



# THE CATHOLIC UNIVERSITY OF EASTERN AFRICA

## A. M. E. C. E. A MAIN EXAMINATION

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AUGUST – DECEMBER 2018 TRIMESTER

FACULTY OF LAW

REGULAR / EVENING PROGRAMME

CLS 421: PROCUREMENT LAW

Date: DECEMBER 2018

Duration: 2 Hours

**INSTRUCTIONS: Answer Question ONE and ANY OTHER TWO Questions**

- Q1. The Republic of Kenya National Cereal and Produce Board advertised two tenders, “the tenders” for the supply of 50,000 metric tons each of the Diamonium Phosphate fertilizer “the DAP fertilizer” and Calcium Ammonium Nitrate fertilizer “the CAN fertilizer” on 4<sup>th</sup> May 2018. The Advert was published on both the Standard Newspaper and the Nation Newspaper the two leading newspaper in Kenya with wide circulation. The purpose of the tenders was to ensure adequate maize harvest and food security, maize being staple food in Kenya. The maize planting season in Kenya commences in the month of August of every year. Kenya had previous experienced multiple fertilizer procurement scandals revolving around bribery, collusive tendering, bid rigging, nepotism, political patronage and other forms of misfeasance. The Kenyan Political opposition popularly known as NASA had dismissed the tenders as “another maize scandal” a claim that Kenyan Government dismissed as ‘vitendawili’. On 20<sup>th</sup> May 2018, after completing the technical and financial evaluation, the Kenya National Cereal Board sent a letter to KiKwetu Ltd, the highest bidder, to the effect that it had terminated the Tenders because “several reputable firms did not submit responsive bids”. The Cereal Board also sent another letter to Ndiani Ltd the lowest bidder to the effect that it was non responsive because the tender security was valid for a period shorter that the one set out in the tender documents. The letter further stated the samples of the DAP and CAN fertilizers submitted by most of the bidders failed the organoleptic test set out in the Technical evaluation criteria, because granules appeared bluish and easily disintegrated when squeezed between the technical evaluators fingers. This letter was evidence of bad chemical formulation of the fertilizer that most bidders proposed to supply to the National Cereal Board. On 8th July 2018, The National Cereal Board sent an email to Ndiani Ltd requesting it to ‘urgently’ submit fresh

bids by email. The email stated that the National Cereal Board needed the DAP and CAN fertilizer “very urgently” because “the planting season is nigh and the clouds have gathered in the skies”. In view of the urgency, the email further stated that the exigencies of the moment did not permit the use of standard tender documents and that the bidders could only submit the fresh bids in excels spreadsheets. Unlike the other nine bidders that originally participated in the Tenders, Ndiani Ltd. was a citizen Contractor, wholly owned by Kenyan Farmers, youth, women and persons with disability. On 10th July 2018 Ndiani Ltd chanced upon a bill of lading and ship Manifest indicating that Kikewtu Ltd had imported 50,000 Metric tons of DAP and CAN fertilizers. These documents indicated that the National Cereal Board as the ultimate owner of the consignment and the country of origin as Mexico. The date of importation indicated as 4<sup>th</sup> May 2018. Upon further inquiry, Ndiani Ltd established that:

- i) The ship MV Hustler, had already docked at Kenyan coastal city of Mombasa,
- ii) The National Cereal Board Managing Director, Mr. Kanza was a close relative and business associate of the directors of and shareholder at Kikewtu Ltd.

On 12<sup>th</sup> July 2018, The Kenyan Public Procurement Regulatory Authority and Ombudsman issued joint press statement to the effect that they were investigating ten local Companies and foreign companies, including Kikewtu Limited for serious breaches of country’s tax,labour, money laundering, anti-corruption and public procurement laws. On 17<sup>th</sup> July 2018, The National CerealBoard sent a letter to Ndiani Ltd stating that its offer was not the most competitive and hence unsuccessful. Ndiani Ltd says it cannot accept the turn of events “lying down”. Ndiani Ltd plans to appeal the National Cereal Board actions and decisions before the Kenya’s Public Procurement Administrative Review Board. You are a leading Public Procurement lawyer in Kenya. According and perhaps, Ndiani has instructed you to provide a “brief and Succinct”, legal opinion on the viability of the intended appeal, highlighting the relevant legal provisions and the underlying principles and objectives of public procurement regulation. Kindly prove the legal opinion. **(30marks)**

Q2. Why have developing countries declined to accede to the World Trade Organization’s Government Procurement Agreement despite its provisions on special and differential treatment of such countries. **(20marks)**

Q3. a) “The challenge that arises from the conflictual co-existence of economic and social objectives in a system of public procurement regulation does not necessarily require a choice between good and bad or, inferior and superior-Anonymous. Discuss the above dictum **(10marks)**

b) Mr.Ouma has been currently employed by the Public Procurement Administrative Board. As a way of familiarizing himself with his day to day

duties he has been requested to state the obligations of the Board. Help him in preparing a brief stating the said obligations. **(10marks)**

- Q4. a) The Government of Kenya is the largest consumer of Consumer of goods and services. This is the rationale for the quest for transparency and accountability in the Public Procurement process. Put the above preceding statement in its rightful context. **(10marks)**
- b) Describe the remedies available to an aggrieved party in a public procurement dispute. **(10marks)**
- Q5. There is no one ideal form of Public procurement regulation; there is only regulation which is particularly suited or adopted to the objectives pursued in the territory or territories in which it applies. It is the failure to recognize or the tendency to misinterpret the underlying objectives which often leads to confusion and false expectation. –*Peter Trepte, Regulating Procurement: understanding the Ends and Means of Public Procurement Regulation*. Discuss the above dictum. **(20marks)**

**\*END\***