

PARLIAMENT OF KENYA

THE SENATE

THE HANSARD

Thursday, 28th April, 2022

*The House met at the Senate Chamber,
Parliament Buildings, at 2.30 p.m.*

[The Speaker (Hon. Lusaka) in the Chair]

PRAYER

PETITION

ALLEGED GRAFT AND MISAPPROPRIATION OF FUNDS AT WEST KANO IRRIGATION SCHEME

The Speaker (Hon. Lusaka): Hon. Senators, I hereby report to the Senate that a Petition has been submitted through the Clerk by Pastor Ochieng' Odido and two other residents of Kawino North Location in Kisumu County concerning the Ethics and Anti-Corruption Commission graft investigations on West Kano Irrigation Scheme.

Article 119 (1) Constitution states as follows-

“Every person has a right to petition Parliament to consider any matter within its authority including to enact, amend or repeal any legislation”.

Hon. Senators, the salient issues raised in the said Petition are: -

(1) That, the West Kano Irrigation Scheme revolving fund dates from 2009 to 2015 and that in August, 2015 a report was made to the Ethics and Anti-Corruption Commission (EACC) on the West Kano Irrigation Scheme revolving fund graft involving the government rehabilitation funds economic stimulus programme funds and the farmers own saving funds encompassing irrigation farm machinery, accessories, aid and West Kano irrigation rice sales;

(2) The graft involves misappropriation of 13 tractors and accessories granted by the Government of Kenya in conjunction with the government of Japan;

(3) That, upon receipt of the report an investigation was launched by EACC western region office in Kisumu and further there is a delay in investigation of misappropriation of

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funds by EACC regional office which resulted in the culprits going scot free and it remains an injustice to the local residents and that the petitioners have made all efforts to have this matter investigated and resolved including reporting it to the Commission on Administration of Justice whose response has not been satisfactory.

The Petitioners, therefore, pray that the Senate investigates these issues by among others instituting a forensic audit of the scheme to ensure that justice is served and culprits are held liable.

Hon. Senators, pursuant to Standing Order No.231, I shall now allow comments, observations or clarifications in relation to the Petition for not more than 30 minutes. Okay, I do not see any interest.

Hon. Senators, Pursuant to Standing Order No. 232(1), the Petition is hereby committed to the Standing Committee on Agriculture, Livestock and Fisheries for its consideration. In terms, of Standing Order 232(2), the Committee is required in not more than 60 calendar days from the time of reading the prayer to respond to the petitioners by a way of a report addressed to the petitioners and laid on the Table of the Senate. I thank you.

(The Petition was committed to the Committee on Agriculture, Livestock and Fisheries)

Next Order!

PAPERS LAID

REPORTS ON FINANCIAL STATEMENTS OF VARIOUS COUNTY FUNDS/COMPANIES

The Senate Majority Leader (Sen. Poghiso): Mr. Speaker, Sir, I beg to lay the following Papers on the Table of the Senate today 28th April, 2022:

Report of the Auditor-General on the Financial Statement of Nol-Turesh Loitokitok Water and Sanitation Company Limited for the year ended 30th June, 2018.

Report of the Auditor-General on the Financial Statement of Nol-Turesh Loitokitok Water and Sanitation Company Limited for the year ended 30th June, 2019.

Report of the Auditor-General on the Financial Statement of Nol-Turesh Loitokitok Water and Sanitation Company Limited for the year ended 30th June, 2020.

Report of the Auditor-General on the Financial Statement of Narok Water and Sewerage Services Company Limited for the year ended 30th June, 2019.

Report of the Auditor-General on the Financial Statement of Samburu County Executive Bursaries Fund for the year ended 30th June, 2019.

Report of the Auditor-General on the Financial Statement of Baringo County Micro and Small Enterprises Fund for the year ended 30th June, 2020.

Report of the Auditor-General on the Financial Statement of Kericho County Emergency Fund for the year ended 30th June, 2015.

Report of the Auditor-General on the Financial Statement of Kericho County Emergency Fund for the year ended 30th June, 2016.

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Report of the Auditor-General on the Financial Statement of Kericho County Emergency Fund for the year ended 30th June, 2017.

Report of the Auditor-General on the Financial Statement of Kericho County Emergency Fund for the year ended 30th June, 2018.

Thank you, Mr. Speaker, Sir.

(Sen. Poghiso laid the documents on the Table)

The Speaker (Hon. Lusaka): Thank you. Next Order!

STATEMENTS

ACTIVITIES OF THE COMMITTEE ON AGRICULTURE, LIVESTOCK AND FISHERIES

The Speaker (Hon. Lusaka): Is the Chairperson of the Standing Committee on Agriculture, Livestock and Fisheries not here? The Statement is deferred.

(Statement deferred)

ACTIVITIES OF THE COMMITTEE ON DEVOLUTION AND INTERGOVERNMENTAL RELATIONS.

The Speaker (Hon. Lusaka): Is the Chairperson of the Committee on Devolution and Intergovernmental Relations not here? The Statement is deferred.

(Statement deferred)

ACTIVITIES OF THE COMMITTEE ON EDUCATION

The Speaker (Hon. Lusaka): Is the Chairperson of the Committee on Education not here? The Statement stands deferred.

(Statement deferred)

The Speaker (Hon. Lusaka): The next Statement is by the Senate Majority Leader.

