



**OFFICE OF THE
LEADER OF THE OPPOSITION**



**Statement of the Leader of the Opposition on the Presidential
Arbitrary Directives Awarding Contracts to Various Construction
Entities for Construction of Roads, Schools and Health facilities
across the Country**

(Moved under Rule 53 (1) of the Rules of Procedure)

October 2021

Rt. Hon. Speaker and Members, it has come to my attention and notice that in total contravention of the laws and principles relating to procurement of construction works and services, the President adopted a practice of;

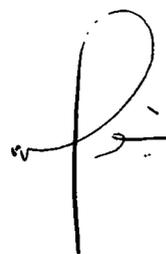
- a) Initiating procurement needs,
- b) Informally meeting service providers; and
- c) Subsequently issuing directives commanding Government Ministries, Departments and Agencies (MDAs) to enter into formal agreements with service providers based on his whims and wishes.

Whereas the President enjoys executive authority under the Constitution, the same ought to be exercised judiciously and within confines of the law as provided under Article 91 (1) of the Constitution.

Presidential Directives

It has been established that the President, in abuse of the executive powers, directed that the following construction contracts under pre-financing model be undertaken without going through the mandatory procurement process:

- (i) In a letter dated 15th May 2021, the President directed the Uganda National Roads Authority (UNRA) to enter into agreement with Zhongmei Engineering Group on pre-financing arrangement for construction of Kanoni – Misingi – Mityana road (37 km).
- (ii) In a letter dated 21st June 2021 the President directed UNRA to enter into agreement with Chongqing International Construction Cooperation (CICO) on pre-financing arrangement to design and construct Kabwohe – Kitagata – Rukungiri (65.7 km) and Masindye – Kabimbiri – Ziobwe – Wobulezi – Kapeeka (138 km).
- (iii) In another letter dated 21st June 2021, the President directed UNRA enter into agreement with China Communication Construction Co. LTD (CCCC) on pre-financing arrangement for construction of Pakwach – Karuma road; Pakwach Bridge; Kisubi – Nakawuka –Natete road; Nakawuka – Kasanje – Mpigi road; Nakawuka – Mawugulu – Nanziga – Maya road; Kasanje – Buwaya road; and Nakasero – Northern Bypass Express VVIP road .
- (iv) In a letter dated 29th July 2021, the President directed UNRA enter into agreement with Ashoka Buildcon limited on pre-financing arrangement for



construction of Mpigi – Kibibi – Mityana road (60 km); Kanungu – Hamurwa (47 km) and Butogota – Buhoma (32 km).

- (v) In the month of August, 2021 the President wrote three letters directing the Executive Director of UNRA to sign contracts for six government road projects that he had awarded to three Chinese Entities i.e. China Communication and Construction Company, China Railway 18th Bureau Co. Limited as well as Ashoka Buldeon Limited apparently.

Additionally on 01st July 2021, President Museveni directed the Minister of Education and Sports and Minister of Health that beginning this financial year 2021/22, all contracts or projects for the construction of schools and health centers should be given to the Uganda Peoples' Defence Force (UPDF) Construction Brigade.

Consequently on 29th September 2021, the Permanent Secretary of the Ministry of Health directed all Districts' administrative officers to handover all construction sites works to the UPDF Construction Brigade.

Similarly, the President directed UNRA to enter into agreement with M/s Arab Contractors to undertake the construction of Pallisa, Kumi and Iganga Town roads and emergency works on Saka Swamp Bridge along the Pallisa – Kaliro Road.

Rt. Hon. Speaker, I wish to express my reservations about these transactions and highlight that the Presidential Directives and the subsequent transactions are marred by gross illegalities, procedural flaws and improprieties as shown hereunder.

Circumvention of the Procurement Legal Requirements

The processes, cycle and activities of Procurement and Disposal of Public Assets in Uganda are governed by the Public Procurement and Disposal of Public Assets Act.

Non-compliance with the PPDA Act and regulations made thereunder by any person whether public servant or not attracts criminal action and sanctions and in some cases civil liability.

Under Section 79 of the PPDA Act and Regulation 6 (1) of the Public Procurement and Disposal of Public Assets (Rules and Methods for Procurement of Supplies, Works and Non-Consultancy Services) Regulations, 2014 all Procuring and Disposing Entity (PDE) including UNRA and other Ministries, Departments and Agencies (MDAs) are enjoined to use the procurement methods and requirements specified in Part VI of the Act. They include:



- a) Open domestic bidding;
- b) Open international bidding;
- c) Restricted domestic bidding;
- d) Restricted international bidding;
- e) Quotation method;
- f) Direct procurement and
- g) Micro procurement.

