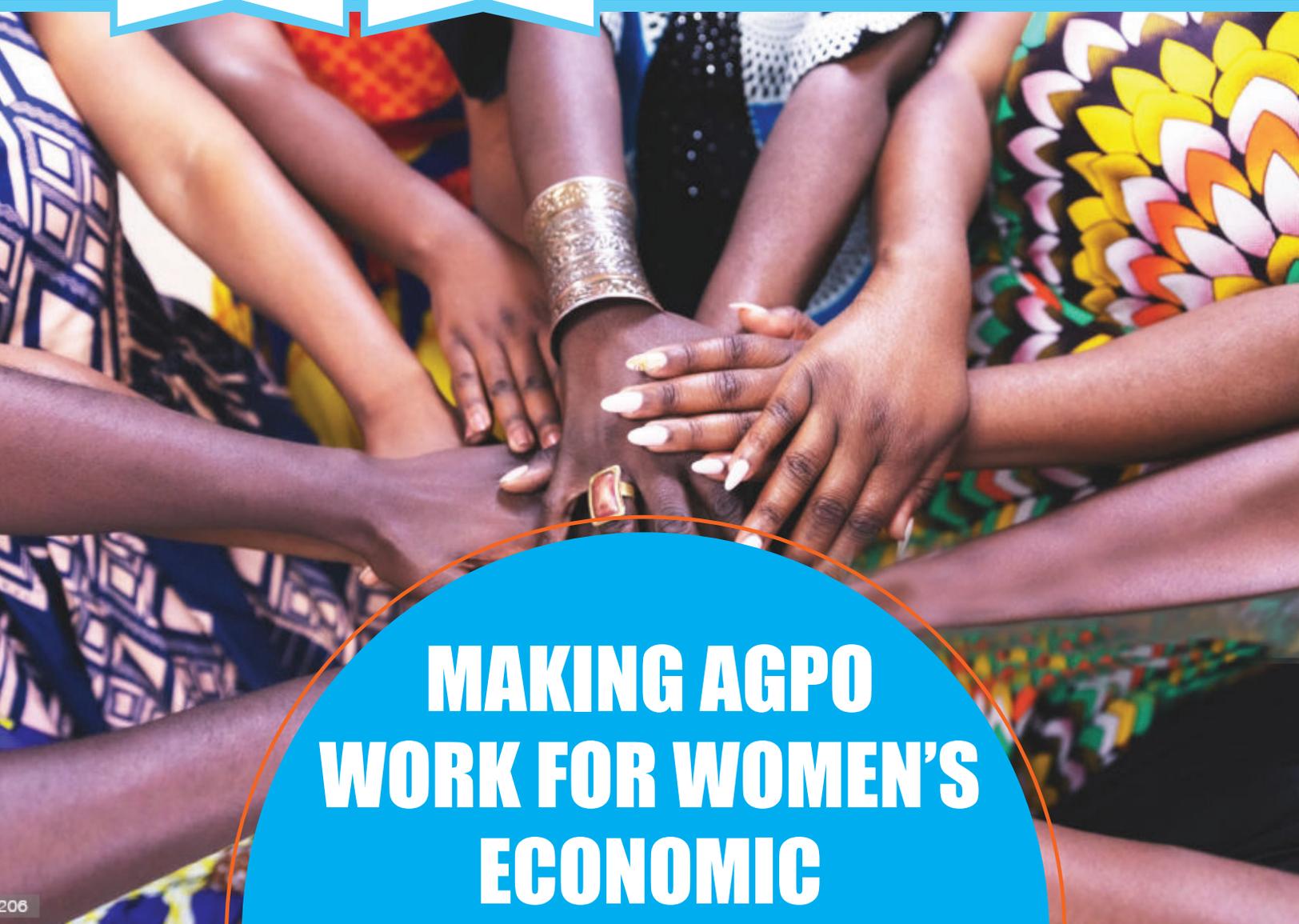




AFRICAN WOMEN'S
STUDIES CENTRE
UNIVERSITY OF NAIROBI



**African Women Studies Centre &
Women's Economic Empowerment
Hub, University of Nairobi**



MAKING AGPO WORK FOR WOMEN'S ECONOMIC EMPOWERMENT

Abstract

The Government of Kenya has initiated several Affirmative Action Funds and Programs with the aim of supporting groups of people who have been marginalized over time due to various factors, including historical injustices and socio-cultural discrimination. This is a report on the Access to Government Procurement Opportunities (AGPO) which has a 30% reservation on all contracts for uptake by the less advantaged groups in Kenya who comprise women, youth, and persons with disabilities (PWD).

A report submitted to The Ministry of public Service and Gender affairs..From WEE hub African Women Studies Center UON | Aug. 2021

WEE HUB MOTO

Promoting Womens Economic
Empowerment through **African
Women Centered Research,
policy change and collaboration**
with womens organisations policy
makers and other stakeholders

Acknowledgments

The UON WEE hub acknowledges the contribution of the team of researchers that reviewed literature, prepared the report and distilled the proposals herein. The Hub would like to specifically thank Prof. Wanjiku Kabira, Prof Tabitha Kiriti, Dr. Linda Musumba, Dr. Mary Mbithi, Wambui Kanyi, Njeri Karuru, Dr. Agnes Meroka and Ibrahim Kitoo. We also acknowledge the Women's organisations that reviewed the proposals and gave input. Special thanks go to Daisy Amdany of Crown Trust/Women's Steering Committee, Elizabeth Oduor of the CS Office, Ministry of Public Service and Gender Affairs, Gloria Ndeti of KEPSA. We also thank Anna Mwangi for Editorial and layout work and Kevin Mapesa for design and publication. The Hub also acknowledges the Bill and Melinda Foundation. The WEE HUB Management thanks you.

CONTENTS

List of Abbreviations	6
EXECUTIVE SUMMARY	7
Literature Review on the Status of AGPO since Its Inception in 2013	7
Key findings of the Study	8
Program Implementation	9
1.0 Introduction	10
2.0 Context of the Study	10
3.0 Objectives of the Study	10
4.0 Methodology	11
5.0 Affirmative Action	11
6.0 Global Perspectives	12
6.1 Affirmative Action, USA	12
6.2 Affirmative Action, Canada	13
6.3 Affirmative Action, Malaysia	14
6.4 Affirmative Action, South Africa	14
7.0 Lessons and Best Practices from the Global Literature	14
8.0 Historical Development of AGPO in Kenya	16
9.0 Policies and Legal Notices	16
9.1 Legal Notice No. 58, the Public Procurement and Disposal Regulations (Preference and Reservations) Regulations 2011	16
9.2 Legal Notice No. 114, Public Procurement and Disposal (Amendment) Regulations, 2013	17
9.3 Public Procurement and Asset Disposal Act No. 33 of 2015	17
9.4 Legal Notice 69 on Public Procurement and Asset Disposal Arrangement of Regulations, 2020	17

10.0 Legal Analysis of AGPO: Enabling Provisions on Preferences and Reservations	18
11.0 Public Procurement	22
11.1 Registration	25
11.2 Pre-qualification	26
11.3 Preparation of Financial and Technical Proposal	27
11.4 Award of Tender	27
12.0 Challenges in the Implementation of AGPO	29
12.1 Challenges from Procurement Law	29
12.2 Challenges Arising from Information Asymmetry	30
12.3 Challenges Faced by the AGPO Secretariat	30
12.4 Financial Challenges	30
12.5 Lack of Experience in Undertaking Larger Projects	30
12.6 Corruption and Nepotism	31
13.0 Legislative Proposals	31
14.0 Reducing Barriers of Entry	31
15.0 Administrative Reforms	32
16.0 Conclusion	35
References	36

List of Abbreviations

AGPO	Access to Government Procurement Opportunities
AWSC	African Women's Studies Centre
BEE	Black Economic Empowerment
CS	Cabinet Secretary
CDF	Constituency Development Fund
EOI	Expression of Interest
KNBS	Kenya National Bureau of Statistics
KEPSA	Kenya Private Sector Alliance
KRA	Kenya Revenue Authority
KICC	Kenyatta International Convention Centre
LEEP	Legislated Employment Equity Program
NCA	National Construction Authority
NEP	New Economic Policy
OECD	Organisation for Economic Co-operation and Development
OEOD	Office of Equal Opportunity and Diversity
PIN	Personal Identification Number
PWD	Persons with disabilities
PPRA	Public Procurement Regulatory Authority Kenya
RFP	Request for Proposal
SMEs	Small and medium-sized enterprises

EXECUTIVE SUMMARY

The Government of Kenya has initiated several Affirmative Action Funds and Programs with the aim of supporting groups of people who have been marginalized over time due to various factors, including historical injustices and socio-cultural discrimination. One such Program is the Access to Government Procurement Opportunities (AGPO) which has a 30% reservation on all contracts for uptake by the less advantaged groups who comprise women, youth, and persons with disabilities (PWD). The reserved contracts are designed to strengthen the economic empowerment of women, youth and PWDs. Public procurement spent for businesses on the affirmative action groups is estimated at KES 2.5 trillion annually.