BUSINESS FOR THE WEEK COMMENCING TUESDAY, 3RD MAY, 2022

The Senate Majority Leader (Sen. Poghiso): Mr. Speaker, Sir, pursuant to Standing Order No.52 (1), I hereby present to the Senate the Business of the House for the week commencing Wednesday, 4th May, 2022. I take this opportunity to welcome the hon. Members back from the April recess and look forward to another fruitful session of the next few weeks.

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As we are all aware, Tuesday, 3rd May, 2022, has been gazetted to be a public holiday, to mark *Eid ul-Fitr*, the end of the holy month of Ramadhan. In this respect, I take this opportunity to wish all Muslims, *Eid ul-Fitr*.

Likewise, Friday, 29th April, 2022, has been gazetted to be a public holiday for the State funeral service for our former President of the Republic of Kenya, His Excellency the late President, Mwai Kibaki.

I take this opportunity to say thank you to all Hon. Members or Senators who gave their tribute through the Motion that was concluded yesterday, expressing the condolences of the Senate on the demise of the former President.

Mr. Speaker, Sir, regular sittings of the Senate will, therefore, resume on Wednesday, 4th May, 2022. On that day, the Senate Business Committee (SBC) will meet to schedule the business of the Senate, which is projected to contain business that will not be concluded from today's Order Paper and any other business scheduled by the Committee. The Order Paper for Thursday, 5th May, 2022, will contain business that will not be concluded on Wednesday, 4th May, 2022, as well as Motions, Petitions, Statements and any other business as directed by the Senate Business Committee.

There are 18 Bills at the Second Reading Stage. Upon First Reading of the Bills at Order Nos.8 and 9 from today's Order Paper, this number will change to 20. Six of these Bills have been listed in today's Order Paper for Division, at Order Nos.8 to 13. However, seven Bills at the Second Reading Stage have been dropped from the programme of Senate Business, pursuant to Standing Order No.59(3), due to unavailability of Movers when the Orders were called out, and are, therefore, not available for debate. I urge the respective Movers to make requests to the Hon. Speaker for the Bills to be reinstated in the programme of the Senate Business.

On the other hand, there are 11 Bills that are at the Committee of the Whole Stage, six of which have also been listed in today's Order Paper for Division, at Order Nos.16 to 21. As regards to Divisions at Second Reading and at the Committee of the Whole, I urge all Senators to avail themselves for divisions and equally urge the movers of the Bills, Committee Chairpersons and individual Senators who have filled Amendments to be in the Chamber for the House to smoothly transition to the next stage.

Mr. Speaker, Sir, other Business before the Senate includes 48 Petitions and Statements pursuant to Standing Orders Nos.47 and 48. Petitions are important tools of oversight. I urge concerned committees to hasten consideration of this pending businesses and to table reports pursuant to the Standing Orders.

Mr. Speaker, Sir, allow me in conclusion to thank all Senators for their dedication and commitment they have continued to exhibit in their work and service to the people of Kenya, and urge that we continue to do the same during this period of the Senate Calendar.

Thank you, Mr. Speaker, Sir. I hereby lay the Statement on the Table.

The Speaker (Hon. Lusaka): Sen. (Dr.) Zani, do you have an intervention?

Sen.(Dr.) Zani: Thank you, Mr. Speaker, Sir. Allow me to just make some observations after that Statement in terms of an input to thank the Senate Majority Leader for issuing a Statement on the Business of Senate for the week commencing Wednesday, 4th May, 2022.

The Senate Majority Leader has also indicated that we have 11 Bills in the Committee of the Whole stage on the Order Paper. The Order Paper clearly indicates exactly what is meant to happen at the Committee of the Whole and the amendments we need to make.

This House and Session will be remembered as one of the Houses that came up with quite a number of Bills touching on various facets like agriculture, community health services, health issues and so on, for example, The Irrigation Amendment Bill (National Assembly Bills No.12 of 2021) that is on the Order Paper and various other Bills.

We are at a time when we are moving to Senate's *Sine Die* recess. However, it is important for us to find a way to get together and expedite the processing of these Bills. Quite a number of them are almost at the stage of finalization. For example, The Community Health Services Bill is at the National Assembly right now and they might not have very many more amendments to add on to it. That means that the Bill might not need mediation and it might come to the Senate as it is. It is still possible to get most of these Bills signed into Acts. The main thing remaining is the Division Stage where we vote for them.

We know that we vote according to our county delegations in the Senate. Most of the issues that we resolve in this Senate are those that we agree across the board for all the counties. Indeed, most of the times we have been able to get the 24 delegations to vote expeditiously for this. As we move towards the end, I encourage us to use the hybrid methodology for the voting.

It is also very important for the Bills that have been dropped to be reinstated where possible, so that the work that has been put either by the individual Senator or a committee is not entirely lost.

We appreciate this Statement. As we get ready for business starting on 4th May of 2022, we are bracing ourselves as Senators to finish the business that is scheduled in this House.

Thank you, Mr. Speaker, Sir.

The Speaker (Hon. Lusaka): Thank you. Sen. (Dr.) Zani. I guess we have heard. We will try our level best to see what we can conclude. As I mentioned, where necessary, we will use the hybrid method to get the vote, so that we vote for most of the Bills.

Next Order!