The choice method of procurement and disposal is determined by the nature of the service or works to be undertaken. At times the procuring entity must ensure that the basic principles of public procurement and disposal are applied, observed and achieved. They include:

- (a) non-discrimination;
- (b) transparency, accountability and fairness;
- (c) maximization of competition and ensuring value for money;
- (d) confidentiality;
- (e) economy and efficiency; and
- (f) Promotion of ethics.

I do submit that the Presidential directives miserably fell short of the required standards and could not achieve a semblance of any of the legally recognized procurement methods and basic principles.

a) UPDF Engineering Brigade arrangement for Construction of Schools and Hospitals

Whereas the Permanent Secretary for Health directed all Local Governments to surrender and prepare the ground for the UPDF Brigade to take over construction works for Schools and Health facilities. It was further directed that local government units supervise and takeover contract management. However this directive falls short on the required legal procurement standards.

The law clearly guides that procurement processes do not commence with identification and zoning out a sole contractor where a competitive procurement was available but suffocated. Such an arrangement, if properly done, would ordinarily fall under the basic execution of works known as Force Account Mechanism provider under Section 95A of the PPDA Act as amended.

Under this section, force account mechanism means "*undertaking the works of a procuring and disposing entity using the personnel and equipment of the procuring and disposing entity or of another procuring and disposing entity.*"



It is a highly regulated mechanism under the PPDA Act and Regulations which provide for the circumstances and conditions related to its applicability.

Under Section 95A (3) of the PPDA Act, for this mechanism to be applied, it must be established by the Procuring and Disposing Entity that the supplies to be used for the assignment shall be procured in accordance with the requirements of the PPDA Act; and that the direct, indirect and overhead costs to be incurred are less than would be incurred if the assignment was executed by a contractor. It is only in times of emergency situations or where no contractor is willing to execute the assignment that these requirements would be waived.

In any case the application of the Force Account mechanism does not do away with the Procurement procedure but rather regards it as a safety valve for the procurement. Similarly, it's incumbent upon the entity to establish that it is cheaper to use force on account than to seek services of a contractor to undertake works.

Therefore, it is important to note that force account mechanism is not a method of procurement per se but rather a mode of execution, and only applicable where conditions set out in S. 95 A (3) and (4) are satisfied as indicated above.

In a nutshell, the Country is not struggling with a shortfall in Contractors to undertake the Works in question and there is no Emergency that can warrant the Presidents' directive, making it illegal and unconstitutional.

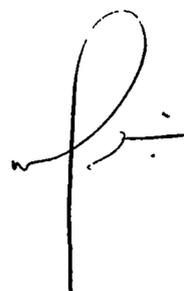
The arbitrary application of the force account mechanism will create a fertile ground for fraud, misappropriation, substandard works, and final loss.

The Presidential directives do not meet the required criteria warranting him to invoke the Force Account mechanism in the circumstances.

b) Construction of Road Projects under pre-financing model

The Presidential directives awarding contracts to Zhongmei Engineering Group, Chongqing International Construction Cooperation (CICO), China Communication Construction Co. LTD (CCCC), Ashoka Buildcon Limited, China Communication and Construction Company, China Railway 18th Bureau Co. Limited and Ashoka Buldeon Limited would be construed to be Direct Procurement.

Under Section 85 (1) of the PPDA Act, direct procurement is a sole source procurement method for procurement requirements where exceptional circumstances prevent the use of competition. It is initiated by a user department and approved by Contracts Committee of the contracting agency not the President.

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On the face of it, the directives contained in the letters issued by the President do not show whether in procuring the services of the aforementioned entities, the legal requirements, best practices and principles were complied with. There is no evidence on how the competitive methods were dropped for direct procurement; why line agencies and departments particularly the user departments were not involved; and notably the process for the award of contracts was not transparent as required under the PPDA Act.

c) Presidential directive to UNRA to enter into agreement with M/s Arab Contractors

As articulated earlier, the President directed that the Arab Contractors be awarded additional construction works on different roads and a bridge. Again this purports to be a direct procurement, however it does not meet the legal requirement as well.

Under Paragraph 6 of the 4th Schedule to the PPDA Act, a direct procurement for provision of additional works is applicable where, among others, the prices on the additional contract are reasonable and the value of the new works does not exceed fifteen percent of the value of the original or existing contract and the original or existing contract is awarded through a competitive process.

