized assignments for which it is difficult to define precise terms of reference (TORs) and the required input from the consultants; assignments that have a high downstream impact and in which the objective is to have the best experts; assignments that can be carried out in substantially different ways; assignments and professional services which are regulated by Acts of Parliament which stipulate fees and charges applicable for such assignments.⁵³ On the other hand, **LCS method** is used in selecting consultants for assignments of a standard or routine nature where well-established practices and standards exist.⁵⁴

CQS method is used when the nature and complexity of the project does not require the issuance of RFPs nor is there justification to evaluate competitive proposals. The selection of a consultant proceeds by way of Request for Expressions of Interest (REIO), Instructions to Consultants (ITC) and TORs and thereafter a request for the selected consultant to submit a technical and

⁵² *ibid* s 124.

⁵³ *ibid* s 124(7).

⁵⁴ *ibid* s 124(8).

financial proposal before negotiations of the contract for engagement ensue. **ICS method** proceeds through a Letter of Invitation (LOI), ITC and TORs followed by the submission of technical and financial proposals before negotiation of the consultant engagement contract. ICS method is used to select individual consultants regulated by professional associations.

FBS method indicates the available budget and requests consultants to provide their best technical and financial proposals (within the budget) in separate envelopes, hence is appropriate only when the assignment is simple and can be precisely defined and when the budget is fixed.⁵⁵ In FBS method, financial proposals that exceed the indicated budget are rejected and the consultant who has submitted the highest ranked technical proposal among financial proposals within the budget are selected and invited to negotiate a contract.⁵⁶

SSS method is used only if it presents a clear advantage over competition, in cases: where there is evidence that goods, works or services are available only from a particular supplier, or a particular supplier has exclusive rights in respect of the consultancy services, and no reasonable alternative or substitute exists; or for tasks that represent a natural continuation of previous work carried out by the firm; and in exceptional cases, such as, but not limited to, in response to natural disasters and for a declared national emergency situations.⁵⁷ The accounting officer of a procuring entity must justify the use of the Single Source Selection method in the context of the overall interests of the procuring public entity.⁵⁸ Moreover, the intention to single source must be advertised and all interested suppliers who respond will be invited to submit proposals.⁵⁹

QCBS method is the preferred method for evaluating and selecting successful firms for purposes of public procurement of consultancy services, while the rest are alternative selection methods and must be reported to the Public Procurement Regulatory Authority and approved accordingly before being

⁵⁵ *ibid* s 124(9)-(10).

⁵⁶ *ibid* s 124(11).

⁵⁷ *ibid* s 124(12).

⁵⁸ *ibid* s 124(13).

⁵⁹ *ibid* s 124(14).

used.⁶⁰ In any case, the method to be used in the evaluation and selection of the successful firms, plus the estimated budget or estimated time for completing the project, must be stated in the request for proposals.⁶¹

Following the evaluations, the successful proposal will be the responsive proposal with the highest score determined by an accounting officer per the procedure and criteria under section 86 of PPADA, 2015 on successful tenders.⁶² Thereafter, contractual negotiations will be undertaken between the procuring public entity and the successful RFP tenderer.⁶³

D. Invitation of Tenders

A tender is an offer in writing for the supply of goods, services or works at a price, following an invitation to tender, request for quotation,⁶⁴ or request for proposal by a procuring entity.⁶⁵ Under section 74 of PPADA, 2015, the accounting officer of the procuring public entity will prepare **an invitation to tender** that sets out the following;

- (a) the name and address of the procuring entity;
- (b) the tender number assigned to the procurement proceedings by the procuring entity;
- (c) a brief description of the goods, works or services being procured including the time limit for delivery or completion;

⁶⁰ *ibid* ss 124(1), (6) and (15).

⁶¹ *ibid* ss 124 and 125.

⁶² *ibid* s 127.

⁶³ *ibid* ss 128 and 129.