BILLS

First Readings

THE ELECTIONS (AMENDMENT) BILL (NATIONAL ASSEMBLY BILLS NO. 3 OF 2022)

THE ELECTION CAMPAIGN FINANCING (AMENDMENT)
BILL (NATIONAL ASSEMBLY BILLS NO.37 OF 2021)
(Orders for First Readings read - Read the First Time
and ordered to be referred to the relevant Senate
Committees)

The Speaker (Hon. Lusaka): Hon. Senators, for the convenience of the House, I am rearranging the Order Paper, so that we start with Order Nos.24 and 25.
Next Order!

BILL

Second Reading

THE PUBLIC PROCUREMENT AND ASSET DISPOSAL
(AMENDMENT) BILL (NATIONAL ASSEMBLY BILLS NO. 32 OF 2021)

The Speaker (Hon. Lusaka): The Senate Majority Leader, proceed.

The Senate Majority Leader (Sen. Poghio)

Mr. Speaker, Sir, I beg to move-

THAT, The Public Procurement and Asset Disposal (Amendment) Bill (National Assembly Bills No. 32 of 2021) be now read a Second Time.

The Bill was published on 11th June, 2021 and passed by the National Assembly and referred to the Senate on the 22nd February, 2022. The purpose of the Bill is to amend The Public Procurement and Asset Disposal Act to address the challenges faced by procuring entities in implementing the Act, including the multiple awards of contracts in the wake of Sections 82 and 86 of the Act.

Challenges have been witnessed in procurement processes, particularly, in regards to awarding of contracts. These challenges relate to the allegations of unfairness in evaluating contracts, including non-disclosure of evaluation criteria and whether the contracts were evaluated properly.

These challenges have largely come from bidders, who have made a substantial investment in the contracting process and are seeking to recover their costs. This Bill attempts to cure these challenges and its passage is paramount in streamlining the procurement processes in Kenya.

The Bill specifically proposes the following -

Clause 2 of the Bill proposes to amend Section 2 of the Act by amending the definition of “Procurement Profession” to recognize other institutions, which offer membership and professional qualifications in procurement and supply chain management.

Further to this, the Bill proposes to introduce the definition of a “local contractor” into the Act to pave way for the inclusion of sole proprietorships, partnerships, cooperative societies and individual consultants, associations and groups that are registered in Kenya.

Clause 3 of the Bill contains proposals to amend Section 9 of the Act, among others, to address the training lacuna for the non-procurement professionals involved in procurement, such as user departments, disposals and contract implementation teams *et cetera*.

Clause 6 of the Bill contains proposals to amend Section 40 of the Act, to assign the Director General the responsibility to institute investigations, pursuant to Section 35 of the Act.

Clause 7 contains proposals to amend Section 41 of the Act by adding a new paragraph to provide for the provisions to reduce chances of delayed contract by new tenderers.

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Clause 8 of the Act proposes to amend the Act by introducing a new Section 43(a) to give the authority the power when conducting investigations, inspections, assessments and reviews relating to contracts, procurements and asset disposal proceedings to enter premises of the procuring entities to make any inquiries that may be necessary for the collection of information.

Mr. Speaker, Sir, Clause 9 of the Bill contains proposals to amend Section 44 of the Act by adding a new sub-section to enable the accounting officer of a procuring entity to seek assistance from The National Treasury, where that procuring entity lacks capacity to comply with the Act.

Clause 10 proposes to amend Section 46 of the Act to allow the head of procurement to delegate the secretarial function. The proposed amendment intends to enhance efficiency in delivery of public services and reduce procurement lead time. Thus, procurement entities will be able to run multiple procurements or tenders concurrently.

Clause 12 of the Bill proposes to amend Section 48 of the Act by deleting the words “Procuring Unit” and substituting thereof “Head of Procurement Function”. This is meant to ensure consistency with the definition and the role of the procurement function.

Clause 14 of the Bill seeks to amend Section 53 of the Act by empowering the head of the procurement function to carry out market surveys, to inform the placing of orders on decision making on procurement by the relevant awarding authority. The subject of this provision is to guide against purchasing standards items at inflated prices.

Mr. Speaker, Sir, Clause 17 of the Bill seeks to amend Section 71 of the Act to correct the notion that a tenderer may seek clarification from the candidate, which is not feasible as it is the procuring entity that is evaluating the candidates to determine their eligibility.

Clause 23 of the Bill seeks to amend Sections 96 (2) and (4) of the Act to enable those Kenyans who have no access to newspapers and would wish to participate in the tendering process. That is very important.

Clause 27 of the Bill proposes to amend Section 119 of the Act to provide for the preparations for a notice inviting expressions of interest mandatory. Clause 28 of the Bill proposes to amend Section 121 to clarify that it is the role of the evaluating committee to carry out evaluation and to align the provisions of Section 121 (4).

Further, the proposed new Sub-Section 5 is intended to unlock the procurement process that might stall due to the failure to elicit requisite number of qualified candidates or proposals.

Clause 29 of the Bill proposes to amend Section 124 of the Act by deleting Sub-Section 14, which contradicts the conditions of single sourcing provided under Sub-Section 12. Further to this, the Bill seeks to amend Sub-Section 15 to enhance efficiency by eliminating the approval requirements before initiating a procurement process.

The Bill also seeks to amend the Section by adding a new Sub-Section 16 to uphold the principle of independence, where the regulator authority should not involve itself with procuring entities operational matters.

Clause 30 of the Bill proposes to amend Section 138 of the Act by deleting Sub-Section 5 and substituting thereof a new Sub-Section 5. This will ensure that the security

organs report contracts processed through the open list maintained under Section 90 (4) for accountability within protecting national security interest.