The Ministry of Public Service and Gender has been keen to ensure that the Program achieves its objectives. To ensure its effectiveness and efficiency, the Cabinet Secretary (CS) Prof. Margaret Kobia requested the African Women's Studies Centre (AWSC) to undertake a review of the Program. In her letter, the Cabinet Secretary noted that despite the great potential, the AGPO Program has continued to experience low uptake due to the poor capacity of the target groups and challenges in payment to suppliers, among other issues. She further noted that to realize the full potential, the Ministry of Public Service and Gender has been keen to undertake a study on the Program, its challenges and possible solutions with a view of informing policy action.

In recognition of the Centre's research capacity, the Cabinet Secretary requested the AWSC to undertake a Literature Review of the AGPO program since its inception in 2013. Upon receipt of this request, the AWSC, undertook the study between March and October 2020.

Literature Review on the Status of AGPO since Its Inception in 2013

The objectives of the study were to undertake a literature review on the status of AGPO since its inception in 2013, review global literature on AGPO with a view to borrow lessons that could be used in Kenya, review the regulations of AGPO in order to understand their limitations and examine the implementation of AGPO with a view to recommend changes that would improve the Programs uptake by women.

The methodology used to access information on AGPO included conducting a literature review, commissioning of issue papers which were discussed in webinars and the feedback was provided to the authors who then revised the papers. Specifically, Ms Wambui Kanyi of the AWSC tracked the evolution of AGPO from a gender perspective while Ibrahim Kiptoo analysed AGPO regulations. Prof Kiriti-Ngang'a examined the performance of AGPO. In addition, a review of literature was undertaken both at the global and local level and lessons drawn from the global literature. These documents were shared with of the WEE Hub technical committee for input. The report was then shared with key stakeholders including women's organization, women in business and women entrepreneurs convened by the Ministry of Public Service and Gender in partnership with Kenya Private Sector Alliance (KEPSA). Other stakeholders included Crown Trust, the academia, and the National Women Steering Committee.

Feedback from this meeting was incorporated and a further document analysis was done to update the data on the uptake of the AGPO Program by women and draw lessons from other countries.

Key findings of the Study

Global literature suggests that Affirmative Action is led by the Government and public procurement is among the more important government programs intended to advance self-employment and economic opportunities for the less advantaged as seen in the US, Malaysia, and South Africa. The drivers of Affirmative Action include past historical injustices which lead to movements and advocacy that pressure governments to act. Studies have shown that legal and compliance institutions contribute to the effective implementation of affirmative action programs.

Research findings suggest that women, youth, and persons with disability have benefited from the AGPO program since its establishment with the value of tenders increasing from KES 7.4 million in 2015/16 to KES 17.2 million in 2019/2020.

Performance of some state agencies such as the ministries' state departments have increased and achieved high rates of 84% on the average for a 5-year period while others, such as the county assemblies have awarded only 12% of the amount reserved for AGPO. More research will identify the challenges at the county levels affecting the performance of AGPO reserved projects.

Despite it being a national initiative, AGPO is currently largely serving the capital city, Nairobi with the highest registered firms being in Nairobi County (67%), followed by Mombasa (6%); and

Kiambu (5%) (HIVOS, 2018). Studies have also shown that Kenya has strong legislation and regulations for procurement but there is need to focus on efficiency, accountability, application, and disbursement processes.

Policy Recommendations

While there are several recommendations, a few, highlighted here, include the need to enforce the code of conduct governing public officers' integrity to reduce corruption. In addition, training and capacity building for both procurement officers and beneficiaries should be done at national and county levels since each group has experienced its own challenges. It is also important to ease registration requirements to enable more women to register for AGPO and to ringfence funds set aside for payment for goods and services. Further, timelines set for payment for goods and services delivered should be strictly adhered to, failure of which interests on the principal payment should be done at the prevailing commercial lending rate.

To improve on efficiency, there should be cooperation between The National Treasury and the Public Procurement Regulatory Authority to streamline registration of businesses carried out under AGPO. In addition, a multi-sectoral approach should be developed within government departments for the implementation of AGPO to ensure that the planning, finance and procuring departments work together to effectively coordinate, communicate, and cooperate on AGPO matters. Lastly, the AGPO certificates need to be serialized to avoid double procurement and the dominance of some suppliers in the procuring entities at the expense of the other firms.

Program Implementation

There is need to strengthen the capacity of public procurement staff to better understand the legal framework governing preference and reservation schemes in Kenya; increase the capacity of potential applicants outside and within Nairobi to accurately interpret and use procurement requirements and documents; enforce compliance to the Public Procurement and Asset Disposal Act, 2015, the Public Procurement and Asset Disposal Regulations, 2020 and specifically the provisions bearing on reservations and preferences by the procuring public entities. Moreover, there is need to revamp and enhance the staffing and resources at the AGPO Secretariat; address the financing gap and payment delay challenges to AGPO group; strengthen the transparency in the registration of AGPO related firms to curb the exploitation of the genuine disadvantaged groups by men who may have the financial resources to bid for the tenders; and create a solid communication strategy that will allow for information to reach all women in urban and rural areas. Lastly, there is need to examine the existing bottlenecks and develop a strategy on how they will be addressed. Continuous monitoring and establishment of accountability structures is important if the program is to meet its original objective.

Research findings suggest that women, youth, and persons with disability have benefited ...with the value of tenders increasing from **KES 7.4 million** in 2015/16 to **KES 17.2 million** in 2019/2020.



PART ONE: INTRODUCTION AND CONTEXT

1.0 Introduction

The Report is divided into four parts. Part One comprises an introduction and context of the study of AGPO, including the global perspectives and best practices emerging from the literature. Part Two discusses the historical development of AGPO including the legal analysis, while Part Three provides the performance of the AGPO Program in Kenya. Finally, Part Four brings together the key findings, challenges, recommendations, and conclusion.

2.0 Context of the Study

The Government of Kenya has initiated several Affirmative Action funds and programs with the aim of supporting groups of people who have been marginalized over time due to several factors, including historical injustices and socio-cultural discrimination. One such Program is the Access to Government Procurement Opportunities (AGPO) which has a 30%

reservation on all contracts for uptake by the less advantaged groups who comprise women, youth, and persons with disabilities (PWD). The reserved contracts are designed to strengthen the economic empowerment of women, youth and PWDs. While KES 64.4 billion was reserved for affirmative action groups only KES 32.74 billion was awarded.

The Ministry of Public Service and Gender has been keen to ensure that the program achieves its objectives. To ensure its effectiveness and efficiency, the Cabinet Secretary Prof. Margaret Kobia requested the African Women's Studies Centre (AWSC) to undertake a review of the Program. In her letter, the Cabinet Secretary noted that despite the great potential, the AGPO Program has continued to experience low uptake, poor capacity of target groups and challenges in payment to suppliers, among other issues. She further noted that to realize the full potential, the Ministry of Public Service and Gender has been keen to undertake a study on the Program, its challenges and possible solutions with a view of informing policy action.

In recognition of the Centre's research capacity, the Cabinet Secretary requested the AWSC to undertake a literature review of the AGPO program since its inception in 2013. Upon receipt of this request, the AWSC undertook the study between March and October 2020.

3.0 Objectives of the Study

The objectives of the study were to undertake a literature review on the status of AGPO since its inception in 2013, review global literature on AGPO with a view to borrow lessons that could be used in Kenya, review the regulations

The Ministry of
Public Service and
Gender has been
keen to ensure
that the program
**achieves its
objectives.**

of AGPO to understand their limitations and examine the implementation of AGPO with a view to recommend changes that would improve the Programs uptake by women.

4.0 Methodology

The methodology used to access information on AGPO included conducting a literature review, commissioning of issue papers which were discussed in webinars and the feedback was provided to the authors who then revised the papers. Specifically, Ms Wambui Kanyi of the AWSC tracked the evolution of AGPO from a gender perspective while Ibrahim Kiptoo analysed AGPO regulations. Prof Kiriti-Ngang'a examined the performance of AGPO. In addition, a review of literature was undertaken both at the global and local level and lessons drawn from the global literature. These documents were shared with of the WEE Hub technical committee for input. The report was then shared with key stakeholders including women's organization, women in business and women entrepreneurs convened by the Ministry of Public Service and Gender in partnership with Kenya Private Sector Alliance (KEPSA). Other stakeholders included Crown Trust, the academia, and the National Women Steering Committee.

