

DELAYED PAYMENTS KILL BUSINESSES

**CPA S.T. WAINAINA: B-COM(Hons)UON, MsocSc(UK)/
Director Dream Credit Ltd, former CEO, Family Bank and
Women Enterprise Fund**

Public procurement constitutes the largest domestic market for goods, services and works. When you include procurement by private sector enterprises, the market gets even bigger. Worldwide, procurement spending averages 13-20% of Gross Domestic Product (GDP). When it comes to promoting business sales, charity really begins at home: the domestic market is a low lying fruit for businesses. Conquer the home ground, and gain the strength to venture out. With such an expansive and usually lucrative market, it is not surprising that it's every entrepreneur's dream to be mainstreamed in the arena. We commend the Kenyan government for the affirmative action to secure at least 30% of the procurement cake for the youth, women and persons with disabilities.

Undoubtedly, public procurement is an extremely competitive process. Given the huge financial resources required to be purchased in order for the public entities to execute their mandates, the need for a legal framework to guide the process cannot be overemphasized. Relevant enabling statutes and regulations have been enacted for this purpose. Regular reviews have also been done to ensure that the statutes evolve to address emerging challenges, like corruption, non-compliance, overpricing and the need to support local enterprises among others.

Whereas the legal framework is clear, elaborate and easy to understand, its implementation has not been without hitches. National, County governments and other public entities do business with the private sector owned entities. As procuring entities, the former have not been faithful in executing the part of their bargain. Except for common user items like sugar, milk, teabags, bread and others that are bought in cash, other material goods, services and works are bought on credit. This is a critical point to note, given that suppliers' credit is virtually interest free source of funding. When we are talking of national debt, focus has been on external and domestic debt at the exclusion of unpaid suppliers' debts that run into hundreds of billions (in public finance parlance, the pending bills).

Why should this be the case when the laws are very clear on procurement process and commitment of public funds for that purpose? Why should the public sector the 'Big Brother' in terms of financial allocations be strangling the weaker parties in the procurement equation, the 'skinny suppliers' the last drop of blood through delayed payments for supplied goods, services and works? Is it fair? Is it morally right to mess your citizens' dreams and livelihoods?

PROCUREMENT PROCESS

Through the annual budgeting process, public and private sector entities appropriate funds for procuring various factors of production that are necessary for the execution of the strategic plans and mandate realization. A budget is a quantitative statement in monetary terms of all the activities to be undertaken in a given time frame, normally, one year. In other words, a budget is a costing of goods, services and works to be bought pursuant to realization of the set goals and mandates.

For the public sector entities in national and county governments, parastatals, universities and other quasi-public bodies, procurement of goods, services and works (GSW) is guided by the Public Procurement and Assets Disposal Act (no.33 of 2015) and Regulations and the Public Finance Management Act 2018.

Basically, before a public entity initiates buying of GSW, it must satisfy itself that:

- a) The items must be provided for in the approved annual budget.
- b) There must be sufficient budget allocation (funds).
- c) The necessary internal policies and procedures are adhered to.
- d) All the necessary approvals have been granted.

It is the responsibility of the procuring entity to comply with the statutes. In other words, before your company is issued with a Local Purchase Order (LPO) or Local Service Order (LSO) or written Contract, the officers concerned must satisfy themselves about the regularity and legality of the procurement in question. Section 156 (6) of the Regulation buttresses this point by providing that, "a procuring entity shall plan its procurement and cash/fund flows to ensure contractors are paid promptly as per the terms of contract".

They must ensure that the procurement satisfies the six objectives, namely:

- ❖ Right item
- ❖ Right quantity
- ❖ Right quality
- ❖ Right time-delivery on schedule
- ❖ Right place-location of delivery
- ❖ Right price

Value for money is the guiding principle in public and private sector procurement. Organizations desire to optimize utilization of funds by buying GSW as the most cost effective price and in the most efficient way.