Clause 31 of the Bill seeks to amend Sub-Section 139 of the Act to allow variations in terms of quantity, which might be occasioned due to unforeseen circumstances within a period less than 12 months, provided the subject variations are within outlined limits or thresholds.

Clause 32 of the Bill seeks to amend Section 14(1) of the Act to facilitate multiple award of contracts. Clause 34 of the Bill proposes to amend Section 169 of the Act by adding a new Sub-Section to waive filing fees for reviews for disadvantaged groups.

Clause 35 of the Bill contains proposal to amend Section 172 of the Act to introduce further grounds for debarment. Clause 36 of the Bill seeks to amend Section 176 for proper cross-referencing.

Clause 37 of the Bill seeks to amend the First Schedule by deleting Paragraph 3, which contradicts provision of Section 10, 1(a) of the Act providing that the chairperson of the board is nominated by the Cabinet Secretary (CS) and appointed by the President.

Clause 38 seeks to amend the Second Schedule by deleting Paragraph 3, which contradicts provisions of Section 29 of the Act. The last one is Clause 39 of the Bill, which seeks to amend the Third Schedule for proper cross-referencing.

Mr. Speaker, Sir, all these amendments look like they are many, but are very relevant to the Act. It does not change much of what the Act is. It introduces efficiency and one way of dealing with the many complaints from business people, who want to participate in contracts that have been announced.

Mr. Speaker, Sir, there should be fairness to all, including those who come from far-flung parts of this country, who do not get access to newspapers. Therefore, there must be a way of making sure that they are not disadvantaged because of being where they are.

I, therefore, urge hon. Senators to consider and pass this important Bill in order to ensure efficiency and effectiveness in procurement processes. Let it go out there to procurement entities that they will have to comply with the new law, which is more user-friendly. It will ensure that contracts are not delayed.

Mr. Speaker, Sir, I beg to move and ask Sen. (Dr.) Zani to second. I thank you.

Sen. (Dr.) Zani: Mr. Speaker, Sir, I beg to second that The Public Procurement and Asset Disposal (Amendment) Bill (National Assembly Bills No.32 of 2021) be now read a Second Time.

This is an important Bill that seeks to amend areas that have been causing a lot of inconveniences because of many processes for people or procurement entities. There are many procedures and hindrances that this amendment Bill seeks to address.

This is a National Assembly Bill with specific areas that need to be amended. This is critical because it will create efficiency. It seeks to amend specific sections of the Act to ensure that proper processes are put in place.

Basically, the Bill is about procurement processes and awarding of contracts, and it delves into the area of evaluation criteria. This is because procurement officers or entities start processes, but there is no clarity about the evaluation criteria. That creates a lot of anxiety.

Starting with Clause 2, we have some definitions that are important. For example, it explains who a procurement professional is. It is clear that any procurement or supply chain professional body should be recognized in Kenya. This expands the scope of a procurement professional, and that is key.

In Paragraph (b), it seeks to insert various definitions that will help to make it easier to follow procurement processes. For example, we have complex and specialized contracts, which means contracts that include procurement where the terms and conditions of an agreement are different from standard commercial terms and conditions. That will not be the case because they do not fit into the specific contracts and how they are expected to be stipulated.

There is also definition of “local contractor”, which means a person or a firm registered in Kenya under the Company’s Act, 2015, or any other written law and whose operation is based in Kenya. This is also important in terms of contextualizing and putting into consideration the existence of local contractors.

Clause 6 proposes that Section 39 of the "Principal Act" be amended by deleting the word "Board" and substituting therefor the words "Director-General". This will create a larger scope and give the Director-General specific responsibilities and deliverables that will hold them responsible. It seeks to move the responsibility from the Board, which could be amorphous to specifically the Director-General who will be in charge for that particular process.

Clause 7 also seeks to make an amendment to reduce chances of delay. It proposes that Section 40 of the "Principal Act" be amended in subsection (2) by deleting the word "Board" and substituting therefor the words "Director-General".

Clause 8 proposes that Section 41 of the "Principal Act" is amended in subsection (1) by adding the following new paragraph immediately after paragraph (i)—

"(j) is determined by the Review Board to have filed a request that is frivolous or vexatious or was made solely for the purpose of delaying the procurement proceeding or a performance of a contract".

This will reduce chances of delays because contracts will be considered appropriately.

In Clause 9, we have the provision to inspect premises. Many times, inspections are done on a procurement entity that does not want people to know what they have in their premises. That has not been easy because there is nowhere in the law a possibility of enforcing it. Therefore, during investigation, inspection, assessment and reviews relating to contracts on procurements and assets disposal procedures, anyone authorized by the authorities may enter any premises of a procuring entity.

We have specifications like a reasonable time, so that you do not find somebody coming and doing something at midnight in the name of inspecting the premises or make any inquires that may be necessary for the collection of information.

That is also important because it will do away with the shroud of secrecy that sometimes we have regarding procurement processes. Where an authorized person is refused entry, there are provisions of what can be done. It includes getting an application for a magistrate to make a ruling on that.

Clause 9(2) states as follows-

“Where an authorized person is refused entry or is prevented from entering premises, a magistrate may, on application by the Authority, issue a warrant authorizing the Police to enter the premises, using such force as may be reasonably necessary and to conduct the search and obtain the required information.”

This is one area where you could find contradicting information, for example, even in terms of the capacity of the procurement entities or items that they have. If we do not allow people to go into certain premises to get the information, it can take a long time without the necessary information being provided.