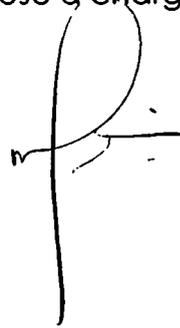
In the instant case however, it is not indicated anywhere whether the foregoing requirements were met. The President only directed UNRA to engage Arab Contractors on the said projects without addressing himself on the dictates of the law, which is quite absurd.

1. Unconstitutional Pre – Financing Arrangements

The President indicated further that the contracts with the said road works would be operated on a pre-financing arrangement. From the onset, this arrangement is unlawful and unconstitutional as shown hereunder.

The construction companies have undertaken to commence construction works without any payment from the government and that they would expect to be paid quarterly in installments effective the third year from the commencement date of the contract and construction works.

Contextually, a pre – financing arrangement is a form of advance of cash or money's worth to enable or permit the work on the project to begin repayable at a later stage. Impliedly, this model of financing would impose a charge on the Government

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in form of a debt repayable by the tax payers or from the consolidated fund without the approval of Parliament as required by the law.

A pre-financing arrangement is a public liability and a debt which requires approval of the Parliament before the Government is committed to the same as provided under Article 159 (2) of the Constitution and Section 39 of the Public Finance Management Act.

In broader terms, the President's act of entering into an arrangement for the contractors to advance money in form of works is in itself a loan. The Pre financing arrangement is a disguised way of borrowing from the contractors. There is an elaborate procedure that guides transactions of this nature. The Constitution of the Republic of Uganda guides on instances where the country is to be committed on financial matters.

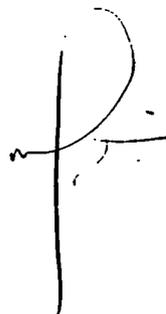
Under Article 159(7) of the Constitution of the Republic of Uganda 1995 as amended, a loan includes any money lent or given to or by the government on condition of return or repayment and any other form of borrowing or lending in respect of which:

- a. Monies from the consolidated fund or any other public fund may be used for payment or repayment; or
- b. Monies from any fund by whatever name called, established for the purposes of payment or repayment whether in whole or in part and whether directly or indirectly, may be used for payment or repayment.

Article 159 (2) of the Constitution guides to effect that the government shall not borrow, guarantee, or raise a loan on behalf of itself or any other public institution, authority or person save as authorized by or an act of Parliament. It is further clear that under such circumstances, any loan or arrangement can only take effect by a resolution of Parliament.

Article 159(4) of the Constitution compels the President to cause presentation to Parliament such information concerning any loan to show the total indebtedness by way of principal and accumulated interest; the terms for serving and loan repayment. The loan facility ought to be given efficacy by a resolution of parliament as provided under Article 159 (5) of the Constitution.

Article 159 (6) of the Constitution and Section 36 (5) of the Public Finance Management Act mandate the Government to lay before parliament the loan agreement for approval by resolution.

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Contrary to the provisions of the law, the terms, conditions and any other factors incidental to these transactions remain unknown to Parliament the general public.

The procedure taken by the President does not guarantee any value for the taxpayers' money and we are not sure as to whether the contract price is not higher than the market price.

By all legal standards the president is illegally and unconstitutionally overstepping his powers, thus rendering his actions null and void.

The Public Private Partnerships (PPP)

Even if the President's pre-financing agreements were to be interpreted under the Public Private Partnership Act, they would still miserably fail the legal thereunder as shown below.

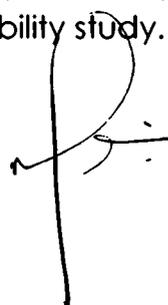
This particular type of contract enables the public partner (government entity) to delegate some of its own responsibilities to a private partner under a long-term contract that defines the rights and obligations of each party during the term as well as the mechanisms for its financial re-equilibrium arising from unforeseen events or lack of compliance of the parties.

The principles govern such arrangements are governed by the Public Private Partnership Act 2015 and under section 3 of the same, an elaborate guide on the principles to guide the arrangement is well stipulated. Among others it provides for a clear procurement process with special regard to the core standards of the procurement.

It is an ideal system for it brings private sector competencies, efficiencies, and capital to improving public assets or services when governments lack the upfront cash. In essence companies agree to take on risk and management responsibility in exchange for profits linked to performance.

In the instant matter, the correspondences from the president to the relevant authorities indicate that he was approached by the prospective contractors with proposals to undertake construction of various roads and bridges under the pre-financing model. This alone would bring the respective transactions under the PPP Act.

It is important to note that there is an elaborate legal framework enabling the PPP procurements. Section 21 and 22 under the PPP Act 2015 requires that before a PPP project is contracted, it should be preceded by preliminary economic cost benefit analysis, registration with the PPP Unit and a feasibility study. Section 31-36 of the Act equally specifies the procurement rules.

