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Nexus between the Access to Government Procurement Opportunities Initiative's Legal and Regulatory Framework with Its Uptake by Youth in Isiolo County, Kenya

Dr. Fredrick Khaunya Mukabi

Deputy Director, Kenya School of Government, Embu, Kenya

Dr. Ann Teresa Wanjiru Kangethe

Director, Kenya School of Government, Embu, Kenya

David Newton Simiyu

Senior Lecturer, Kenya School of Government, Embu, Kenya

Abstract:

The Kenyan Government, cognizant of the Constitution of Kenya (2010) Article 227 on the fair, equitable, transparent and cost-effective public procurement of goods and services and Article 55 on affirmative action in the Public Procurement and Asset Disposal Act, 2015 came up with the Access to Government Procurement Opportunities (AGPO) initiative. It was envisioned that the AGPO initiative facilitates the Small and Medium size Enterprises (SMEs) owned by youth, women and PWDs to benefit from at least thirty percent of the Government tenders. However, considering the challenges experienced the connection of the LRF of this initiative and how it influences the uptake of these opportunities is not clear. This study therefore purposed to investigate the significance of the LRF in the Uptake of AGPO by the youth as beneficiaries in Isiolo County, Kenya. Using the descriptive research design, inferential statistics as tools of analysis, and with a sample of 55 youth drawn across the three (3) Sub-Counties of Isiolo County, the researchers were able to measure how the LRF influences the uptake of AGPO by the youth. The study established that the LRF was an insignificant factor in the Uptake of the AGPO initiative by these youth, since it had a weak positive correlation with the dependent variable Uptake of AGPO $r(51) = .153$ $p > .05$. However, it emerged that the procedures of getting licenses were bureaucratic and with multiple licenses required to operate the SMEs. The researchers recommend that the County establishes an agency to sensitize the youth on the various laws, regulations and obligations in the AGPO program. The study further recommends a review of the PPADA (2015) after an expanded study to include all 47 Counties to encompass concerns of beneficiaries countrywide.

Keywords: Access, government procurement opportunities, legal and regulatory framework, youth, and uptake

1. Introduction

Globally, there is a trend to economically empower the disadvantaged groups especially through entrepreneurship. This empowerment should also be seen through the prism of ongoing global sustainable strategies aimed at ensuring inclusive economic participation and development in the 21st Century where the principle of sustainability, participation and equity are important factors in measuring economic growth rather than aggregate factors such as the Gross Domestic Product (GDP) of a country (World Bank, 2015). The initiative would broadly support the UN Sustainable Development Goals (SDGs), the AU Agenda 2063 and Kenya Vision 2030 all anchored on sustainable development of communities and states.

In Tanzania, amendments to the Public Procurement Act of 2011 (PPA, 2016) were made to address among others; to enhancing participation of local traders and special groups in public purchases and also discourage importation of goods and services in the domestic market. Thai (2004) explained that, as many countries have moved to a regional and or global economy, Public procurement practitioners face another challenge that is, how to comply with their government's procurement regulations and social and economic procurement goals without violating regional and/or international trade agreements. For example, how to comply with national economic policies such as nurturing domestic firms, without dealing unfairly with foreign firms as provided in regional trade agreements and/or the World Trade Organization (WTO) agreements is not easy, which requires a careful study of trade agreements in order to take advantages of special provisions.

In Kenya, the legal requirement for youth, women and PWDs to access thirty percent of procuring opportunities is being implemented through the AGPO initiative which was officially launched by the President on 16th October 2013 in Nairobi. This AGPO initiative is anchored in the COK (2010), Article 227 on the fair equitable, transparent and cost-effective public procurement of goods and services, and also in Article 55 on affirmative action and the Public Procurement and Asset Disposal Act (PPADA), 2015.

1.1. The Legal and Regulatory Framework (LRF) in the AGPO Initiative

The aim of the AGPO program according to the National Treasury website is to facilitate the enterprises owned by youth, women and PWDs to be able to participate and benefit from Government procuring opportunities. This is made possible through the implementation of the legal requirement that thirty percent of Government procurement opportunities be set aside specifically for enterprises owned by these groups. As a result, the initiative is aimed at empowering them by giving them more opportunities to do business with the Government. The Government of Kenya (GOK) further provides that for the purpose of benefiting from preference and reservations schemes, an enterprise owned by Kenyan youth, women or PWDs shall be a legal entity that is registered with the relevant Government body and has at least seventy percent membership of youth, women, PWDs and the leadership shall be one hundred percent youth, women and PWDs, respectively. All SME Groups or disadvantaged groups that have been registered by the National Treasury are automatically included in the list of registered suppliers of a procuring entity upon submission of the National Treasury Registration certificate.