It is important to realize that when it comes to procurement, both non-professionals and local contractors are key. If we do not have regulations or legislation in place, it will be difficult for them. Again, the Director-General will play an important role of investigating irregularities.

With a magistrate’s order, investigations can be done, so that we know the truth. That is important because there will be no delays working on a contract. Once a contract is deemed viable, it will be given out.

These clauses will ensure that if there is any investigation matter, it will not be left to the procurement entity, because they could delay and claim that there is a certain provision or paperwork that is not in place. Allowing some sort of investigation will make it possible for a procuring entity to be investigated, so that they do what they are expected to do.

Therefore, the authority to enter into premises is important. This will ensure that some sort of complacency is dealt with or somebody does not take a long time to do what is required of them. Especially when it comes to ensuring efficiency because this is a public service, these provisions become very important.

We also have amendments that ensure the regulatory Authority does not over-influence and overstep. They also have limitations on their powers and they cannot just move and put into place specifications that may not be ideal in specific situations.

Mr. Speaker, Sir, Clauses 13 and 14 are amending the Principal Act. Clause 14 states that-

“Upon submission of the procurement plans to the National Treasury pursuant to Section 44(2) (c) of this Act, the accounting officer of a procuring entity shall publish and publicize its approved procurement plan as invitation to trade on its website.”

Therefore, the National Treasury also has a role to play. The transparency of using the website is key. This brings me to a related issue, where the Senate and counties need to empower young people to understand this procurement processes.

Mr. Speaker, Sir, during our Senate *Mashinani* visit to Uasin Gishu County, we also managed to visit a few other counties too. We found youth Information and Communications Technology (ICT) hubs to specifically help the young people to understand how procurement is meant to be done. This is especially with regard to

the 30 per cent procurement awards that target women and youth. Without such training and exposure, it becomes very difficult for them to get these opportunities.

Once this procurement plans have been submitted to the procuring entity, the National Treasury publishes and publicizes the procurement plan as invitation to trade in the state tender portal. This makes it very transparent.

Once you have been invited to tender or procure, this then goes into the State tender plan. This will largely reduce the level of secrecy and lack of understanding. Most of the time, people say that they qualified for a particular procurement and question why they were not awarded.

It is very important to indicate the reason for not awarding to any person who qualified for the same. State the problems, shortcomings and what can they be improved. This level of transparency and openness will get us to that place where it becomes possible to really put it out there.

Clause 14(2) (a) says –

"The head of procurement function shall carry out market survey(s) to inform the placing of orders or decision making on a procurement by the relevant awarding Authority."

This is the sort of education that we need to put into place. The market surveys, state tender portal and understanding of this process will make it viable.

Mr. Speaker, Sir, right now, you will find that most of the people who tend to procure are the same. Some of them have accomplished because they have been able to understand the skill. They quickly bid for these tenders and get them, while there is another category who have been trying for the longest time without any success. This creates a lot of problems. One of the critical functions of the head of procurement shall be to carry out market surveys.

Clause 19 states-

"Section 69 of the "Principal Act" is amended by adding the words "and delegation of responsibility" immediately after the words "procurement approvals" appearing in the marginal notes."

This will ensure that the levels of responsibilities are carried at the various delegation levels within the Act, so that it is not a one-man show. It is actually responsibilities that cut across.

At Clause 19, Section 82 of the Principal Act is amended. It says-

"The tender sum as submitted and read out during the tender opening shall be absolute and final and shall not be the subject of correction, revision, adjustment or amendment in any way"

This is very critical because sometimes people get insider information. They are then able to adjust their documents according to the information.

However, enabling transparency and being able to have those figures right into place is very key. This creates inequalities where a certain category has received information and have been told to either downgrade or upgrade their figures. That is unfair.

When this becomes public, everybody is able to see how the tender documents look like, and this cannot be changed. For avoidance of doubt, the provisions of this sub-section shall apply. That is, the regulations that have been put into place to ensure the transparency of these tenders is enhanced at the various stages.

Mr. Speaker, Sir, the Bill has various clauses. All in all, as the Mover of this Bill said, it is really to create efficiency of public service and in the process of procurement. It is meant to encourage, enhance and almost create a burst in terms of interest in procurement, which is key.

As we have been analysing and talking about the various counties, this is one issue that always turns out. The issue of procurement, who is awarded and whether there is a relationship between the procurement officers and the people who are awarded this procurement.

This can be a game-changer, especially within devolution, when we are talking about spurring the economic growth of the counties and own-source revenue. It is important to know if somebody can deliver the tender awarded to them.

Mr. Speaker, Sir, we know various cases of people who are awarded a tender and then they suddenly try to get their assets changed into money, so that they can use the money to procure for a tender. Sometimes they actually get a tender and deliver, but when it comes to remuneration, there are crisscrosses or problems that make it such a process.

We know of very many families and procurement entities that have ended up being disadvantaged as a result of this. This has even been to the extent that you find somebody's savings are actually taken away completely.

Many of these are addressed, for example, in Clause 28, which states-

“Section 121 of the "Principal Act" is amended –

(a) in subsection (1), by deleting the words "accounting officer of a procuring entity" and substituting therefor the words "evaluation committee".

An evaluation committee will now have to be put in place. The responsibility now is not just for the accounting officer. This is an amorphous of a procuring entity. The emphasis of “accounting officer of a procuring entity” will now be on the evaluation committee. That evaluation committee can actually go through the specific outputs in terms of the processes for those tenders. It should ensure that the process of the evaluation committee is very transparent.