PAYMENTS FOR GOODS/SERVICES/WORKS

If the seller/contractor also satisfies the six conditions which are normally set out the LPOs/LSOs/Contracts, and the same are received in good condition, and certified so by the authorized officers by signing the delivery note, then next stage is to issue an invoice. Many sellers forget to indicate their payment terms in the invoices, thus exposing themselves unnecessarily. If the procuring entity does not indicate the payment terms, it is your responsibility to make sure this is clarified and put in writing.

Section 168(1) of the Regulations provides that, “a procuring entity **shall make prompt** payments for all performed contracts including enterprises owned by youth, women and persons with disabilities and **shall make payments within sixty days** from date of **invoice**.”(Emphasis added).

Further, section 156 (2), provides that, “a procuring entity shall make prompt and timely payment to a contractor that meets its contractual obligations. Sub-section (4) “unless the contract provides otherwise, a procuring entity shall pay interest on overdue amounts”.

Sub-section (5) “the interest to be paid under sub section (4) above shall be in accordance with the prevailing commercial bank rates”. What about favoritism when it comes to processing of payments? Haven’t we heard some suppliers alleging favoritism? The regulations give a clear cut criteria, “First in First Out basis”, sub-section (7).

If the statutes are so clear regarding purchase and payments of GSW, we need to ask ourselves, why do we have a protracted countrywide hue and cry over pending bills running into billions?

WHY THE UNPAID BILLS?

We need to ask ourselves a couple of questions in order to unravel this national shame. Businesses have collapsed. Dreams have been shattered. Entrepreneurs are ailing. Jobs have been lost. Family assets have been auctioned. Children have dropped from college. It is a real mess out there.

How did we find ourselves in the hole of billions of unpaid monies owed to suppliers and contractors?

If the law provides that you cannot purport to commence buying of GSW without sufficient budgetary allocation, how does one fail to pay once the suppliers have executed the contracts satisfactorily alleging lack of funds? Are the entries in the Vote book meaningless?

Like the national government, County governments are going concerns with perpetual succession. It is the institution that enters into procurement contracts not the Governors in their private capacities. Why would an incoming governor purport not to honor genuine contractual commitments by his/her predecessor?

Whenever there is a leadership change, new hurdles are erected in the name of verifications of pending bills. The auditing exercise appears to take eternity. All this time, the suppliers are kept in darkness as they struggle to survive auctioneer's hammer.

ARE SUPPLIERS/CONTRACTORS INNOCENT?

No sector of our society has been spared of the corruption scourge. It's a cancer that has infected and affected virtually every citizen. It takes two to tango. Public entities do business with private sector companies that are owned by adult men and women, both old and young.

Those who are complaining of unpaid bills, how many can raise their hands to proclaim their having executed ethical clean contracts?

Did you win the tender/quotation regularly?

Did you get the legitimate LPO/LSO/Contractor?

During the execution, did you satisfy the six requirements of the right price, right quality, right quantity, timely delivery and delivery at the right location?

Were your GSW acknowledged as received with correct documentation?

Did you issue a correct invoice and on time?

There is no doubt that we have rotten apples amongst the suppliers. The current corruption crackdown bears this out as evidenced by the number of entrepreneurs who have been arraigned in court for criminal misrepresentation, including being paid for supplying 'toxic air' in form of GSW.

It is safe to conclude that majority of the suppliers are genuine men and women doing ethical business to feed and take care of themselves and their families. We need to separate the wheat from the chuff.

CONSEQUENCES OF UNPAID BILLS

What was initially a celebration for winning a tender has turned to be nightmarish for many micro, small, medium and large enterprises. Men and women are going through hell arising from unpaid bills.

While releasing the half year results for Equity Group, Dr. James Mwangi decried the mounting non-performing loans attributable to among other things unpaid supplier credit by the national and county governments. The CBK governor aired similar concerns. In the same breathe, Dr. Kiboro, the chairman of the Nation Media group lamented the inordinate delayed payment by the government amounting to almost one billion shilling. This had a negative impact on profitability and dividends payable to shareholders. Actually, for the first time the company reduced the interim dividend from sh2.50 to sh1.50 per share. The Kenya National Chamber of Commerce and Industry, Kenya Association of Manufacturers and Kenyan Private Sector Alliance have also been at the forefront in agitating for timely payments for GSW.