This program since inception has been riddled with challenges that have a bearing on its uptake including access to information, complaints about the high bidding costs, weaknesses in the feedback mechanism and transparency in the tendering process (Hivos East Africa, 2018). Of major concern is the LRF upon which this program is anchored. This arises in the form of disregarding the law, the lengthy and bureaucratic legal processes before registration and a failure in the understanding of the legal provisions in the Act by the beneficiaries. To reinforce this argument, in October 3, 2016 President Uhuru Kenyatta warned that Government officials who fail to pay the youth, women and PWDs under AGPO on time were not complying with the law and would face reprimand and punishment. Munene, 2018 posits that the effects of the regulatory regime including the complicated registration requirements, the poor oversight by the Public Procurement Regulatory Authority, (PPRA) as factors contributing to the challenges in the realization of the program objectives.

Research by Hivos East Africa (2018) identifies issues of transparency in the tendering process as being a major impediment to the realization of the AGPO initiative. Complaints over lost bids whether through failure in communication or weaknesses in the communication system were identified as possible integrity-related issues by government procuring agencies. It was also cited that women from affluent and politically connected families tended to exploit the opportunity to win lucrative tenders at the expense of the needy and vulnerable who were the target group in this initiative.

The Public Procurement Regulations (2013) stipulate that procuring entities are allowed to unbundle goods, works and services in practicable quantities pursuant to Section 31(7) of the PPDA, (2005) for the purpose of ensuring maximum participation of youth, women, and PWDs, through registered SMEs. The AGPO initiative was also supported by a number of laws including Article 227 of the COK (2010) on the fair equitable, transparent and cost-effective public procurement of goods and services, and Article 55 on affirmative action; the PPADA (2015) and the PPDR (2006), the Preference and Reservations Regulations (PRR), 2011 and the Public Procurement and Disposal (Preference and Reservations) (Amendment) Regulations (2013). Consequent to Article 227 of the COK (2010), the PPADA (2015) was enacted and took effect on the 7th of January 2016, were all procuring entities including Counties are required to adhere to these provisions. Each procuring entity is required to submit quarterly reports to the Public Procurement Regulatory Authority (PPRA), tenders secured by the special groups and the list of these registered and issued with AGPO certificates. In this regard, the Government of Kenya (GOK) has waived the requirements that otherwise obstructed disadvantaged groups from public procurement processes through a waiver on mandatory tender security, unconditional award of Local Purchase Orders (LPOs) and a one-stop registration process and application for Public Procurement Processes under AGPO (GOK, 2013).

1.2. Statement of the Research Problem

The AGPO as an economic empowerment, inclusivity and equalization initiative by the GOK through the National Treasury was meant to facilitate the SMEs owned by youth, women and PWDs to be able to access, participate and benefit from the various Government procuring opportunities that exist at both National and County levels. This was to be made possible through the implementation of the legal requirement encapsulated in the COK 2010 article 227 and executed through the PPADA, 2015 through which thirty percent of Government procurement opportunities were to be set aside specifically for enterprises owned by these groups. It is also in line with the global, regional and national development agenda of all inclusive, participatory economic empowerment of communities and states (World Bank, 2015).

However, the beneficiaries, particularly the youth have portrayed aversive tendencies in the uptake of the AGPO program thereby undermining the program objectives. This is evidenced by publications in the Annual Reports from the National Treasury and research findings by other nongovernmental agencies such as *Hivos East Africa*. According to the National Treasury Report on AGPO, 2018 less than forty percent (40%) of the youth, particularly in rural areas have picked up the challenge to exploit this opportunity and procuring entities are finding it difficult to meaningfully engage these youth for varied reasons. Hivos, (2018) found that only thirty six percent of applicants reported to have won tenders, sixty six percent (66%) lack capital, sixty percent (60%) had challenges in getting paid after delivery and all indicated that procurement procedures and criteria are complex, burdensome, costly for new entities, too technical requiring specialized bidding skills and have limiting compliance costs. Scholars have attributed this development phenomenon to the existing legal framework (Munene, 2018).