I think that it is from the evaluation committee that they will be able to move in to the exposure of putting out everything into the website, so that everybody might to see and understand what is going on.

Mr. Speaker, Sir, the Authority is given a lot of responsibilities in this Amendment Bill. Clause 29 (c) says-

“By adding the following new subsection immediately after subsection (15) –

(16) The Authority shall issue written directions and guidelines governing the reporting requirements for use of alternative selection methods by the accounting officers of procuring entities.”

This is important especially when deviation is done and alternate methods are used as a selection method by accounting officers. It is very important to have this written and these guidelines put into place, so that one person is not held responsible.

This is the work of the Authority. The head of the Authority will have to issue written direction and guidelines governing the reporting, and requirements for use of alternative selection when it is required. The written direction and guidelines needs to be put into place. This will reduce the levels of favoritism. It will enhance the level of transparency that is expected at the level of the Authority.

Mr. Speaker, Sir, we know that in many of the legislations that we have put forth, the Authority becomes the regulatory bodies, which become key in ensuring that the regulatory Authority will not have an influence. The Mover was very clear about this. The Authority will now have some sort of control.

Many times, we find that many authorities have their own unwritten rules and standards. We do not have a way of querying what it is that they do. In fact, now that we are talking about authorities, most of them are put in place by Acts.

Mr. Speaker, Sir, most of these authorities are put in place by us. I read through the legislation and I understood it. However, hardly is there a review of some of their process and how they should do them, especially where some sort of gaps might be created. In other words, where there is an alternative process that has to be entered into, then it will be key to explain exactly what it should be done instead of just putting something into place.

In Clause 31, there are various amendments where an accounting officer for a procuring entity on the recommendation of an evaluation committee or as prescribed in the signed contract may approve the request. For example use of prime course, use of contingencies, reimbursable course and use of provisional sums. This clause gives the basis for the alternative processes that can be used and the explanation of the same thereof.

Clause 31(4) says for the purpose of this section any variation of a contract could-- Kindly give me two minutes so that I conclude.

The Speaker (Hon. Lusaka): Okay, summarize. May be five more minutes, if you can.

Sen. (Dr.) Zani: Thank you, Mr. Speaker, Sir. Under this clause, it says any variation of a contract shall only be considered if the following are satisfied. I think this is very important. We are Kenyans and we know ourselves. Where variation is introduced without putting boundaries for it, before you know about it, it becomes an issue itself.

Clause 31 is a well thought out clause because it explain the purposes of price variation from the original price. For example, if you have already quoted one price, then you can say, “petrol cost went up, or there was a war that happened in between, therefore, justification for a change.”

There has to be some justification from the original prices based on prevailing consumer price index obtained by the Kenya National Bureau of Statistics; the quality-quantity variation for goods does not exceed 15 per cent. That is the capping so that you do not have an open-ended quality-quantity variation. For example, if you had requested for 30 bags of a particular product and now you are varying it up to more than the 15 per cent, that will not be acceptable. It should not exceed more than 15 per cent. So, the variation should be within limits plus or minus 15 per cent.

The price or quantity variation is to be executed within a period of the contract so that forces of the market economy do not come into place.

Mr. Speaker, Sir, the cumulative value of all contract variations for goods do not result in an increment of the total contract long term which then surpasses even the figure that had been put in the first place. The cumulative value of the professional services should not result in increment of the total contract prices by more than 25 per cent

Those provisions are very important. They are just to guide where the Amendment Bill proposes for amendment, that amendment should be put in place.

The method for computing price variation under that this clause shall be prescribed in regulations. This is key because the regulation can make sure that a thorough follow-up can be put into place under any circumstances.

Remember, there will also be an authority. The CS office will also be part and parcel of this. Through this tied jacketed procedures then it will be possible for us to look at the procuring entity and the provisions that they have to go through. Therefore, they should be comfortable that the award for that procurement was done within the basics of the particular Act.

Clauses 32 and 33 give further provisions. Clause 34 is about renumbering, existing provisions as subsections and inserting new section notwithstanding the provision of subsection (1). It further talks about filing fees for review by candidates under reserve procurement. This is very important. It says filing fees for women, youth, PWD and other disadvantaged groups, may be waived by the secretary or where required fees shall be as prescribed. This provision is key in terms of filing fees for review.

Mr. Speaker, Sir, I see can Sen. Sakaja in the House. They have also dealt with this issue in the Committee on Labour and Social Welfare. They have received a lot of complaints about PWD, women, youth and other disadvantaged groups not being able to raise filing fees despite the 30 per cent procurement quota reserved for them.

I welcome the possibility of a waiver or consideration filing charges. It is just filing charge. It is not even that the tender has been awarded or will be awarded to you. It is important to even make considerations at the procedures which can allow waivers. If there is any sort of figures that need to be paid later on after they have benefited from this procurement process, then they might be introduced later.

For as long as that is not put into place, the provision of women, youth and PWD becomes a hindrance instead of being a way of empowering them. That has been the intention and I welcome this amendment.

This amendment is very important because it is addressing the needs of the women, youth and PWD.

This Bill has the First Schedule, the Second Schedule and the Third Schedules which are herein attached. The fact that there will be key regulations to help the implementation of the procurement process, clearly puts us in a situation where we are addressing an issue that we have dealt with for a long time in Kenya. We are now addressing it to a satisfaction to make it a smooth process which will create efficiency that is so desired by these amendments.