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Based on the Presidential directives to the Ministry of Education, Works and Transport and Health, the contractors presented unsolicited proposals to the government which the President fragrantly accepted in total contravention of Section 34 of the PPP Act which lays out an elaborate criteria and process for handling unsolicited proposals.

The criteria consists of alignment to the National Development Plan, feasibility, innovativeness and cost effectiveness. In the likely event that the proposal has been successfully evaluated, Section 34(6) demands that it should be subject to a competitive bidding process. When the proponent of the proposal is not successful, section 34(7) provides for compensation for the proprietary interest.

Therefore, the Presidential directives not to consider any other interested bidders under this arrangement is unlawful.

2. Violations of commitments made in regard to the World Bank funded Projects

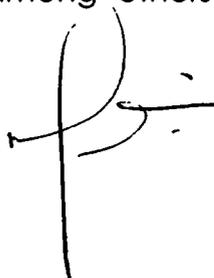
Closely related to the foregoing, the reckless and illegal procurement conducted by the President has attracted the attention of the World Bank. In a letter by World Bank dated 8th August 2021 addressed to the Ministry of Finance, a red flag was raised and expressed its dissatisfaction over the directives.

Uganda being a pioneer in implementing policies to achieve universal access to both primary and secondary education has since benefited from a number World Bank funded programs. Under the Uganda Secondary Education Expansion Project, the World Bank Board of executives Directors sat and approved a tune of USD 150 million to enable greater access to higher quality secondary Education in a safer and better equipped learning environment with special to the girl child.

According to the World Bank, this project is ongoing and a total of 2.5 Million learners will benefit directly from the construction of 116 secondary Schools. Additionally, 61 schools will get more classrooms in underserved districts of the country creating 70,300 new spaces for learners including 30,000 in areas hosting refugees.

The above highlighted project is in respect of the Education sector but there are other mega national and regional ongoing projects about 27 in number worth USD 4.3 Billion that the World Bank is funding in various sectors.

According to the World Bank its financing commitment as highlighted above is premised on the country's observance and compliance with the project specific financing agreement. Such agreements detail among others the procurement

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• procedure to be followed. In the instant case the World Bank clearly stated that for its investment financing portfolio in Uganda the procurement legal and regulatory framework is embedded in the following:

1. The world Bank Procurement Regulations;
2. Project specific financing agreement and the attendant project operational manual; and
3. The PPDA Act (where necessary).

Specifically, under the *World Bank Procurement Regulations for Investment Project Financing (IPF) Borrowers for Goods, Works, Non-Consulting and Consulting Services dated July 1st 2016 (as revised in November 2017 and August 2018)*, Uganda is duty bound to observe the core procurement principles of value for money, economy and integrity, fit for purpose, efficiency, transparency and fairness in all World Bank funded projects.

The World Bank permits a Country to apply its own procurement procedures, if the same are consistent with the Bank's core procurement principles.

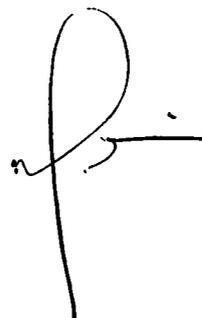
The World Bank has noted further that the presidential directives do not conform to the regulatory instruments highlighted above and tantamount to violation of the provisions of the financing agreement which may lead to mis-procurement /cancellation and ineligible expenditure.

In line with the above, the Procurement legal regimes lay down stringent and rather meticulous processes of awarding contracts like the ones in issue. Hence the President's directives are a clear and blatant disregard of the legal safeguards against the ills and mischief which the law was meant to address.

The President's approach offends the standard core procurement principles of value for money, economy, and integrity, fit for purpose, efficiency, transparency and fairness therefore unfit in all aspects.

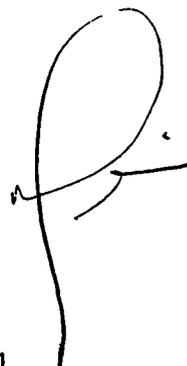
I therefore pray that:

1. The Minister of Works and Transport, Minister of Health and Minister of Education should adhere to the provisions of the law under the Constitution of the Republic of Uganda, PPDA Act and Public Finance Management Act instead of the Presidential Directives.

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- 2. The Minister of Health recalls and cancels the letter written by the Ministry's Permanent Secretary to all local governments directing them to pave way for the UPDF to take up all construction sites of all health facilities in the Country.

I beg to Submit.

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