This research discourse therefore attempts to explore how the LRF contributes to this phenomenon that could account for the current Uptake of the AGPO initiative by the youth bracket. It is noteworthy that these Government procuring entities are countrywide in Kenya while the youth who comprise twenty five percent (25%) of the total population still constitute the low-income cadre as per the Kenya National Housing and Population Survey of 2019.

1.3. Research Objective

The objective of the study was to investigate the nexus between the Legal and Regulatory Framework (LRF) and the Uptake of AGPO initiative by the youth in Isiolo County

1.4. Research Hypothesis

The hypothesis discussed assumed that there is relationship between the research variables after the review of literature. In this case:

- H₀₁: The Legal and Regulatory Framework does not have a statistically significant relationship with the Uptake of AGPO initiative by the youth in Isiolo County.

1.5. Conceptual Framework

The research is structured through the following conceptualization which relates the independent variable of LRF and the dependent variable of the uptake of AGPO initiative.

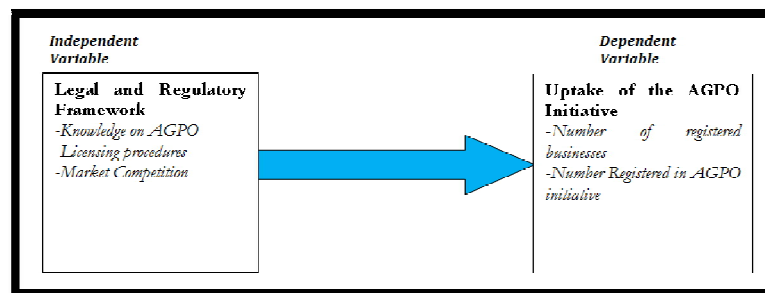


Figure 1: Conceptual Framework
(Source: Authors, 2019)

2. Review of Literature

2.1. Theoretical Framework

The study was anchored on the Principle-Agent Theory. This was found appropriate since it links the beneficiaries of the AGPO program to the procurement processes and their relationship is defined by the existing LRF.

2.2.1. Principal-Agent Theory

The theory postulated by Donahue (1989) argues that procurement managers in public sectors play the relationship role. The theory of Principal Agency helps to explain the role of public procurement in discharging their mandate (Mahmood, 2010). An agency relationship is a contract under which the principal engages the agent to perform some services on their behalf which involves delegating some decision-making authority to the agent. The theory further posits that the principal and the agent do not share the same level of knowledge and the agent can opportunistically take advantage of the situation, sometimes to the detriment of the principal. Therefore, the managers take on the role of agent for the elected representative (Eyaa et.al., 2011). According to the theory, the agent and the principal conflict in a number of ways given each party has a differing objective.

This theory therefore helps to anchor the study as in Kenya, the principle which in this case could be youth, women or PWD expects the agent which is the procuring public institution and its procuring staff to carry out the procurement responsibilities in accordance with the set procurement regulations. Hence the existing LRF must be adhered to in the execution of the procuring process. If this is flouted then it works for the detriment of the principal and ultimately for the agent when found culpable.

2.2. Contextual Literature

A content analysis of the LRF governing the AGPO program in the areas of licensing procedures and costs, competition from both local and international businesses and the level of knowledge on the program is highlighted in this section.

2.2.1. Knowledge on the AGPO Program in Kenya

The legal framework governing the eligibility for consideration under the Access to Government Procurement Opportunity (AGPO) program is anchored within the affirmative Action of the Constitution of Kenya 2010 Chapter 27 (8) which obligates the government to put in place legislative measures geared towards addressing the conditions of marginalized or discriminated groups. The subsequent statutory regulation sets forth the main prequalification criteria for women, the youth and PWDs businesses access to the facility (GOK, 2010). It is however important to note that except from specific reservation provisions setting aside 30% of opportunities to the special groups, all other general regulations governing the participation of business entities in public procurement also apply (GOK, 2015). The prequalification for participation in public procurement requires that the procuring individual or entity must demonstrate adequate capacity in terms of experience, equipment, resources or otherwise facilities for goods/services being tendered for; possess sound legal capacity to enter and execute contracts; and should not be declared bankrupt, insolvent, in the process of being

wound up or involved in legal proceedings that could hamper their effective delivery of procured goods/services (GOK, 2013).

