

SUPREME COURT CLOSES THE LOOPHOLE ON "SPECIALLY PERMITTED" AWARDS IN PROCUREMENT LAWS

Governments across the world frequently appeal to national security, emergencies, or "special circumstances" when seeking to bypass established procedural laws—particularly those that govern public procurement. These invocations, while occasionally justified, are often exploited as a veil of opacity, enabling procurement decisions to occur beyond the reach of public scrutiny or institutional oversight.

Kenya is no exception to this trend. This culture of opacity has recently come under judicial scrutiny in Supreme Court Petition No. E011 of 2024, Omtatah v. Portside Freight Terminals Ltd & 12 Others. At the center of this case was the use of the Specially Permitted Procurement Procedure (SPPP)—a procurement method shrouded in discretion and introduced under Section 114A of the Public Procurement and Asset Disposal Act (PPAD Act) introduced through the Finance Act No. 15 of 2017.

The Specially Permitted Procurement Procedure was ostensibly designed for exceptional cases—where innovation, time sensitivity, or strategic interest might make traditional procurement untenable. However, in practice, the method has become a legal gray zone: one that enables public entities to circumvent competitive tendering with minimal justification and little public oversight.

The petition challenged the legality and constitutionality of the procurement process by which Portside Freight Terminals Ltd was awarded a license and wayleave for the construction of a second bulk grain handling facility and an island berth at the Port of Mombasa.

The project originated from an unsolicited proposal submitted by Portside Freight Terminals to the Kenya Ports Authority (KPA), which then granted approval using the SPPP method—arguably without adhering to principles of open competition or transparency. The petitioner argued that this process flouted key constitutional provisions—Articles 10 (national values and principles), 201 (principles of public finance), and 227 (procurement of public goods and services)—as well as the broader provisions of the PPAD Act.

The Supreme Court of Kenya issued a landmark judgment that definitively establishes the legal parameters surrounding the Specially Permitted Procurement Procedure (SPPP) under the Public Procurement and Asset Disposal Act (PPAD Act)—effectively eliminating its misuse as a vehicle for bypassing mandatory competitive tendering.

WHY DOES THIS MATTER?

Because this precedent decisively curbs the manipulation of "special procedures" as clandestine mechanisms to grant exclusive government contracts, thereby restoring the primacy of constitutional principles—integrity, equity, and transparency—in public procurement.

ISSUES

The Supreme Court meticulously evaluated whether KPA:-

- Substantiated the existence of "exceptional circumstances" warranting the use of the SPPP;
- Fulfilled the mandatory pre-qualification obligations under Section 93 of the PPAD Act;
- Complied with the overarching constitutional principles under Articles 10(2)(c), 201(a), and 227(1)—namely fairness, equity, transparency, accountability, and competition.

KEY TAKEAWAYS FOR PROCUREMENT AND PUBLIC FINANCE PROFESSIONALS

1. **All procurement methods, including SPPP, must meet constitutional standards:**

Fairness, equity, transparency, competitiveness, and cost-effectiveness are not optional. The Supreme Court expressly condemned the notion of treating the SPPP as a "preference" or an exploitable loophole under Section 93 of the PPAD Act.

2. **"Exceptional circumstances" under Section 114A(2)(a) must be demonstrably proven—not merely asserted**

KPA's rationale that an open tender would be "impossible, impracticable, or uneconomical" was unsubstantiated and unpersuasive. The Court reaffirmed that public urgency or administrative convenience cannot override statutory procurement safeguards.

3. **Pre-qualification under Section 93 is a binding obligation and mandatory**

The Court held that the use of the word "may" must be interpreted in light of Article 227 of the Constitution. Accordingly, failure to conduct expressions of interest and a transparent pre-qualification process renders the procurement process unlawful.

4. **Compliance with conditional approvals from the Cabinet Secretary is legally enforceable**

If the Cabinet Secretary authorizes an SPPP subject to specific conditions—such as amending tender documentation—such conditions must be strictly complied with before execution can proceed. KPA's disregard of these terms vitiated the procurement process.

5. **Procurement projects must be aligned to the correct legal framework - Mischaracterizing procurement methods invites legal peril**

The Court underscored that the grain terminal project was better suited to the Public-Private Partnership (PPP) model due to its scale, structure, and commercial implications. Misclassifying the procurement method exposes procuring entities to statutory non-compliance, financial loss, and reputational damage.

HOW CM ADVOCATES LLP CAN HELP

The Public Procurement and PPP Legal Practice Group at CM Advocates LLP is uniquely positioned to provide expert legal support across the entire procurement and infrastructure project lifecycle. Our services span from structuring and negotiating PPPs, advising on regulatory compliance, preparing compliant bids, handling Public Procurement Administrative Review Board (PPARB) litigation, and managing disputes arising from non-compliance or misapplication of the PPAD Act. We assist both public entities and private sector bidders in navigating conditional approvals, aligning project delivery models with the correct legal regime, and mitigating exposure to financial and legal risks. With a track record in complex, high-value projects across East Africa

and beyond, our team offers not only legal precision—but strategic foresight.

FINAL THOUGHT: LEGAL COMPLIANCE IS NOT AN OPTION

For both local and international investors seeking to engage in Kenya's public sector through tenders, direct licensing, or Public-Private Partnerships (PPPs), strict legal and regulatory compliance is critical.

Contracts issued in breach of the Public Procurement and Asset Disposal Act (PPAD Act) or constitutional requirements are vulnerable to cancellation, injunctive orders, refund obligations, and reputational damage. Government agencies and their officers face significant risks—ranging from audit sanctions and litigation to personal liability under the Public Finance Management Act and the Leadership and Integrity Act.

YOUR LEGAL ADVISOR OF CHOICE

CM Advocates LLP offers specialised, strategic, and compliant legal counsel for investors and public sector participants navigating Kenya's procurement and PPP landscape.

Our team provides end-to-end legal support—including:

- Pre-bid advisory
- Contract documentation review
- Regulatory compliance audits
- Representation before PPARB and courts
- PPP structuring and project due diligence

We help safeguard your investments, promote compliance, and mitigate risk across all phases of public sector engagement.

CONTACT US:

Let us guide your next government project—compliantly, securely, and confidently.

CM Advocates LLP
I&M Bank House, 7th Floor,
2nd Ngong Avenue, Nairobi, Kenya
law@cmadvocates.com | +254 716 209 673

For direct queries, contact **Mr. Wilfred Lusi**, *Head of Dispute Resolution*: ***wlusi@cmadvocates.com*** or **Cyrus Maina**, *Managing Partner*: ***cmaina@cmadvocates.com***

Contact Persons & Contributors



Cyrus Maina
Managing Partner
cmaina@cmadvocates.com



Wilfred Lusi
Partner
wlusi@cmadvocates.com

www.cmadvocates.com

Disclaimer; *This article is for informational purposes only and should not be construed as legal advice.*