⁶⁴ See *ibid* ss 105 and 106. (Request for quotations method of public procurement is normally used alongside the list of the registered suppliers prepared under section 57 of PPADA, highlighted above. A procuring public entity will issue a request for quotations if: the estimated value of the goods, works or non-consultancy services being procured is less than or equal to the prescribed maximum value for using requests for quotations as prescribed in the Regulations; the procurement is for goods, works or non-consultancy services that are readily available in the market; and the procurement is for goods, works or services for which there is an established market. Request for quotations is a very competitive process and the successful quotation will be the quotation with the lowest price that meets the requirements set out in the request for quotations.)

⁶⁵ See *ibid* ss 2 and 70.

- (d) an explanation of how to obtain the tender documents, including the amount of any fee, if any;
- (e) an explanation of where and when tenders shall be submitted and where and when the tenders shall be opened;
- (f) a statement that those submitting tenders or their representatives may attend the opening of tenders;
- (g) applicable preferences and reservations pursuant to the PPADA, 2015;
- (h) a declaration that the tender is only open to those who meet the eligibility requirements;
- (i) requirement of serialisation of pages by the bidder for each bid submitted; and
- (j) any other requirement as may be prescribed.

Thereafter, all tender documents must be sent out to eligible bidders by recorded delivery.⁶⁶

E. The bidding Process

The bidding process is mostly a price competition by the suppliers of goods, works, or services—in this case the supply of professional services, although other factors also play a major role in determining which service provider is ultimately selected, such as the expertise of the potential consultants.⁶⁷ The evaluation and comparison of received tenders is to be done using the procedures and criteria set out in the tender documents. However, evaluation and comparison of tenders for professional services must have regard to the provisions of the statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered, alongside the provisions of PPADA, 2015.⁶⁸

Following the evaluation and comparison of tenders, the public procurement contract will be awarded to the successful tenderer.⁶⁹ Under section 86 of PPADA, 2015, the successful tender will be the one that meets any of the following, as specified in the tender document:

⁶⁶ *ibid* s 74(2).

⁶⁷ *ibid* s 80.

⁶⁸ *ibid* s 80(2).

⁶⁹ *ibid* s 85.

- (a) the tender with the *lowest evaluated price*;
- (b) the responsive proposal with the highest score determined by the procuring entity by combining, for each proposal, in accordance with the procedures and criteria set out in the RFP, the scores assigned to the technical and financial proposals where the RFP method is used;
- (c) the tender with the *lowest evaluated total cost of ownership*; or
- (d) the tender with the highest technical score, where a tender is to be evaluated based on procedures regulated by an Act of Parliament which provides guidelines for arriving at *applicable professional charges*.

Nonetheless, to be eligible to bid for a public procurement contract, one must meet the following requirements:

- (a) the person has the legal capacity to enter into a procurement contract;
- (b) the person is not insolvent, in receivership, bankrupt or in the process of being wound up;
- (c) *the person, if a member of a regulated profession, has satisfied all the professional requirements*;
- (d) the procuring entity is not precluded from entering into the contract with the person under section 38 of PPADA, 2015;
- (e) the person and his or her sub-contractor, if any, is not debarred from participating in procurement proceedings under Part IV of this Act;
- (f) the person has fulfilled tax obligations;
- (g) the person has not been convicted of corrupt or fraudulent practices; and
- (h) is not guilty of any serious violation of fair employment laws and practices.⁷⁰

⁷⁰ *ibid* s 55.

III. The Special Exception in Public Procurement of Legal Services

Special exceptions are imperative in the public procurement of legal services because the legal profession is a self-regulating profession. The practice of law in Kenya is regulated by the Advocates Act⁷¹ and the Law Society of Kenya Act, 2014,⁷² and the rules, orders and regulations made thereunder. The workings of the legal profession as pertains to the means and methods of obtaining clients and the charging and receiving of fees for the provision of legal services by advocates is specifically governed by the Advocates Act, and its subsidiary legislation, the Advocates (Remuneration) Order, 1962, the Advocates (Practice) Rules, 1966, and the Advocates (Marketing and Advertising) Rules, 2014.