Feedback from this meeting was incorporated and a further document analysis was done to update the data on the uptake of the AGPO Program by women and draw lessons from other countries.

5.0 Affirmative Action

Access to Government Procurement Opportunities (AGPO) is one of the affirmative action programs that has been used all over the world to support the economic empowerment of

marginalized groups. Affirmative Action can be defined as public or private actions or programs which provide or seek to provide opportunities or other benefits to persons based on, among other things, their membership in a specified group or groups (Fairlie & Marion, 2012); (Jenkins & Moses, 2014). It means, taking positive steps to increase the representation of minorities in areas of employment, education, and culture from which they have been historically excluded (Fullinwider, 2018). Affirmative Action, therefore, encompasses any measures that allocate benefits, such as admission into academic institutions, jobs, public contracts, business loans, and rights to buy and sell property, based on membership in a designated group and with the objective of increasing the proportion of members of that group in the relevant labour force, entrepreneurial class, or university student population, where they are currently under-represented as a result of past or present discrimination (Sabbagh, 2004).

In economic development, these programs are commonly used as a means to level the playing field for minority and women-owned firms, for example, in public procurement markets and thus they serve as a positive factor in business entry and survival (Fairlie & Marion, 2012). They go beyond antidiscrimination policy strictly conceived. Affirmative Action policies, therefore, focus on demographics that have been historically under-represented in all spheres of life including leadership, professional roles, and economic development. It is often considered a means of countering historical discrimination against groups.

6.0 Global Perspectives

Public procurement as an affirmative action program has been used extensively in many countries in the world as well as in Kenya. Some of the countries that have been studied include the US, India, Canada, Malaysia, South Africa, and Korea, among others. Public procurement is among the most important government programs intended to advance self-employment opportunities (Justin, 2011; Fairlie & Marion, 2012; Pretorius, 2001; Lee, 2015).

The importance of public procurement in women's economic empowerment can be understood in the context of the value of public procurement contracts. Studies indicate that public procurement is the biggest spender in developing economies (Xavier & Xavier, 2016). Such spending can lead to economic growth for those who are able to access the contracts. Women form over 50% of the population and their engagement in one of the sectors crucial to development has implications on their capacity to access economic opportunities.

6.1 Affirmative Action, USA



The term Affirmative Action was first officially used in Executive Order 10925, signed by the then President of the United States of America, John Kennedy on March 6, 1961 (Brunner & Rowen, 2020). The order which was made in the context of the Civil Rights Movement, put the responsibility on contractors and employers to take affirmative action to ensure that applicants were employed without discrimination and that employees were treated equally during employment, without regard to their race, creed, colour, or national origin (OEOD, 2020); (Kristi, 2003).

The John F Kennedy Executive Order was later supplanted by President Lyndon B. Johnson's Executive Order 11246, issued on September 24, 1965, prohibiting employment discrimination based on race, colour, religion, and national origin by those organizations receiving federal contracts and subcontracts (OEOD, 2020). In

1967 President Johnson amended the order to include sex on the list of attributes which then promoted gender equality. Executive Order 11246 also required Federal contractors to take affirmative action to promote the full realization of equal opportunity for women and minorities. This broadened the use of affirmative action to ensure gender equality in the workforce and political and socio-economic spaces.

More significant is that the core of Affirmative Action in the USA then was the regulation enabling marginalized groups to access government procurement contracts. Affirmative Action programs in public procurement are among the more important government programs intended to advance self-employment opportunities for minorities and women in the United States and it is particularly widespread in the highway procurement industry (Justin, 2011). While there are other models of Affirmative Action, including credit guarantee schemes using both public and the private sector for disbursement, public procurement has been used as an important model by other countries.

6.2 Affirmative Action, Canada



Canada's Affirmative Action policies began in the 1980s when some policies were adapted from the US implementation, and other, intentionally differentiated programs. These were perceived as a strategy of improving the representation and distribution of the chosen group. One of the affirmative action programs was the creation of the Employment Equity Act (1986) which was designed to remove barriers to employment of historically marginalized groups, including women, visible minorities, aboriginal people, and Persons Living with Disability (Thomas & Jain, 2004).

Canada also included two new programs: Legislated Employment Equity Program (LEEP) and the Federal Constructors Program. With LEEP, corporations are required to enact equity plans to promote representativeness of their workforce, to identify and eliminate discriminatory practices, and to provide goals and schedules for the operation of such special measures. They were also required to collect data on their employees' occupational status, wage, and representativeness and submit this information to the Ministry of Human Resources, (Klarsfeld et al., 2010). This, in a sense, supported the promotion of equity as there was a system of accountability.

6.3 Affirmative Action, Malaysia



In Malaysia the 1957 Constitution included a provision for special rights (Article 153), allowing priority for Malay residents in terms of economic development, access to education and business licencing. However, economic disparity led to ethnic tension, culminating in the 1969 ethnic riots (Ratuva, 2013). These riots led to the enactment of the New Economic Policy (NEP) whose main objectives was to address poverty as a whole, irrespective of race and to accelerate country transformation in a way that identification of race with key economic function would be eliminated (Ratuva, 2013).

The Government of Malaysia also adopted the Industrial Coordination Act of 1975, one of the few *affirmative action* laws enacted by the government to regulate the private sector (Ratuva, 2013). It required the large-scale manufacturers to align their employee base on proportions like that of the population. This served as an enforcement mechanism to ensure compliance. Although state interventionism led to positive results in Malaysia this may prove unsustainable in other countries as adoption of strict employment legislation in private sectors might discourage multinational corporations from investing in the Malaysian industry (Weisskopf, 2004).

6.4 Affirmative Action, South Africa



The objectives of public procurement policy in South Africa, on the other hand, are largely the same as they are for most national procurement systems. The South African Constitution, in section 217(1), stipulates that organs of state must contract for goods or services in accordance with a system which is fair, equitable, transparent, competitive, and cost-effective. In recognition of South Africa's history of discriminatory policies and practices, however, Section 217 also makes provision for organs of state to use their contracting power for empowerment purposes. Section 217(2) stipulates that organs of state are not prevented from implementing a procurement policy that provides for categories of preference in the allocation of contracts and the protection or advancement of persons or categories of persons disadvantaged by unfair discrimination. Such use of procurement must, in terms of section 217(3), take place in accordance with national legislation.

The Preferential Procurement Policy Framework Act (the 'Procurement Act') of 2000 was enacted in 2000 and provides a framework for the implementation of preferential procurement policies. The Regulations to the Act, i.e., Preferential Procurement Regulations, Government Gazette, No. 22549 of 10th August 2001, flesh out the use of procurement as an empowerment tool. In June 2011, new Regulations, Preferential Procurement Regulations, Government Gazette, No. 34350 of 8th June 2011, were enacted and became effective on 7th December 2011. The

Regulations were re-drafted to bring them more in line with South Africa's Broad-Based Black Economic Empowerment Act No. 53 of 2003. The aim of the Act is to, among others, establish a legislative framework for the promotion of Black Economic Empowerment (BEE) in South Africa. It has been suggested that South Africa's preferential procurement remains an obstacle in free trade negotiations with trade partners such as the European Union and the United States.

7.0 Lessons and Best Practices from the Global Literature

Global literature suggests that Affirmative Action program, led by the Government and public procurement, is among the more important government programs intended to advance self-employment and economic opportunities for the less advantaged as seen in the US, Malaysia, and South Africa.

In terms of the drivers of Affirmative Action, past historical injustices are key in development of affirmative action programs which lead to self-mobilization movements and advocacy that pressure governments to act. This is evident in the history of affirmative action in the US, for example, where Affirmative Action Policies owe their origin to the Civil Rights Movement of the 1950s and early 1960s (Weisskopf, 2004) and in South Africa, where the injustices under apartheid led to the enactment of similar policies and the black consciousness movement and labour unions mobilized to get black people into jobs that were previously reserved for whites (A. Leonard, 2005). Affirmative action was not meant just for jobs but included all sectors that had previously been reserved for whites. The South African affirmative action policies were borrowed and adapted from Malaysia and the

US (A. Leonard, 2005). In Malaysia, the program was initiated as an affirmative action program for the Malays who were mainly rural farmers and on the verge of being totally marginalised by the Chinese, Indians and other groups (A. Leonard, 2005).

Legal and institution responses to Affirmative Action have contributed to change in countries where such legislation exists (Xavier & Xavier, 2016). In the US, the most important legislative step in response to the Civil Rights Movement was the 1964 Civil Rights Act, championed by President Lyndon B. Johnson and passed by both Houses of Congress in the wake of the assassination of President John F. Kennedy (Weisskopf, 2004). President Johnson issued Executive Order No. 11246, in addition to directing government contractors to actively seek out Black candidates for jobs and admit more Black students and faculty members. He also created the Office of Federal Contract Compliance Program to monitor and enforce the policy directive (Weisskopf, 2004).