While such regulations are vital for effective and efficient utilization of public resources, they often pose a significant challenge especially given the low capacity of the youth, women and PWDs operated businesses. To offset this impediment, the AGPO program identifies thirteen classifications of services, goods and public works that are for disadvantaged groups and another six classes for which they are given preference. This includes special waivers to unbundle procurement quantities to make them easily biddable by disadvantaged groups businesses/entities. Furthermore, disadvantaged businesses benefit from a variety of facilities meant to ease their business operations such as; Local Purchase Orders (LPO), payments on delivery facilities and a waiver on the mandatory tender security applicable in all public procurements (GOK, 2013).

2.2.2. Licensing Procedures

Disadvantaged groups are however expected to formalize their businesses through officially registering their business before accessing the AGPO Program. To be eligible, the business entities must pass a two-tiered registration process consisting of business registration with Attorney General Office or relevant County Office and with the AGPO Program at Treasury. The AG's office registers business entities as; sole proprietorship, registered company, or partnership with disadvantaged groups invested capital/share ownership of at least 70%. The other statutory documents that should also be acquired and made available for a business to qualify are Business Registration Certificate or Certificate of Incorporation, Partnership Deed for businesses registered as Partnership, Personal Identification Number (PIN), Value Added Tax and Tax Compliance Certificates, Memorandum of Association for Registered Companies, a letter/certificate from authorized technical/professional/regulatory body such as the National Construction Authority for those tendering for Public Works and Energy Regulatory Commission for those supplying energy/fuel product (GOK, 2015).

Registration with the AGPO office at Treasury ensures that the business is among those prequalified to make procurement bids under the AGPO Program. It is vital to appreciate that while these pre-conditions may seem straight forward to most business enterprises, the disadvantaged groups are not particularly endowed with adequate capacity, especially financial and awareness capacity to for instance meet the modest registration fees required to obtain a business/technical registration certificate. Given most of them are based in rural and per-urban areas means they rarely comply with the necessary annual returns with Kenya Revenue Authority (KRA) or other statutory bodies (Nkonge, 2013). From a governance perspective, regulatory requirements are key control mechanisms for all business firms and organizations to operate in harmony. Kotler (2006) says that these requirements are mainly composed of legislative controls into which form the basis upon which business firms and organizations operate.

2.2.3. Market Competition

Market competition is a key determinant of the success of the AGPO initiative considering that Kenya is an open economy. As far as the public procurement opportunities goes, it is important to acknowledge that regulatory requirements in general are less flexible for disadvantaged or special interest group's enterprises like the AGPO beneficiary cluster as opposed to other established firms (Irungu, 2016). Youth enterprises in form of SMEs for instance are challenged by limited business operational experience, limited resources, facilities and equipment to enable them compete favourably with other established firms for public procurement opportunities. This places them in a fairly uncompetitive position. Oluka (2011) and Gatere (2011) observe that the situation obviously impacts on their legal capacity in terms of ability to enter into legally binding contracts for purposes of public procurement opportunities thereby competitively disadvantaging them. Hivos East Africa (2018) further identifies competition from local and established firms involved in competitive importation as a major impediment in the successful bidding of the youth in government procurement opportunities.

Therefore, such SMEs run by youth and after failing to meet legal requirements due to competitive disadvantages such as insolvency, receivership, and bankruptcy or in the process of being wound up is ineligible to participate in public or indeed any other procurement process. Such disadvantaged groups therefore may benefit from the unbundling procurements to quantities to make them friendlier and cushion them against adverse competition.

3. Research Methodology

This paper focused on examining the influence of LRF on the Uptake of AGPO by the youth in Isiolo County in Kenya. To realize this, the study utilized the descriptive survey design. The study population of the youth from Isiolo County was narrowed through a representation made up the 55 respondents drawn from the three Sub-Counties Isiolo, Garbatulla and Merti. The respondents were attending a training at the Kenya School of Government (KSG) Embu Campus. Their geographical spread was considered for the reliability and validity of the data. This is shown in Table 1.

3.1. Respondents' per Sub-County

From Table 1, majority of the respondents, that is eighty percent (80%) were from Isiolo Central, eleven percent (11%) from Garbatulla and nine percent (9%) from Merti Sub County.

Sub -County	N	%
Isiolo Central	44	80.0
Garbatulla	6	11.0
Merti	5	9.0
N	55	100.0

Table 1: Respondents Sub-County
(Source: Survey Data, 2019)

The study used structured questionnaires to collect data. The questionnaire had both closed and open ended questions. The closed ended questionnaires made use of a five-point Likert scale where respondents were required to indicate according to their level of agreement with the statements. The statements were based on parameters of the LRF namely knowledge on AGPO, Licensing Procedures and Market competition. The open-ended questions generated the qualitative responses in the questionnaires.