A. The Advocates Act

Part IX of the Advocates Act⁷³ entails provisions on the remuneration of advocates for legal services rendered. The Act allows for the drawing of legal services agreements, including an agreement on fees, as between the advocate and his or her client. However, the contents and the extent of a legal services agreement can only be determined when the advocate is aware of the claim and its nature and complexity. Without information on the nature of the particular claim in which the professional services of the advocate are required, the likelihood of contravention of the Act is very high. For instance, a number of factors determine how much remuneration is due to the advocate, including the position of the party whom the advocate is to represent (whether they are plaintiffs or defendants etc.), the unique circumstances of the claim, the value of the subject matter involved, the skill, labour and responsibility required of the advocate, and the number and importance of the documents to be prepared or perused.⁷⁴

An advocate may enter into a **legal services agreement** with the client as provided under section 45(1) of the Advocates Act, in that the advocate may;

⁷¹ Cap 16, Laws of Kenya.

⁷² Act No 21 of 2014, Laws of Kenya.

⁷³ Advocates Act, ss 44-52.

⁷⁴ See e.g., *ibid* s 44(2) as concerns some of the considerations in remunerating advocates in non-contentious matters.

- (a) before, after or in the course of any contentious business, make an agreement fixing the amount of the advocate's remuneration in respect thereof;
- (b) before, after or in the course of any contentious business in a civil court, make an agreement fixing the amount of the advocate's instruction fee in respect thereof or his fees for appearing in court or both;
- (c) before, after or in the course of any proceedings in a criminal court or a court martial, make an agreement fixing the amount of the advocate's fee for the conduct thereof,

A legal services agreement will be valid and binding on the parties, the advocate and his or her client, if it is in writing and is signed by the client or his agent duly authorized in that behalf. Even so, section 46 of the Advocates Act forbids advocates from entering into certain agreements with their clients and even goes ahead to invalidate such agreements. Such invalid agreements include any agreement where an advocate states that payment or remuneration rates for legal services rendered will be dependent on the success or failure of the underlying suit or proceedings, or that remuneration will be less than that prescribed in the Advocates (Remuneration) Order. In particular, section 36 of the Advocates Act expressly forbids advocates from **undercutting**, by charging remuneration below that which is prescribed under the Advocates (Remuneration) Order, and stipulates that;

- (1) Any advocate who holds himself out or allows himself to be held out, directly or indirectly and whether or not by name, as being prepared to do professional business at less than the remuneration prescribed, by order, under this Act shall be guilty of an offence.
- (2) No advocate shall charge or accept, otherwise than in part payment, any fee or other consideration in respect of professional business which is less than the remuneration prescribed, by order, under this Act.⁷⁵

Further, section 38 of the Advocates Act frowns upon **soliciting or touting for legal services** and provides that:

⁷⁵ See also Advocates (Remuneration) Order, 1962, r 3.

(1) Any unqualified person who, in consideration of any payment or other advantage to himself or any other person, procures or attempts to procure the employment of an advocate as such in any suit or matter or solicits from an advocate any such payment or advantage in consideration of such employment shall be deemed to be a tout for the purposes of this section.

(2) The Chief Justice may, if satisfied that any person has acted as a tout, by order exclude such person from the employment by an advocate in his practice as such.

Whether or not there is a written legal services agreement or agreement on fees, the Advocates (Remuneration) Order sets the **minimum fees** to be charged for the provision of a variety of legal services by the advocates. Advocates are restricted from charging fees below the minimum fees set out under the Advocates (Remuneration) Order. Beyond the minimum fees set out under the Advocates (Remuneration) Order, the legal fees charged are determined by the value of the subject matter involved, the complexity of the legal issues involved, the length of litigation, the Court in which the litigation is taking place (from the subordinate courts to the superior courts), and the expertise and particular skill-set of the advocate. Also, a Senior Counsel charges higher fees in comparison to an advocate who is not a Senior Counsel.