Weisskopf also brings out other institutional arrangements that could be borrowed in the enforcement of Affirmative Action. The US Labour Department, for example, began to measure progress in ending discrimination in terms of quantitative increases in the percentage of Blacks in various fields and work forces. Public organizations, non-profit institutions and private companies supported by (or otherwise linked to) the Federal Government came under pressure to increase the representation of Blacks so as to demonstrate that they were operating in a non-discriminatory manner (Weisskopf, 2004). Such pressure increased as courts began to accept statistical information on the low percentage of Blacks employed, in relation to their proportion

of the population presumably qualified for a position, as evidence of racial discrimination.

In addition to the legal responses, political will is also important in the effective implementation of affirmative action. Leonard notes that compliance reviews as well as imposition of tax for organization that do not meet their targets can also act as incentives for compliance (J. S. Leonard, 1989).

Global literature suggests that **Affirmative Action program**, led by the Government and public procurement, is among the more important government programs intended to **advance self-employment and economic opportunities** for the less advantaged

PART TWO:

AGPO IN KENYA

8.0 Historical Development of AGPO in Kenya

The Public Procurement System in Kenya has evolved from a crude system with no regulations to a legally regulated procurement system in line with International Standards (Ochieng & Muehle, 2014). The evolution was through a system regulated by Treasury Circulars in the 1970s, 80s and 90s and further to an orderly legally regulated procurement system since March, 2001 under the Exchequer and Audit (Public Procurement) Regulations (Ochieng & Muehle, 2014). As a result of the implementation of this reform agenda a Public Procurement and Disposal Act was approved by parliament in 2005 (Ochieng & Muehle, 2014).

The evolution, however, took a gender dimension for the first time with the introduction of a 10 percent reservation on all public procurement contracts for disadvantaged groups which consisted of women, the youth, and persons with disability. This was done through a Presidential Directive by the then President of Kenya H.E. Hon Mwai Kibaki in 2011. The directive was a landmark as it aimed at empowering disadvantaged groups by giving them more opportunities to do business with the Government of Kenya with the aim of increasing their economic resources through access to Government procurement opportunities. The Directive was based on the Constitution of Kenya (COK), 2010 article 27(3) which notes that “Women and men have the right to equal treatment, including the right to equal opportunities in the political and economic spheres. Furthermore Article 27(6), specifies that “to give full effect to the realization of the rights guaranteed under this Article, the State

shall take legislative and other measures, including affirmative action programs and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination” (GOK, 2010).

9.0 Policies and Legal Notices

Since the inception of AGPO in 2011, major progress has been made in its enactment through a series of policy amendments aimed at effecting the directive. Some of the key policies for implementing this presidential directive include the following.

9.1 Legal Notice No. 58, the Public Procurement and Disposal Regulations (Preference and Reservations) Regulations 2011

This was the first amendment to the Public Procurement and Disposal Act, 2005 which aimed at implementing the presidential directive. Gazetted on 8th June, the regulations aimed to facilitate the promotion of local industry and economic development by setting preference and reservation schemes that allow public entities to reserve certain procurements to target groups identified under the Regulations (Ochieng & Muehle, 2014). The identified target groups are small and medium size enterprises, micro enterprises, disadvantaged groups, citizen contractors and local contractors. This amendment was a major milestone as it saw the inclusion of enterprises owned by disadvantaged groups in the economic policies and identified as women, youth, and persons with disability.

9.2 Legal Notice No. 114, Public Procurement and Disposal (Amendment) Regulations, 2013

This legal notice enabled small or micro enterprises or a disadvantaged group wishing to participate in public procurement to apply for registration with the National Treasury or the respective county treasury within which they operate and are located. In addition, this legal notice introduced an amendment that saw the setting up of a 30 percent reservation of tenders for enterprises owned by disadvantaged groups and the defining of enterprises owned by the disadvantaged groups as regards membership and leadership.

The AGPO was officially launched by His Excellency the President, Uhuru Kenyatta, on October 16th, 2013 at the KICC - COMESA Grounds in Nairobi. In the same year, the Cabinet Secretary for Finance, issued a circular on the implementation of Public Procurement and Disposal (County Governments) Regulations, No 14 of 2013 in which he directed public officers to ensure that the affirmative action reservations were adhered to. The public officers included Accounting Officers, Chief Executive Officers in State Corporations, County Governors, Vice Chancellors in Public Universities, Managers in Co-operative Societies, Principals of Public Colleges/Schools, and Constituency Development Fund (CDF) Account Officers

9.3 Public Procurement and Asset Disposal Act No. 33 of 2015

This Act was another milestone because it introduced the concept woman, which was defined to mean a person of the female gender who has attained the age of eighteen years. The Act also includes the definition of what constitutes

an women's group that can apply for contract as 'a company, association or body of persons, corporate or unincorporated in which at least seventy percent of the shareholders, members or persons and a majority of its directors are of the female gender' (pg. 1970). While this is a milestone in terms of women's access to AGPO, the challenge is that there is no accountability mechanism to ensure that the few men in the organizations are not the ones in control and thus taking advantage of the women in the group.

9.4 Legal Notice 69 on Public Procurement and Asset Disposal Arrangement of Regulations, 2020

This introduced the registration fee of fifty thousand shillings for companies/ entities wishing to do business with AGPO. This could be a drawback as most enterprises owned by the disadvantaged groups may not have such resources, particularly given the fact that the tendering is a competitive process and there is no guarantee that an enterprise will win a tender within the two-year registration limit. This means that women must pay the KES 50,000 every two years regardless of whether they win a tender or not, further depleting their meagre resources.

In summary, it can be argued that a lot has been done over the last 10 years in terms of legislation and regulations on AGPO to facilitate women and enable them to compete for contracts in government procurement processes. However, a lot more needs to be done because there are still challenges in implementation if women are to realize the 30 percent reservations already legislated.

10.0 Legal Analysis of AGPO: Enabling Provisions on Preferences and Reservations

The AGPO program is anchored on 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. The Public Procurement and Asset Disposal Act, 2015 and the Public Procurement and Asset Disposal Regulations, 2020 provide for preferences and reservations for women, youth, and people with Disabilities.

Reservation practice is where contracts or portions thereof are reserved for contractors who satisfy certain prescribed criteria, for example, contractors who are owned, managed, and controlled by a target population group. As regards preferences and reservations, Article 227(2) (a) and (b) of the Constitution provides that an Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for categories of preference in the allocation of contracts and the protection and advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination.

In addition, the Public Procurement and Asset Disposal Act, 2015 was enacted pursuant to and to give effect to Article 227 of the Constitution, 2010. It repealed the Public Procurement Disposal Act, 2005 and became effective on 7th January 2016. Section 3 (b) and (c) of the Public Procurement and Asset Disposal Act, 2015 provides that the public procurement shall be guided by the following national values and

principles as provided for in the Constitution 2010. Section 157 (4) (a) and (b) provides that for the purpose of protecting and ensuring the advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination, reservations and preferences shall apply to, among others, candidates such as disadvantaged groups, micro, small and medium enterprises. Several entities in these two classifications are owned by women and youth.

Section 157(5) proceeds to provide that an accounting officer of any procuring public entity shall, when processing procurement, reserve at least thirty percent (30%) of its budget to the disadvantaged group and comply with the provisions of the Act and the regulations in respect of preferences and reservations. While these reservations are made, available data shows that women, youth and PLWD have not yet achieved the 30% threshold as will be discussed in the next section. Section 157(9) provides that for the purposes of ensuring sustainable promotion of local industry, a procuring entity shall have in its tender documents a mandatory requirement as preliminary evaluation criteria for all foreign tenderers participating in international tenders to source at least 40% of their supplies from citizen contractors prior to submitting a tender while section 157(10) provides that every procuring entity shall ensure that at least 30% of its procurement value in every financial year is allocated to the youth, women, and persons with disability.

Section 157(11) requires every procuring public entity to ensure that all money paid out to an enterprise owned by youth, women or persons with disability is paid into an account where the mandatory signatory is a youth, woman, or a person with disability. This is meant to protect the

designated groups from being used by others. In addition, Section 157(12) & (13) require the procuring public entities to issue reports on compliance with all the aspects of Section 157 and provide data disaggregated to indicate the number of youths, women, and persons with disability whose goods and services have been procured by procuring entity after every six months to the Public Procurement Regulatory Authority (PPRA). Closely related to the foregoing is Section 157 (14), which requires the Public Procurement Regulatory Authority to make a report to Parliament after every six months for consideration by the relevant committee responsible for equalization of opportunities for youth, women, and persons with disability, which Report shall contain details of the procuring entities and how they have complied with the provisions of Section 157 of the Act.