Descriptive statistics in form of frequencies and percentages were used to analyze the data. Pearson correlation coefficient was further used to measure the level of strength and direction of the relationship between the LRF of AGPO and its Uptake in Isiolo County. Pearson's Correlation coefficient allowed the researchers to analyze the degree and direction of the relationship between the study variables.

3.2. Research Findings and Discussions

There was a 100% response rate since all the questionnaires that were administered were filled and collected by the researchers. This was as a result of the respondents' ease of reach within the precincts of the training institution.

3.2.1. Business Ownership

From Table 2 forty-four percent (44%) of the respondents owned some form of business while fifty-six percent (56%) did not own a business. This suggests that majority of the youth are business averse and points to deterrents of business establishment according to Munene (2015) as possible reasons for the low business uptake. It also points to an early pointer upon which it may therefore be argued that the legal and regulatory procedures act as impediments to the AGPO initiative (Lagat et al., 2016).

Response	N	%
Yes	24	44.0
No	31	56.0
N	55	100.0

Table 2: Business Ownership (N = 55)
Source: Survey Data, 2019

3.2.2. Legal and Regulatory Framework and Uptake of AGPO initiative

When the legal and regulatory framework and the AGPO uptake was measured, the findings were as summarized in Table 3 whereby fifty-four percent (54%) agreed that there are bureaucratic procedures in getting a trade license. Sixty-two percent (62%) agreed that there are many licenses required for business initiation and operation. Fifty-one percent (51%) agreed that there are high taxes levied to businesses.

A majority, forty-three percent (43%) did not know whether the Government cushions SMEs from imports, while a minority of thirty-seven percent (37%) agreed that the Government cushions SMEs from imports. On the government having inhibitive policies on SMEs funding, as thirty eight percent (38%) agreed with the statement while thirty-three percent (33%) disagreed, and twenty nine percent (29%) did not know. This suggests that they were generally indifferent on whether the government has inhibitive policies. This could be explained by the fact that due to the limited uptake of the businesses by the youth, many could not tell since they lack the requisite experience with government policy regulations. Ninety-one percent (91%) disagreed with the statement that the current legal and regulatory framework supports SMEs. This is a strong indication that there is still a lot that the government needs to do to attract youth to embrace the AGPO initiative. These findings are also indicative that the current Act needs review. Obiri (2016) concurs with this argument as he established business experience was a prerequisite to accurate analysis of legal frameworks.

In summary, these findings therefore suggest that majority of the youth in Isiolo were not keen on running businesses because of the long bureaucratic processes and the high cost of licensing. Knowledge on the AGPO program was equally not available and consequently its uptake was low. They are in agreement with the views in the Hivos East Africa (2018) report which found that the bureaucratic procedures in qualifying as a beneficiary of the AGPO program in most instances acted as an impediment to its absorption.

Parameter	Strongly Disagree	Disagree	Don't know	Agree	Strongly Agree	%
	%					
There are bureaucratic procedures in getting trade license	12.0	14.0	21.0	44.0	10.0	100.0
There are many licenses required for business operation	7.0	26.0	6.0	49.0	13.0	100.0
There are high taxes levied to businesses	4.0	36.0	9.0	36.0	15.0	100.0
Government regulations cushion SMEs from imports	4.0	15.0	43.0	28.0	9.0	100.0
There are inhibitive Government policies on SMEs funding	6.0	27.0	29.0	23.0	15.0	100.0
The current legal and regulatory framework supports SMEs	63.0	28.0	-	4.0	5.0	100.0

Table 3: Descriptive Statistics of the Study Variable, Legal and Regulatory Framework (N = 55)
Source: Survey Data, 2019

3.2.3. Inferential Statistics of the Legal and Regulatory Framework and Uptake of the AGPO

The independent variable Legal and Regulatory Framework had a statistically insignificant weak positive correlation with the dependent variable Uptake of AGPO $r(51) = .153$ $p > .05$ hence we FAIL TO REJECT Null Hypothesis H_{02} : The Legal and Regulatory framework does not a statistically significant relationship with the uptake of AGPO by the youth in Isiolo County. Table 4 illustrates this.