Moreover, where there is a disagreement on legal fees as between the advocate and his or her client, the advocate is required to draw a **bill of costs** for purposes of taxation, being guided by the Advocates (Remuneration) Order, and to present the bill of costs to the taxing officer to be taxed accordingly.⁷⁶ The client may equally initiate the taxation process if dissatisfied with the legal fees charged by an advocate. Otherwise, the client is allowed to respond to the advocate's bill of costs and participate in the taxation proceedings. The ultimate costs of the legal services rendered by the advocate is determined by the taxing officer through a discretionary process.⁷⁷

⁷⁶ *ibid* r 13.

⁷⁷ *ibid* r 16 of the Advocates (On every taxation, the taxing officer may allow all such costs, charges and expenses, as authorized in the Order, as shall appear to him or her to have been necessary or proper for the attainment of justice or for defending the rights of any party. However, no costs shall be allowed which appear to the taxing officer to have been incurred or increased through overcaution, negligence or mistake, or by payment of special charges or expenses to witnesses or other persons, or by other unusual expenses.)

B. The Advocates Remuneration Order

The Advocates (Remuneration) Order, 1962 sets out the minimum fees that an advocate can charge and receive for legal services rendered, whether in contentious or non-contentious matters, and the taxation of costs as between the advocate and the client.⁷⁸ As already indicated above, an advocate cannot agree to or accept his remuneration at less than that provided by the Advocates (Remuneration) Order.⁷⁹ In addition, an advocate may charge and receive additional remuneration for any business that requires and receives exceptional dispatch, or is attended to outside normal business hours at the client's request, and as agreed between the client and the advocate.⁸⁰

Moreover, the Advocates (Remuneration) Order entitles an advocate to charge and receive a further special fee in case of a business of exceptional importance or unusual complexity, which may be brought about by factors such as: the place at or the circumstances in which the business, or part it, is transacted; the nature and extent of the pecuniary or other interest involved; the skill, labour and responsibility entailed; and the number, complexity and importance of the documents prepared or examined.⁸¹

C. The Advocates Practice Rules

The Advocates (Practice) Rules, 1966 forbid advocates from charging fees in contravention of the Advocates (Remuneration) Order and from engaging in unfair business practices in order to obtain clients. No advocate may directly or indirectly apply for or seek instructions for professional business, or do or permit in the carrying on of his practice any act or thing which can be reasonably regarded as touting or advertising or as calculated to attract business unfairly.⁸² Further, no advocate may hold himself out of or allow himself to be held out directly or indirectly and whether or not by name as being prepared to do professional business at less than the remuneration scales laid down by the Advocates (Remuneration) Order.⁸³

⁷⁸ Advocates (Remuneration) Order, r 13(1).

⁷⁹ *ibid* r 3.

⁸⁰ *ibid* r 4.

⁸¹ *ibid*, r 5.

⁸² Advocates (Practice) Rules, 1966, r 2.

⁸³ *ibid* r 3.

D. The Advocates Marketing and Advertising Rules

The Advocates (Marketing and Advertising) Rules, 2014 set limits on the means and methods that an advocate can employ to obtain clients for their law practice. An advocate cannot unfairly apply for or seek instructions for professional business, nor do or permit to be done in the advocate's name anything that may reasonably be considered as calculated to unfairly attract professional business.⁸⁴ In essence, an advocate cannot advertise his law practice other than as prescribed in the Advocates (Marketing and Advertising) Rules.⁸⁵ For example, when advertising his or her law practice, an advocate cannot include information that constitutes, *'a promise by the advocate or the advocate's firm to achieve a particular outcome for clients or prospective clients of the advocate or the advocate's firm or that failure to obtain that outcome shall constitute a waiver of the advocate's or the advocate's firm's legal fees'*.⁸⁶ Accordingly, an advocate commits professional misconduct when the advocate, or the advocate's firm uses an intermediary to solicit professional business, or makes false or misleading statements in an advertisement to solicit professional business, or refuses to comply with the Advocates (Marketing and Advertising) Rules.⁸⁷