Section 157(15), as read with (16), requires the Cabinet Secretary for the National Treasury to, within ninety days after the commencement of the Act, prescribe the preferences that shall facilitate the attainment of the quota specified in sub-section (10) for the State to achieve the objectives of Articles 55 and 227(2) of the Constitution, 2010.

Article 55 read with 54 and 56 of the Constitution, requires the State to take measures, including affirmative action programs, to ensure that people with disabilities, the youth, minorities, and marginalised groups of which women belong to have access to relevant training programs, information, participate in economic and other spheres of life and have access to employment (including self-employment through procurement).

Section 157(17) of the Public Procurement and Asset Disposal Act, 2015 requires the National

Treasury to operationalise a Preference and Reservations Secretariat to be responsible for the implementation of the preferences and reservations under the Act and responsible for:

- (a) Registration, prequalification and certification of the persons, categories of persons or groups as provided for under Part XII of the Act (preferences and reservations);
- (b) Training and capacity building of the above target groups;
- (c) Providing technical and advisory assistance to the procuring entities in the implementation of the preferences and reservations under the Act;
- (d) Monitoring and evaluating the implementation of the preferences and reservations under the Act.

Section 157(18) requires the National Treasury to provide adequate staff and resources for the operations of the Secretariat. Section 158 requires the procuring public entities to integrate preferences and reservations into their procurement plans and to ensure that they submit to the PPRA the part in the procurement plan demonstrating application of preference and reservation schemes in relation to the procurement budget within sixty days after the commencement of the financial year. Section 140 of the Public Procurement and Asset Disposal Act, 2015, provides that, unless the contract provides otherwise, public entities which delay payments to suppliers shall pay interest on the overdue amounts and that the interest and liquidated damages to be paid shall be in accordance with prevailing mean commercial lending rate as determined by the Central Bank

of Kenya. Despite the above provision, several suppliers falling within women, youth and people with disabilities are still suffering from delayed payments. The situation is further complicated by the fact that the law allows the contract to waive interest and several suppliers under these categories often have weaker bargaining power for the contracts.

The Public Procurement and Asset Disposal Regulations, 2020 are regulations issued under Section 140 of the Public Procurement and Asset Disposal Act, 2015. Part XII of the regulations' centres generally on preferences and reservations in public procurement.

Regulation 145 (2) (b) and (3) on eligibility criteria provides that a person shall not be qualified to benefit from a preference and reservation scheme as a micro enterprise or an enterprise owned by a disadvantaged group, unless that person is registered by the National Treasury as such upon application. It further provides that all small, micro, and medium enterprise groups or disadvantaged groups that have been registered by the National Treasury shall automatically be included in the list of registered suppliers of a procuring entity upon submission of the National Treasury Registration Certificate.

Regulation 149 provides that an accounting officer of a procuring entity shall, when processing procurement under Section 157(5) of the Act, allocate at least thirty percent (30%) of its annual procurement budget for the purposes of procuring goods, works and services from enterprises owned by women, youth and people with disabilities and shall make payment within sixty (60) days from the date of receipt of the invoice. Regulation 150 provides as follows:

1. Subject to the availability of funds and after proper certification of the goods, services or

works has been done, a procuring entity shall make prompt payments for all performed contracts, including enterprises owned by youth, women or persons with disabilities and shall make payment within sixty days from the date of the invoice.

2. Where delay of payments for goods, works and services performed is likely to happen, a procuring entity may facilitate invoice discounting arrangements with a financial institution for the purpose of advancing credit to the affected enterprises stated in paragraph (1).
3. For the purpose of implementing the provisions of paragraph (1), a procuring entity shall implement the requirement through its budgets, procurement plans, tender notices, and contract awards.
4. A procuring entity shall submit a quarterly payment performance statistic to the National Treasury and the Authority demonstrating compliance with the obligation to pay invoices within sixty days for publication.

Regulation 154 provides as follows:

1. Despite the provisions of section 54 (1) of the Act, a procuring entity may, for the purpose of ensuring maximum participation of citizen contractors, disadvantaged groups, small, micro and medium enterprises in public procurement, unbundle a category of goods, works and services in practicable quantities;
2. For greater certainty, a procuring entity in unbundling procurements in paragraph (1) may lot goods, works or services in quantities that are affordable to specific target groups participating in public procurement proceedings;

3. For avoidance of doubt, unbundled procurement proceedings shall be restricted to disadvantaged groups, small, micro and medium enterprises.

Regulation 155 provides as follows:

1. No tender security shall be required from small, micro and medium enterprises or enterprises owned by disadvantaged groups participating in reserved procurement proceedings;
2. (2) Despite paragraph (1), target groups shall be required to complete and sign the Tender Securing Declaration Form set out in the Fifth Schedule to these Regulations;
3. Any bidder from the target group who fails to adhere to the terms of the Tender Securing Declaration Form shall be liable for debarment pursuant to section 41 of the Act;
4. Regulation 156 provides that an enterprise registered by the National Treasury as a target group benefitting from the preference and reservation scheme shall be entitled to such benefits for a period of two (2) years, which may be renewed biennially for up to a maximum period of ten (10) years.

Regulation 159 provides that a procuring entity shall make use of existing framework contracts or framework agreements with disadvantaged groups, small, micro, and medium enterprises to provide an efficient, cost effective and flexible means to procure goods, works and services that are required repeatedly or continuously over a set period.

Regulation 160 provides that:

- a. the application of the preference and reservation scheme by procuring entities shall be monitored by the Authority and the National Treasury pursuant to sections 9 (1) (e) and 157 (17) (d) of the Act respectively and that
- b. any report prepared pursuant 8 to section 157 (17) (d) of the Act by the National Treasury on the implementation of the preference and reservation scheme shall be shared with the Authority.

In summary, it is commendable that the legislation, regulations and implementing institutions are in place for AGPO. It is also commendable that the Government has set aside reservations for disadvantaged groups that include women and are specific as to what this group is entitled to under the AGPO regulations. Further research should be undertaken to identify what the gaps are as women are still not utilizing the AGPO as expected.

PART THREE: PERFORMANCE OF AGPO

Part 3 will examine operations and identify the gaps in the effectiveness of AGPO. One of the advantages of AGPO is that it is a major driver of the economy in Kenya and it accounts for 10 percent of the GDP (Kiriti-Ngang'a, 2017). It also accounts for 70% of government expenditures and remains a substantial market and avenue for fiscal empowerment by securing space for potential suppliers from marginalised groups, including women. This means that if the AGPO Program operations are efficient and effective, women, youth and PWD would benefit tremendously.

11.0 Public Procurement

Public procurement as a gateway to the empowerment of marginalised communities

and special groups is a growing recognised approach to combat poverty and promote inclusive economic growth. Since AGPO was established, women, youth and PWD have benefited from the program and the value of tenders has increased over the years. The value of the contracts, for example, increased from KES 7.4 million in 2015/16 to KES 17.2m in 2019/2020 (KNBS, 2020). The Kenya Economic Survey further notes that women received only 26 percent of the total amount of funds reserved in the 2019/2020 financial year (KNBS, 2020). Data for the five- year period was analyzed to determine the amount awarded through AGPO against the amounts reserved. Table 1 shows the amounts awarded against the amounts reserved for a period of 5 years.

	2015/2016		2016/2017		2017/2018		2018/2019		2019/2020	
	Amount Reserved (Kshs Mn.)	Amount Awarded								
Ministries/State Departments	21,383.00	10,499.00	16,160.00	15,151.00	19,675.00	12,618.00	15,048.00	13,535.00	16,252.00	14,358.00
State Corporations	9,839.60	5,176.00	26,025.00	6,480.00	33,472.00	9,424.00	29,133.00	10,350.00	31,464.00	11,264.00
Commissions & Independent Offices			4,238.00	829.00	1,925.00	492.00	4,610.00	774.00	4,979.00	792.00
Universities & Colleges			1,073.00	1,024.00	1,734.00	804.00	1,716.00	1,290.00	1,853.00	1,344.00
Counties Executives			3,267.00	1,104.00	6,542.00	3,405.00	8,645.00	4,153.00	9,336.00	4,908.00
County Assemblies			301.00	20.00	266.00	51.00	473.00	37.00	511.00	73.00
Sub Total	31,222.60	15,675.00	51,064.00	24,608.00	63,614.00	26,794.00	59,625.00	30,139.00	64,395.00	32,739.00
AA/AR (%)		0.50		0.48		0.42		0.51		0.51
TAR	269,921									
TAA	129,955									
TAA/TAR (%)	48%									

Source: KNBS Economic Survey, 2020

Data in Table 1 indicate that from the total amounts reserved for AGPO, only 48% was awarded. The implementation of awarding tenders lies with the government agencies and an analysis of the performance by the government agencies in awarding AGPO was undertaken.