Mr. Speaker, Sir, I beg to second.

(Question proposed)

Sen. Sakaja: Thank you, Mr. Speaker, Sir, for giving me this opportunity to contribute to The Public Procurement and Asset Disposal (Amendment) Bill (National Assembly Bills No. 32 of 2021) that has come to us from the National Assembly.

Mr. Speaker, Sir, the Public Procurement and Asset Disposal Act is one of the most important pieces of law that we have in our country, but is also one of the most abused. It is an extensive statute that many times, if you look at audit reports of our counties, the Auditor-General's reports of the national Government, Ministries and State agencies, you find a lot of violation of both this Public Procurement and Asset Disposal Act as well as the Public Finance Management Act. A lot of these violations are done deliberately by accounting officers in both national and county entities because of different interests.

This is a law that for me was my first piece of legislation in the National Assembly where we introduced the provisions for 30 per cent preferential and reserved procurement for young people, women and PWDs.

I will speak to that in detail, but that was indeed a long process. In fact, the initial version of the amendment was returned by the President and we had to negotiate. Finally, we came up with a law that we believed would essentially provide a lot of opportunities and hope for our young people, women and PWDs who for the longest time have been at the periphery of public procurement. They have not been able to engage with Government and have not benefited in terms of doing business with it.

Mr. Speaker, Sir, quickly looking at some of the provisions and I will not highlight all of them, but only those which are of interest to me.

The amendment of Section 9 is an important one. It talks about the functions of the Public Procurement Regulatory Authority. We used to have Public Procurement Oversight Authority (PPOA), but the name was changed to Public Procurement Regulatory Authority (PPRA).

The functions are extensive, but what is being added by the Mover, Sen. Poghio, is that one of the functions of the authority then, becomes to develop promote and support the training and capacity development of persons involved in procurement and assets disposal. This is extremely important, especially for these groups that we are talking about.

For the longest time, public procurement has been a preserve for a few connected tenderpreneurs who have mastered the system. They know how to fill in those documents, what is coming up and how to get the information. Information is power. They are the only ones who have access to this information.

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I remember in 2016, after having passed the 30 per cent Access to Government Procurement Opportunities (AGPO) law. I put an advertisement in the newspaper through the Young Parliamentarian Association which I was chairing then; and I am still the Chairperson. In advertising calling for young people who were interested in understanding how to procure. I thought we would use a small room at the Nairobi Safari Club which we booked. We expected around 200 participants, but there were more than 3000. We had to move the meeting to the University of Nairobi because there were very many interested young people.

When you mobilise young people for a political meeting, these ones who came were very different. The young people who came had a lot of hope. They were professionals and had registered business. They all had stories of how they had been trying to do it, but they were not getting opportunities.

Apart from that, we had to do other sessions across the country in the counties. I remember holding one in Embakasi Central at the DCs place which is the confluence of Embakasi West, Umoja and Embakasi Central just across Mama Lucy Hospital. The meeting was once more packed and they wanted the information. They were not interested in politics or hand-outs. They did not want to be given money after the meeting, except for the information. I remember going along with the lady who at that time was in charge of the secretariat at the National Treasury.

When coming up with the law, we created a secretariat for Access to Government Procurement Opportunities (AGPO) to assist young people. I may need to introduce this amendment in Third Reading. I realized that secretariat should not be domiciled at the Ministry of Finance at the National Treasury. It should be domiciled in the Ministry in charge of youth and gender issues because that is where they are concerned about this people.

At the National Treasury, it is just one of many departments that never get prominence and attention. Ideally, that department should be the one conducting these trainings, going around the country calling our young people and women by giving them encouragement by telling them how to fill a tender document, do the technical bit of tender, and fill the financial aspect of it for them to also get these opportunities. I support that provision because it is important

In Section 41, there is an amendment which is also important. We have seen many of Government projects even in counties, where somebody does not get the tender, they hold the entire process through a lot of frivolous litigation. This Bill talks about debarments. That the board shall debar a person from participating in procurement or Assets Disposal Proceedings on the ground that the person and what is being inserted is determined by the review board to file a request that is frivolous or vexatious, which was made solely for the purpose of delaying the procurement proceeding for performance of a contract.

Mr. Speaker, Sir, I recently asked for the compendium of stalled Government projects. They were amounting to more than a trillion shillings of projects that have stopped because of litigation, diversion of funds and because of many procurement entities or those in charge. Once they have initialized procurement and that is the time at which they get a kick back, they then lose interest in it. They initiate and tell you that someone will give you

this tender, they get the 10 per cent and then the project stalls. They have gotten their money and the project does not go on. We need personal culpability for that.

In addition to that, these companies and they are know, there are those who are notorious for always going to challenge on very frivolous ground. They can now be debarred if it is determined by the Review Board and not only the Regulatory Authority, that they have been engaging in frivolous and vexatious requests to the entities.

When you look at Section 43, the amendment here in Clause 8 is about inspections, assessments and reviews relating to contracts procurement and assets disposal proceeding. The proposal is then to insert a new section 43A to give the Authority the power to enter premises when conducting investigations, inspections, assessments and reviews relating to contracts, procurement and asset disposal proceedings. Any one authorized by the authority may enter the premises of a procuring entity, of course, at a reasonable time and with reasonable notice to make these inquiries. We have seen many of them being stopped, including in some of the high profile investigations that have happened recently.