E. Thiong'o Njiri & 81 others v The Municipal Council of Kiambu & another⁸⁸

In *Thiong'o Njiri & 81 others v The Municipal Council of Kiambu & another*, Justice Kalpana Rawal (as she then was, but now retired Supreme Court Justice and Deputy Chief Justice of the Republic of Kenya) considered the issue of public procurement of legal services under the then Public Procurement and Disposal Act, 2005 (PPDA, 2005) in relation to the Advocates Act. The Honourable Judge concluded that **inviting a bid for legal services goes against the spirit and purport of the Advocates Act**. The Honourable Judge expressed herself in the manner that:

It cannot be denied that the Advocates are occupying a special position amongst the professionals and are guided strictly by the very elaborate provisions of the Advocates Act, Orders and Rules

⁸⁴ Advocates (Marketing and Advertising) Rules, 2014, r 2.

⁸⁵ *ibid* r 3.

⁸⁶ *ibid* rule 5(2)(d).

⁸⁷ *ibid* r 10(a), (c) and (d).

⁸⁸ [2011] eKLR, HC (Nairobi) Civ Suit No 499 of 2010 (ruling).

made under the Act as well as the Law Society Act. Due to the position held by the Advocates, they have been placed under stringent conditions as regards legal charges and manner in which they are restricted to advertise or compete with other co-Advocates. The Advocates Act thus is a specific Act governing the practice of the Bar. As against those provisions, the plaintiffs are relying on the provisions of Act [PPDA, 2005] which stipulates the process of procurement before any goods, works or services are procured, by a public entity. In my view, the Act is a general Act unlike the Advocates Act.⁸⁹

The Honourable Judge elaborated further on justifications for excluding the public procurement of legal services from the general public procurement process for consultancy services under the then PPDA, 2005 and stated thus;

In my considered view, the inclusion of service of an Advocate to be procured by advertising and the procurement process could and does involve the breach of the provisions of the Advocates Act, the Advocates [Remuneration] Order as well as Advocates (Practice) Rules. I do wonder how an Advocate could bid to tender for legal service simpliciter. How an Advocate could place the economic provision for legal services in the tender without the claim, value or nature of claim being specified. The legal charges shall vary according to each and every case which the local authorities might file or defend. Inviting to bid for legal services per se could contravene the spirit and purport of the Advocates Act which is a specific Act and prior in time. If the local authority needs the services for a specified case, the insistence of undergoing procurement process shall be self-defeating due to the court procedure. The invocation of the procurement process under the Act would be clearly impractical and, if I may state, unethical so far as legal profession is concerned. Sec. 5 of the Act [PPDA, 2005] (...) in my view, has no relevance to the issue before me. There is no conflict between the purport spirit and purpose of the two Acts considering the nature of the legal services to be rendered even to a public entity.

⁸⁹ Thiong'o Njiri & 81 others v The Municipal Council of Kiambu & another [2011] eKLR, p 5.

I do find that the Act [PPDA, 2005] thus does not apply to the Advocates.⁹⁰

The views of the retired Supreme Court Justice and Deputy Chief Justice, Kalpana Rawal stand true as concerns the public procurement of legal services. Inviting bids for public (or even private) procurement of legal services goes against the spirit, tenet and purport of the Advocates Act and its relevant subsidiary legislation. It would be an illegality and professional misconduct for an advocate to purport to quote the price for legal services to be provided without knowledge of the claim nor the value of the claim for which the legal services are sought.

As a consequence, if the foregoing legal provisions (under the Advocates Act, the Advocates (Remuneration) Order, the Advocates (Practice) Rules, and the Advocates (Marketing and Advertising) Rules, and as interpreted in *Thiong'o Njiri & 81 others v The Municipal Council of Kiambu & another*) are applied to the public procurement process, the special exceptions in the public procurement of legal services would entail that:

- (a) Advocates or law firms would not participate in any bidding process relating to public procurement for legal services, especially where price competition is involved;
- (b) Advocates or law firms would not be selected on the basis of fees to be charged for the legal services sought because the charging of legal fees follows the Advocates Act, the Advocates (Remuneration) Order, the Advocates (Practice) Rules, and the Advocates (Marketing and Advertising) Rules;
- (c) The pre-qualification procedure or registration process to obtain a roster of law firms or advocates that can be engaged by a procuring public entity in the provision of the needed legal services would be sufficient in itself, hence no further need for a bidding process;⁹¹ and
- (d) The procuring public entities seeking legal services would instead have to choose from a list of pre-selected legal

⁹⁰ *ibid.*

⁹¹ See sections 93, 94 and 95 of PPADA, 2015 on pre-qualification procedure, pre-qualification documents and approval of pre-qualified candidates.

services providers (that is, a list of law firms or advocates) on its roster, paying attention to expertise, fairness, rotation, and professional skills, and not the fees to be charged.⁹²

The PPADA, 2015 generally acknowledges the unique position involving the public procurement of professional services. Section 5(1) of the Act, in addressing situations where the provisions of the PPADA, 2015 come into conflict with those of other Acts, provides that;

This Act shall prevail in case of any inconsistency between this Act and any other legislation or government notices or circulars, in matters relating to procurement and asset disposal *except in cases where procurement of professional services is governed by an Act of Parliament applicable for such services.*

In addition, as concerns the professional fees to be charged for consultancy services provided to public entities, section 80(2) of the PPADA, 2015 provides that the evaluation and comparison of responsive tenders in that regard is to be done using the procedures and criteria set out in the tender documents, but in the case of a tender for professional services, the evaluation and comparison is to have regard to the provisions of the PPADA, 2015 and *statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered.* Regulation 81 of the PPADR, 2020 is on board in that regard too as it stipulates that *the professional fees and rates chargeable under section 80(2) of the PPADA, 2015 are to be guided by the rates approved by the respective professional bodies.*

That said, the supremacy of the Advocates Act and its relevant subsidiary legislation, including the Advocates (Remuneration) Order, Advocates (Practice) Rules, and the Advocates (Marketing and Advertising) Rules, in the public procurement of legal services cannot be ignored.

⁹² See section 57 and 71 of PPADA, 2015 regarding the registration of suppliers and the maintenance of a list of registered suppliers by procuring public entities.

IV. Conclusion

In view of the specific tenets of the legal profession embodied under sections 36, 38, 44, 45 and 46(1)(d) of the Advocates Act and its subsidiary legislation, the Advocates (Remuneration) Order, the Advocates (Practice) Rules, and the Advocates (Marketing and Advertising) Rules, as concerns the remuneration of advocates and the means and methods to be employed by advocates in order to obtain clients, **a pre-qualification procedure or registration process to produce a list of participating legal services providers (a roster of law firms or advocates) for any procuring public entity would be sufficient in itself.** Such pre-qualification procedure or registration process should be limited to factors such as expertise and professional skills, in terms of law practice areas of the law firms or advocates, in order to create a roster of participating law firms. Thereafter, law firms should be selected from the roster on rotational and fairness basis, but not on the basis of price quotations.

In essence, legal professionals (that is, advocates) should not participate in a bidding process and the price competition that comes with it. Legal services providers should not be selected on the basis of fees to be charged for the legal services to be rendered as the charging of legal fees and the provision of legal services by advocates, follows the Advocates Act, the Advocates (Remuneration) Order, the Advocates (Practice) Rules, and the Advocates (Marketing and Advertising) Rules. Otherwise, participating law firms may be subjected to or even find themselves engaging in illegality and professional misconduct by undercutting legal fees and soliciting and touting in order to win in the tender bidding process.

The legal framework for the public procurement of consultancy services in Kenya, under PPADA, 2015 and PPADR, 2020, and the procuring public entities should therefore be aware of and take into consideration the tenets of the legal profession that demand special exceptions in the public procurement of legal services. As a result, it is imperative that express exemptions of legal services providers from the normal tender bidding process, that is done on cost basis and promises and actions that go against the Advocates Act, the Advocates (Remuneration) Order, the Advocates (Practice) Rules, and the Advocates (Marketing and Advertising) Rules, are put in place and adhered to.