The percentage of the amount awarded against the amounts reserved by various government agencies is shown in Table 2 below.

Table 2: Amount Awarded against the Amounts Reserved by Various Government Agencies

	2016/2017	2017/2018	2018/2019	2019/2020	Average (AA/AR)	Av. Amount Not Awarded
Ministries/State Departments	94%	64%	90%	88%	84%	16%
State Corporations	25%	28%	36%	36%	31%	69%
Commissions & Independent Offices	20%	26%	17%	16%	19%	81%
Universities & Colleges	95%	46%	75%	73%	72%	28%
Counties Executives	34%	52%	48%	53%	47%	53%
County Assemblies	7%	19%	8%	14%	12%	88%
Av. TAA/TAR					44%	56%

	2016/2017	2017/2018	2018/2019	2019/2020	Average (AA/AR)	Av. Amount Not Awarded
Ministries/State Departments	94%	64%	90%	88%	84%	16%
State Corporations	25%	28%	36%	36%	31%	69%
Commissions & Independent Offices	20%	26%	17%	16%	19%	81%
Universities & Colleges	95%	46%	75%	73%	72%	28%
Counties Executives	34%	52%	48%	53%	47%	53%
County Assemblies	7%	19%	8%	14%	12%	88%
Av. TAA/TAR					44%	56%

While some state agencies such as ministries/ state departments have achieved high rates of performance of 84% on average for a 5-year period, others such as the county assemblies have awarded only 12% of the amount reserved for AGPO. More research will identify the challenges at the county levels affecting the performance of AGPO reserved projects.

In addition, a study by HIVOS found that the program is largely benefitting urban youth, women and persons with disability disproportionately more than their rural counterparts (HIVOS, 2018). Despite it being a national initiative, it is currently largely serving the capital city, Nairobi with the highest registered firms being in Nairobi County (67%), followed by Mombasa (6%) and

Kiambu (5%) (HIVOS, 2018). Studies have also shown that Kenya has very strong legislation and regulations for procurement but there is need to focus on efficiency, accountability, application and the disbursement processes (Otieno, 2015); (Kiriti-Ngang'a, 2017); (OECD, 2007).

Studies show that the youth, women, and persons with disabilities targeted for AGPO reservations are less likely to receive skills training which puts them at a greater risk of being unemployed and having no source of income (Attaran, 2002). The Government of Kenya has supported the strengthening of the Program by reducing the number of required documents. The 2015 Companies Act, for example, eliminated the requirement to have registration documents notarized before the Commissioner of Oaths.

Studies show that the youth, women, and persons with disabilities targeted for **AGPO reservations are less likely to receive skills training** which puts them at a greater risk of being unemployed and having no source of income (Attaran, 2002).

This has reduced procedural complexity and the time to start a business overall. In addition, stamp duty on the memorandum and articles of association and the statement of nominal capital was abolished. Further, financial support through Uwezo Funds, the Women Enterprise Fund, the Youth Enterprise and Development Fund, and the National Fund for Persons with Disability has been provided to cover the cost of supplies required. Other measures include an introduction of E-procurement to motivate the beneficiaries to participate in public procurement and to reduce the cost of doing business in Kenya. Despite all these changes, there are still significant challenges that face the procuring entities and the potential beneficiaries which have contributed to the low utilization of the public procurement opportunities that are available at both levels of government as Table 3 below demonstrates.

Table 3: Number of firms/companies registered under AGPO for the period 2015 -2020

Year	Number	% reduction
2015-2018	104,776	
2018 - 2019	42,092	59%
2019-2020	24,010	43%

Source: Public Procurement Regulatory Authority <http://ppra.go.ke/agpo list/>

11.1 Registration

Instead of a periodic increase, there has been a decrease of registered firms with AGPO. Of note is that an AGPO certificate is valid for 2 years only and must be renewed. Part of the reason could be that most firms do not reregister after time expiry, especially if they have not been awarded any contracts during the period that the certificate was valid for. In addition to the decrease of registered businesses, the study shows that the average size of the tenders remains the same, as shown in Table 4.

Table 4: No of tenders vs the value of tender awarded under AGPO

	No. Of Tenders	Value of Tenders (Kshs Mn)	Average Tender Size (Kshs)
2015/2016	17,349.00	15,675.00	903,510.29
2016/2017	32,510.00	24,608.00	756,936.33
2017/2018	26,916.00	26,795.00	995,504.53
2018/2019	31,651.00	30,140.00	952,260.59
2019/2020	32,989.00	32,739.00	992,421.72

Source: Public Procurement Regulatory Authority <http://ppra.go.ke/agpo list/>

This could be a result of opportunities accorded to the affirmative groups which have high frequency but low finance impact, for example, cleaning activities, printing and stationery as shown in Table 5 below.

Table 5: Registered and certified enterprises under AGPO since inception in 2013

Target Group by Category	Number	Proportion (%)
Youth	25,549	37.47
Women	39,681	58.2
PWDs	2,956	4.34
Total	68,186	100

Source: AGPO Secretariat at National Treasury 6th September 2017

As Table 5 shows, there are more women in the general supplies category than in any other category, followed by small engineering works and professional services and consultancy. This is contrary to expectations because it involves a lot of expenses plus the fact that one has to be registered with the National Construction Authority (NCA), meaning that registration has to be done twice: with AGPO and with NCA. This could be attributed to the allegation by the procuring entities of women fronting for rich businessmen. It could also be attributed to the fact that the general supplies and construction are the most lucrative compared to the others. Very few women are found in ICT services and fresh produce.

To qualify for a contract under the 30 percent set aside quota, a woman/youth or PWD entrepreneur must first acquire an AGPO certificate. To qualify for this certificate under the preference and reservations scheme, an enterprise should be a legal entity that is registered with the relevant government body and has a proprietorship or directorship of at least 70 per cent of the preference group they wish to apply for, for instance, made up of 70 per cent women to qualify for the women's category. The above is assuming the enterprise is already registered and it has:

1. A certificate of incorporation;
2. Business Registration Certificate/Certificate of Incorporation;
3. PIN/VAT Certificate;
4. A Tax Compliance certificate;
5. Partnership Deed for Partnership Business;
6. Memorandum/Articles of Association and CR12 mandatory for registered companies which must indicate who the majority shareholders are;
7. All the necessary licenses, for example, Construction Category, Letter/Certificate from the National Construction Authority, Energy Regulatory Commission, or any other Authorized Public Technical Body.

The total cost of obtaining an AGPO certificate can range from KES7,800 if it is not in the construction sector to KES12,800 if it is in the construction sector. The cost can also be higher depending on the type of business permit and the County. Obtaining a single business permit costs KES6,800 in rural counties such as Nyeri and KES15,200 in Nairobi.

To obtain these documents it requires moving from home or where the business is situated to the nearest Huduma Centre or the County Treasury to apply for a business permit. The certification process although challenging is compounded by financial challenges which may even make it difficult for a woman entrepreneur to win a tender.

Data shows that Nairobi County has the highest number of registered AGPO firms accounting for 76 percent of total registered firms. Nairobi is followed by Mombasa (6 percent) and Kiambu (5 percent), Nakuru and Uasin Gishu (2 percent); Kisumu, Kajiado, Kitui, Nyeri (1 percent) each. This may be due to limited access to information regarding AGPO tenders, National Construction Authority (NCA especially in the rural areas outside Nairobi.

11.2 Pre-qualification

The next stage is pre-qualification where an enterprise can be registered for pre-qualification to supply goods, works, services and consultancies to whichever institution sends out a Notice for Pre-Qualification. Pre-qualification is beneficial, as institutions are supposed to call upon pre-qualified suppliers directly to bid for a tender in their field, as opposed to putting out Expression of Interest (EOIs) or Request for Proposal (RFPs) notices although some institutions announce open EOIs but even then, pre-qualified suppliers have an added advantage.

When tender notices are circulated nationally, bidders are usually given a period to purchase or download the tender document from the procuring agent's website. The bids that ultimately comply with the eligibility criteria of the notice and the bidding document are evaluated after tender opening.

The tender is then awarded after an exhaustive evaluation. Filling out the documents can be a tedious and discouraging process for the less educated women entrepreneurs and it may lead to disqualification if instructions are not followed properly.