Determinant of AGPO	Uptake of AGPO	
	Legal and Regulatory Framework	Pearson Correlation
	Sig. (2-tailed)	.562
	N	55

Table 4: Inferential Statistics of the Legal and Regulatory Framework and Uptake of the AGPO

The inferential statistics therefore suggest that the LRF has no statistical significance in the uptake of the AGPO initiative by the youth in Isiolo County. It points to a lack of appreciation of the relationship on the basis of limited knowledge on AGPO and also lack of experience since most of the youth interviewed do not own businesses anyway. This agrees with the work of Mwangi (2017) and Nduta et al., (2015) in which they concluded that lack of business opportunities is a hindrance to utilization of favourable business policies for the disadvantaged.

3.2.4. Qualitative Analysis

Qualitative data was used for purposes of triangulation of responses in the tool for data obtained from open ended questions. In the study, respondents were probed for their suggestions on how to make the AGPO LRF known to the beneficiaries; how SMEs could be cushioned against importation of cheaper goods; and aspects of the procurement law that need to be changed.

Of those interviewed, ninety percent (92%) felt that there was need for adequate and timely information about AGPO program to the beneficiaries. The seventy eight percent (78%) of the respondents also indicated that the long process and inadequate information hampered their ability to enjoy the benefits of this program. This is in line with the Irungu (2016) report on AGPO which concluded that lack of timely and adequate information was a major hindrance in the realization of the AGPO program. Other suggestions included the need to have an office at the County level to coordinate this AGPO initiative.

Of the respondents interviewed, seventy five percent (75%) of them felt that there was need to cushion their specified supplies against the competitive local and import market players who had adequate capital to buy in bulk and at favourable prices and offer lower bids against the local youth entrepreneurs. The findings resonate with similar findings by Hivos East Africa, (2018) which established that adverse competition from established and influential players in the market could not allow SMEs to compete favourably in the AGPO program. Other suggestions included the imposition of heavier tariffs on such imports, pooling of SMEs resources to supply some of the imported products and provision of tax concessions to the youth in import business. This is also in line with the findings of Waleh (2013) in which he established that competition was a major deterrent to the uptake of AGPO among Kenyan beneficiaries.

Majority of the respondents, eighty five percent (85%) felt that there was need to review the current law governing AGPO on the definition of women. Some of the respondents had indicated that most of the women winning bids were proxies of rich and influential relations, hence compromising the target and spirit of the initiative. Indeed, in the GOK,

(2018) report, out of the AGPO cluster beneficiaries, majority were women. Other suggestions given were to further define a youth to be those below 30 years of age, define the timelines of payments after delivery of the goods/services and also include Information Communication Technology (ICT) services in the bracket of the AGPO initiative procurement areas.

4. Conclusion

The study concluded that the LRF was a drawback in the uptake of AGPO, as it emerged that the processes and procedures of getting a license were bureaucratic and one needed to have a number of licenses to operate a business. However, most were indifferent on the significance of LRF in the uptake of AGO initiative. This is not in tandem with (Harris, 2012) who postulated that the LRF has a positive impact on firm performance when it is created in a way that it supports the development of a sector. Hence, The Government of Kenya and County Government of Isiolo have to create a supportive physical and regulatory environment for it to have a positive influence on the AGPO program and support the youth. These findings agree with the scholarly works of Mwangi (2017) that say that the prequalification criteria negatively contributed to the level of compliance with Access to Government Procurement Opportunities Regulations. The study also concluded that information on how Government cushions SMEs from competitors both local and importers was to be sensitized with recipients.

5. Recommendations

The study recommends the following:

The County Government of Isiolo collaborates with agencies such as Kenya School of Government to establish a dedicated research, education, training and oversight agency of the AGPO initiative, its awareness, processes and procedures and help minimize the bureaucracy and help adopt automated registration;

The National Treasury (NT) in liaison with the Public Procurement Administrative Review Board (PPARB) initiates the review the PPADA (2015) and the articles therein on AGPO to cushion against abuse by implementers and make pertinent clarifications to avoid abusable ambiguities.

5.1. Recommendation for Further Research

This research was based on a limited spatial sample which has helped elicit further inquiry into the AGPO initiative. It would therefore interest researchers and policy developers to carry out a countrywide study involving sampled Kenyan SMEs from the 47 Counties, currently registered in this program so as to get further insights into this initiative that would inform regulatory and policy changes governing AGPO.

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