Nakumatt and Uchumi are on their death beds with billions of unpaid suppliers' debt! All sectors of the economy are affected.

Bad consequences

For business people, Sales = Income

But income is just a book entry. Unpaid invoices is just unrealized income.

What is critical to business owners, is cash flow. Bills are always paid from cash.

Thus, Payment=Cash Flow

Negative effects include:

1. Business closure/stagnation
2. Job losses
3. Emotional stress, ailments including suicide.
4. Shattered dreams
5. Damaged reputation/bad will.
6. Relationship messed up/marital challenges.
7. College drop out
8. Reduced tax collection.
9. Promotion of corruption.
10. Frustrates the Big Four Agenda on job creation.
11. Increased cost of doing business
12. Competitiveness affected negatively
13. Ease of doing business ranking lowered

RADICAL PROPOSALS

None payment or inordinate delay in paying for legitimate debts for GSW delivered is totally unacceptable. This sad state of affairs would not have arisen if the procuring entities complied with the statutes and regulations in toto. Otherwise, it negates the budgetary process, a critical tool in the management of public resources.

Whereas, the regulations allow suppliers to impose penalties in form of interest rates at the prevailing bank rate for delayed payments, very few dare invoke this clause for fear of being blacklisted. Section 168 (2) provides a window to the procuring entities who anticipate delays in payment to facilitate discounting of

invoices by financial institutions. Further, sub-section (4) imposes a duty on the procuring entities to file quarterly reports to the Public Procurement Oversight Authority demonstrating **compliance with obligations to pay invoices within sixty days for publication**. But how many entities provide such self-incriminating information?

Tough times call for tough measures. To cure this procurement mischief, I propose the following measures:

1. Just the way procuring entities demand for performance bonds as a condition precedent to awarding a contract, in the same vein, they should also be giving **payment guarantees to suppliers** through their respective financial institutions. What is good for the geese is good for the gutter. That way, both parties to the contract will be covered. The procuring entities will stop the current illegal practice of issuing LPOs/LSOs/Contracts while fully aware they do not have sufficient funds. A criminal misrepresentation of the highest order.
2. Alternatively, IFMIS(Integrated Financial Management Information System) that is deployed in National and County governments should be integrated with the procurement and banking modules such that immediately an LPO/LSO/Contractor is issued, the monetary equivalent is automatically transferred from the respective bank account and put in an escrow account that is ring-fenced for that purpose. An independent officer, like the Controller of Budget would then make such payments once the procuring entities certifies that everything is done.
3. The IFMIS, integrated with procurement should be able to capture the invoice dates as delivered so that it is able to track the 60-days payment period. After the sixtieth day, if the bill is still outstanding, the system automatically starts accumulating the penalty interest until the day the amounts is full settled. The interest being an additional cost to the institution should be borne by the defaulting officers. As a negative performance variable, it should be tracked in the Performance Contracts for all respective budget holders. Defaulting officers would be penalized for this, including dismissal if the same mischief persists.
4. Finally, the AIE Holders (Authority to Incur Expenditure) who are the respective budget holders, plus the heads of finance and procurement

should be individually held liable for delayed payments including the interest penalties. Tax payers should never shoulder the burdens of individual officers' mischiefs and misdemeanors. The buck must rest somewhere. This is the only way to enforce professional responsibility.

Conclusion

As a people, we must submit ourselves to the rule of law in all facets of our lives. Men and women who risk their money, time and reputation to venture in business should be applauded for the contribution in nation building in terms of job creation, payment of taxes and improvement of standards of living for themselves, families and humanity in general. As partners in this noble agenda, business owners should be supported to thrive and prosper.

Procuring entities should change their mind sets and treat business owners as legitimate partners and wealth creators. Prompt and timely settlement of genuine bills for goods, services and works is not a favor but the only right thing to do. Working together, we will build thriving families and businesses. It will be prosperity for all.