11.3 Preparation of Financial and Technical Proposal

The next stage is preparation of a financial and a technical proposal. To successfully win a tender, the woman entrepreneur's financial proposal should be the most competitive compared to those of the other competitors. In the tender documents, one needs to specify the credit period because the contract obligates the supplier to continue supplying the goods and services for the duration of the contract even when an invoice has not been honoured. So, the entrepreneur needs to have a good relationship with a bank which can extend credit required to purchase the goods to supply while waiting for payment for goods supplied or services rendered. This can be quite a challenge for new businesses that do not have a credit history.

Banks and other micro-finance institutions are not always ready to lend to a start-up because they have no credit history. Recommendation letters may also be required, and these can also be a challenge to a new business.

11.4 Award of Tender

Assuming that a woman wins a tender under the AGPO initiative after having bought the documents and supplied the goods using bank credit, her next challenge will be delayed payments. A lot of money is held up for long, which is discouraging if she is servicing a loan.

To successfully win a tender, the woman entrepreneur's financial **proposal should be the most competitive** compared to those of the other competitors

Apart from the challenges that women face as they try to access these opportunities, critics argue that the country's procurement procedures are still bureaucratic and lack the desired transparency.

In addition, some of the contracts are "abnormally" capital intensive, thus locking out would-be beneficiaries who may not necessarily have the amount of money required to carry out such capital-intensive contracts.

Because of such limitations, enterprises that qualify to undertake government jobs can get

only considerably basic contracts. This is a view that is entrenched within government, with all the procuring entities setting aside what is known within the procuring entities as 'grass cutting' jobs for the youth, women, and persons with disabilities. Thus, contracts set aside for these groups will include delivery of flowers, newspapers, office stationery, cleaning services and maintenance of grounds. The latter involves maintenance of gardens and hence the name grass cutting.



Assuming that a woman wins a tender under the AGPO initiative after having bought the documents and supplied the goods using bank credit, her **next challenge will be delayed payments.**

PART FOUR: CHALLENGES IN THE IMPLEMENTATION OF THE AGPO PROGRAM, RECOMMENDATIONS AND CONCLUSION

12.0 Challenges in the Implementation of AGPO

The biggest challenge to the AGPO program is the fact that firms owned by women, youth and persons with disabilities participate in low value procurement, popularly referred to as *grass cutting jobs* instead of high value consultancies, contracts on engineering, law, accounting, etc that pay at least a million dollars per contract. The average size of a contract for contracts awarded under the Reserve scheme was KES 17.2 million in 2019/2020 (KNBS, 2020). Another notable challenge is that even though Kenya's budgets have grown substantially in the last decade, what has been considered reserved procurement has not grown at the same rate. This phenomenon has been caused primarily by barriers of entry which come in the form of fees, and information asymmetry. The following challenges have been identified in respect to the full implementation and actualisation of the 30% affirmative action towards women, youth, and people with disabilities.

12.1 Challenges from Procurement Law

The Public Procurement Law and Practice to date remains largely complicated and bureaucratic even with the passing of the Companies Act, 2015 which introduced an automated company's registry, and an E-Citizen platform. that made it possible for easier registration of companies, access to secure Kenya Revenue Authority

Personal Identification Number (PIN) and tax compliance certificate among another statutory requirement.

Despite this effort in making registration more efficient, many women, youth and people with disability still find it hard to participate in the tendering opportunities and where they do, participation is not as effective and successful as expected.

Procurement procedures and criteria are complex, burdensome, and costly for new entities, too technical, requiring specialised bidding skills and limiting compliance costs. Accounting officers and boards of government entities disregard legal obligations to set aside reservations for the women, persons with disabilities and the youth.

Because of failure to consider the income differences between urban and rural areas, the AGPO initiative is largely benefiting urban youth, women, and persons with disabilities disproportionately more than their rural counterparts.

Kenya has a youthful population, approximately 75% of which is classified as youth and with a median age of 19 years as per the Kenya Population and Housing Census of 2019. There's need to evaluate whether the 30% reservation scheme is sufficient.

The biggest challenge to the AGPO program is the fact that firms owned by women, youth and persons with disabilities participate in **low value procurement, popularly referred to as grass cutting jobs** instead of high value consultancies, contracts on engineering, law, accounting.



12.2 Challenges Arising from Information Asymmetry

Access to information is another concern, because most of the tender opportunities are advertised through newspapers and government tender portals with the newspapers and internet remaining out of easy reach to several members of the disadvantaged groups, especially in the rural areas.

There is inadequate awareness and lack of information on the preferences and reservations. This can largely be attributed to inadequate resources within the public procuring entities, the Public Procurement Regulatory Authority and the National Treasury Secretariat on preferences and reservations to undertake extensive nationwide capacity building on the available opportunities and reservations under the Act. The inadequate awareness and lack of information can also be

explained by the inaction or lack of initiative by the accounting officers to deliberately open up opportunities for groups under affirmative action.

Whereas the Public Procurement and Asset Disposal Regulations, 2020 came into effect recently on 2nd July 2020, and have quite commendable provisions on reservations and preferences, they remain generic and do not specifically address challenges and systematic problems of preferences and reservations as should be the case with the preferences and reservations regulations under the repealed Act which remains applicable but needs to be phased out or revised to align it with the new Act. As such, fresh regulations on preferences and reservations should be developed to further amplify on and give further guidance on the application of Section 157 of the Public Procurement and Asset Disposal Act, 2015.

12.3 Challenges Faced by the AGPO Secretariat

Customer experience and support from the AGPO Secretariat and other structures such as Huduma Centres has been reported to operate with significant delays on inquiries about application approvals, certification, and others. The capacity and knowledge of the procurement staff within the public entities is inadequate. Most of the AGPO staff are unable to support the vendors because they have inadequate capacities in business knowledge and skills to assist those interested in bidding.

12.4 Financial Challenges

Financial inclusion and access to credit remains a challenge and out of reach to some members of these groups. In addition, the delay in payment by procuring institutions makes the AGPO contractors incur accrued interest charges by

financial institutions on loans taken to meet the tendering requirements. This erodes the profit margins (if any) from the AGPO opportunities.

12.5 Lack of Experience in Undertaking Larger Projects

As a result of systematic exclusion since independence, the majority of women, persons with disabilities and youth lack experience even though they may have the capacity to deliver on complex, complicated and high-ticket projects and contracts which continue to remain the preserve of large infrastructure or consultancy companies some of which are foreign owned. One pre-requisite is to show experience, e.g. how many projects has the applicant undertaken.

12.6 Corruption and Nepotism

Lack of response from government offices regarding procurement under the affirmative action initiative or payment after completion of contractual obligations and numerous allegations of rampant corruption which can be classified as procurement fraud where the award of contracts has been skewed to benefit certain actors, leaving out deserving groups have been reported. Another issue is nepotism in the award of tenders where procurement officers benefit directly.

13.0 Legislative Proposals

- The three disadvantaged groups identified in the AGPO legislation should be included in the various Tender Evaluation Committees to ensure they address the interests of their specific categories.
- Reports should indicate both the tenders and percentage of total funds a procuring agency has awarded and paid to each of

the disadvantaged groups. The youth and PLWDs reporting should also consider women in these groups.

- The regulations should be amended to make it mandatory to provide disaggregated data reporting for the affirmative action.
- Public Procurement staff ought to demonstrate
 - understanding of the legal framework governing preference and reservation schemes in Kenya;
 - understand the objectives and purposes of preferences and reservations;
 - apply the general principles of preferences; and
 - categorise procurement for the purposes of allocation to targeted groups in accordance with the Constitution, the procurement law, and regulations. The law should be revised to make this an obligation to accounting officers;
- Create an enforcement mechanism for compliance with the Public Procurement and Asset Disposal Act, 2015, the Public Procurement and Asset Disposal Regulations, 2020 and more specifically with the provisions bearing on reservations and preferences by the procuring public entities, the Public Procurement Regulatory Authority, Parliament, and the relevant Parliamentary Committee to give effect to and ensure full compliance with all the sections and regulations.

14.0 Reducing Barriers of Entry

- Disadvantaged groups should get a waiver on the KES 50,000 registration fee or the fee be made a one-off payment.
- To allow for women, persons with disabilities and youth to compete fairly with other categories, all other fees such as the NCA registration fee should be phased out once a firm has registered for AGPO.
- Increase the capacities of potential applicants outside and within Nairobi to accurately interpret procurement requirements and documents. A specific public education program should be designed at subcounty level across the Country.
- Create a secured credit access system such as the credit guarantee scheme proposed by the National Treasury for the SMEs to address the effects of the COVID-19 pandemic and enforce the provisions on penalties for delayed payments under the Public Procurement & Asset Disposal Act, 2015 and the Public Procurement and Asset Disposal Regulations, 2020 and ringfence the funds reserved in tenders to make sure that these funds are not reallocated to other activities.
- In order to build capacity and experience for the high value contracts, the Ministry of Gender and Public Service can convene a peer learning group together with other stakeholders such as women groups, development partners, leading firms in respective fields. One example of such peer learning groups are the Women in Manufacturing groups of the Kenya Association of Manufacturers. This will

create a networking effect where firms under the affirmative action initiative can build knowledge and networks. Some of the learning areas that would benefit firms under affirmative action groups include taxation, finance, export markets, value chains, standards, company law landscape amongst other things.

- The Existing Affirmative Action Funds should be better coordinated, operated, and run under good corporate governance principles so as to maximise AGPO benefits and minimise silo operations.
- Stakeholders should petition the Parliament to consider the pattern-or-practise probe with the intend to show systematic discriminatory practises and violations of the law in the government procurement process, especially with regards to the higher value contracts. A pattern-or-practise probe is an intense evaluation of a program with the aim of improving its efficiency. The probe can address issues ranging from law, inactions or omissions by accounting officers (including claims of demanding sex for contracts), and other emerging issues.

15.0 Administrative Reforms

- Strengthen the capacities of AGPO staff to enable them to guide the applicants effectively;
- Train applicants on procedures of application to enhance the AGPO uptake;

Create a secured credit access system such as the credit guarantee scheme proposed by the National Treasury for the SMEs to address the effects of the COVID-19 pandemic

The Ministry of Gender and Public Service should endeavour to create **a Tender Board (website) where all tenders under the reservation scheme are updated in real time** once each entity has advertised them

- Strengthen the coordination among key government ministries and departments involved in the implementation of AGPO. These should include the National Treasury and all government institutions highlighted in the legislation;

- In addition to the above, the AGPO Secretariat should work closely with the Ministry of Public Service and Gender and the various women networks and institutions towards optimal realisation of the AGPO program benefits;
- Revamp and continuously enhance the staffing and resources at the AGPO Secretariat established under Section 157 (17) of the Act to effectively deliver on its mandate.
- Strengthen the transparency in the registration of AGPO related firms to curb the exploitation of the genuine disadvantaged groups by men who may have the financial resources to bid for the tenders;
- Create a solid communication plan every fiscal year that will allow for information to reach all women in urban and rural areas, a plan which is actionable and mandatory for Accounting Officers to undertake;
- The Ministry of Gender and Public Service should endeavour to create a Tender Board (website) where all tenders under the reservation scheme are updated in real time once each entity has advertised them. This is necessary to solve the issue of lack of information when entities advertised in the newspapers. Each entity must also update the same advertisement on its own website;

- The Ministry of Public Service and Gender should be given the evaluation role of the AGPO program on a half-year basis. The findings by the Ministry should be published in a Gazette notice to allow actors and stakeholders in different fields such as Manufacturing, Law, accounting and engineering to follow up with those entities and ensure they meet the goals of the program;
- The Kenya National Bureau of Statistics should publish firm data that follows affirmative action paradigm. Firm data in this case would entail, size of firm, value of contracts, number of employees, taxes paid, new output generated and fiscal multipliers of the program and other important parameters that show the economic output of the program. This will complement the data published annually by the Public Procurement Regulatory Authority Kenya (PPRA);
- Other public procurement (which is not reserved) especially with those relating to technical services, the firms bidding should demonstrate gender diversity-which is a constitutional imperative. The unintended effect of that is that it would force those firms to take onboard women to be competitive in the bidding process and eventually thus solve the issue of women having no experience.

The Ministry of Public Service and Gender should be **given the evaluation role of the AGPO program on a half-year basis.**

16.0 Conclusion

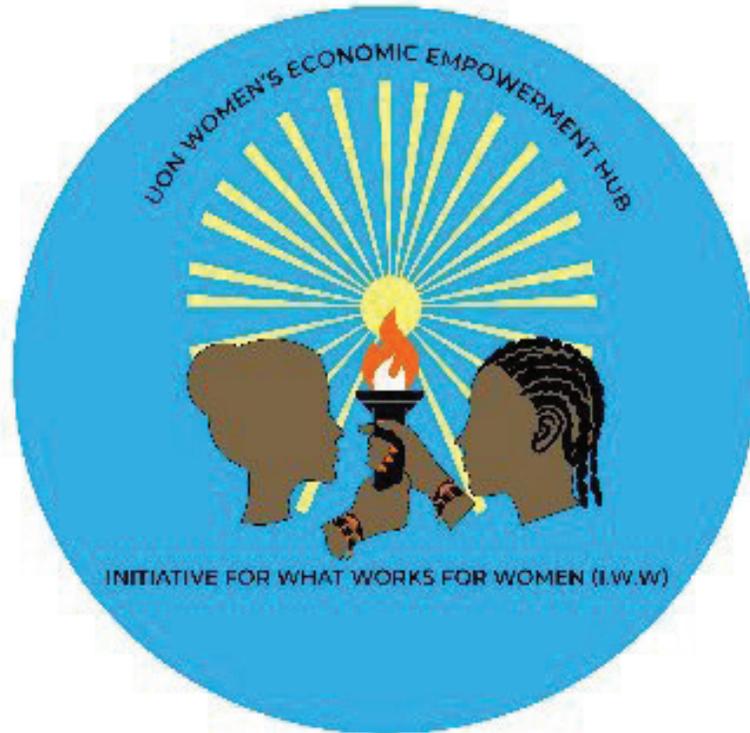
It is evident that the AGPO Program has to a large extent empowered the special groups that had been targeted since its formation. However, the challenges still exist and need to be addressed for the Program to achieve its full potential. A way forward would be to implement the recommendations given in this Report and to incorporate a monitoring and reporting system that will collect information based on disaggregated data that can be used to further streamline the procurement and contracting processes. In addition, undertake an assessment of what has been achieved since the existing studies were conducted. The evidence available suggests that there is political goodwill to ensure that AGPO succeeds. This, however, should be backed up by enforcement and accountability measures that will lead not only to the success of the Program but also to the achievement of its purpose.

References

- Fairlie, R., & Marion, J. (2012). Affirmative Action Programs and Business Ownership among Minorities and Women. *Small Business Economics*, 39(2), 319–339. <https://doi.org/10.1007/s11187-010-9305-4>
- Fullinwider, R. (2018). *Affirmative Action*. The Stanford Encyclopedia of Philosophy (Summer 2018) Edition.
- Jenkins, L. D., & Moses, M. S. (2014). Affirmative Action Initiatives around the World. *International Higher Education*, 77, 5–6. <https://doi.org/10.6017/ihe.2014.77.5672>
- Justin, M. (2011). *Affirmative Action and the Utilization of Minority- and Women-Owned Businesses in Highway Procurement.html*. Economic Enquiry.
- Kiriti-Ngang'a, T. (2017). *Kenya Assessment of Access to Government Public Procurement Opportunities for Women, Youth and Persons with Disabilities.pdf*. UN Women.
- Leonard, A. (2005). *Affirmative Action in South Africa: Development Approaches and Legislative Requirements*. <https://repository.up.ac.za/bitstream/handle/2263/28248/03chapter3.pdf?sequence=4&isAllowed=y>
- Leonard, J. S. (1989). Women and Affirmative Action. *Journal of Economic Perspectives*, 3(1), 61–75. <https://doi.org/10.1257/jep.3.1.61>
- Ochieng, J., & Muehle, M. (2014). *Development and Reform of the Kenyan Public Procurement System*. 21.
- OECD. (2007). *Assessment of the Procurement System in Kenya.pdf*.
- Otieno, A. O. (2015). Factors Affecting Implementation of Public Procurement Reforms in County Governments in Kenya. *UON*, 68.
- Ratuva, S. (2013). *Politics of Preferential Development Trans-Global Study of Affirmative Action and Ethnic Conflict in Fiji, Malaysia and South Africa*. Australian National University Press.
- Weisskopf, T. E. (2004). *Affirmative Action in the United States and India* (0 ed.). Routledge. <https://doi.org/10.4324/9780203799970>
- Xavier, G., & Xavier, J., Anthony. (2016). *Public Procurement in Malaysia: Is there a Need for Reform? A Look at the Objectives of Public Procurement Principles with Particular Emphasis on Transparency and Accountability*. 20.

¹<http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=->

Kenya has a youthful population, **approximately 75%** of which is classified as youth and with a median age of **19 years as per the Kenya Population and Housing Census of 2019**



UNIVERSITY OF NAIROBI
African Women's Studies Centre
Women's Economic Empowerment Hub
P.O Box 30197-00100
Website: Weehub.org
Nairobi, Kenya.

...the thought-leader in cutting edge research for WEE