I have a problem with Clause 9 which amends Section 44 which talks about the responsibility of the accounting officer. Section 44 of the parent Act provides that an accounting officer of a public entity is primarily responsible for ensuring that the entity complies with the Act. That is okay. Then it provides in performance of this responsibility the accounting officer then has some responsibilities to ensure that-

(a) The procurement is within approved budget.

So, you do not procure beyond budget.

(b) Constitute all disposal committees and procurement in accordance with the Act; and under different responsibilities.

The amendment here is that where a public entity lacks capacity to comply with this Act, an accounting officer shall seek assistance from the National Treasury. The mischief then, is that you are creating a loophole where if it is not because they lack capacity, but they want to bypass provisions and then they go to the National Treasury. They will use that as an excuse and they can collude with the official in the National Treasury.

This law needs to be followed as it is. Let us increase or rather work on the capacity and enable procuring entities to be able to follow this law. When you create such a loophole, they find an excuse to bypass some of these provisions by referring to the National Treasury.

Section 51 of the parent Act or Clause 12 of the amendment talks about procurement and disposal unit after the words "established at" and substitute with "procurement function". It is important to have that as it is a clean-up.

Section 51 of the Act talks about procuring agents and asset disposal agents. Subsection (2) says that a procuring entity may not appoint a procuring asset disposal agent unless that that procuring entity demonstrates lack of internal capacity, provides evidence or inability to establish a procurement and disposal unit and demonstrates the inability to use the services of other State organs, or public entities. This provision deletes the words "procurement and disposal unit" and replaces them with "procurement function" so that it is not necessarily a unit.

Section 53 is extremely important. It is where we started inserting in the year 2015 the provisions that then will enable young people, women and Persons with Disability (PWDs) to be incorporated in the public procurement.

Section 53 of the Act talks about procurement and asset disposal planning. It says at the beginning of a financial year, there shall be that procurement plan that is then prepared. In that procurement plan, we said that the procuring entity or the accounting officer shall also demonstrate how within that procurement plan they are going to provide for preferences and reservations that take care of these young people, women and PWDs.

In Clause 12, we are inserting a new section that says-

“Upon submission of this procurement plan to the National Treasury pursuant to Section 44(2)(c), the accounting officer of a procuring entity shall publish and publicize its approved procurement plan as an invitation to treat on its website.”

Mr. Speaker, Sir, access to this information is what has been lacking. There are certain few special people who have been working in the system and are the only ones who understand what procurement plans county government and national Government entities have. I applaud the Governor of Makeni County because he was one of those who had very transparent publishing of his procurement plans, among very few others.

Without this information, you cannot expect these businesses owned by our young people and special groups to be able to compete effectively. This is a great introduction that once it is submitted to the National Treasury, it is then publicized on its website as an invitation to treat. In legal terms, ‘an invitation to treat’ is a beginning of a contract. You have said, “that in this financial year, these are the things we are going to be thinking about. These are the areas we need to procure in terms of recurrent, development, therefore, prepare and plan accordingly.

Mr. Speaker, Sir, further to that, in Section 54 which talks about pricing and requirement not to split contracts says that-

“No procuring entity may structure procurement as two or more procurements for the purpose of avoiding the use of a procurement procedure except where prescribed.”

This provision has been abused by many county governments. Where you know that beyond a certain amount, it must be an open tender. You need to go through the process, then they split those contracts. If it is one for Kshs10 million, they do 10 of them at Kshs1 million. They now do directly yet there is a provision that is clear that you cannot structure as two or more procurements for the purpose of avoiding the use of the procedures, except where prescribed.

The insertion which comes under Subsection 2 is-

“That the head of a procuring entity or function shall carry out market service to inform the placing of orders or decision making on a procurement by the relevant awarding authority.”

Subsection 2b-

For infrastructure projects, the head of the procurement function in liaison with the head of the technical unit function of a procuring entity shall then prepare market survey

at the beginning of every financial year of the cost of goods and services. Thereafter, prepare current cost handbook which must be publicized. Thereafter, prepare current cost handbook for the use in decision making.”

Mr. Speaker, Sir, that is extremely important for us so that this information is available. I can see I have five more minutes.

There are many other amendments here that are of cleaning up or rather editorial review just to sort out where there had been mistakes. However, I now want to go straight into the area of real interest. There was a reason why we struggled to get those provisions in Sections 165 and 166. Many procuring entities in this country have treated our young persons and women as if the provisions of this Act are a mere suggestion.

If you look at the budget we have in our counties and in the national Government, if 30 per cent of the procurement budget goes to the hands of our young people, women and PWDs, especially our young people, a lot of the social ills we are seeing will not be there. Mind you, 30 per cent is not the number of contracts. It is value of procurement which people must understand.

Mr. Speaker, Sir, that is where we can properly integrate the bottom-up philosophy. We make sure that at the lowest level in the wards, we have created entities, companies, SACCOs and put our young people in groups that can procure a service or goods with Government. The opposite of that, the top down is just a few big wealthy entrepreneurs hoarding all of Government procurement.

Mr. Speaker, Sir, despite your political side, that is a provision no one can have a problem with. That we empower our young people. The young people at the lowest level in Nyamira County in a ward in Mugirango can be enabled and trained given the provisions up there to do business with the Government.

Mr. Speaker, Sir, I am the author and the father of the 30 per cent law because I brought it. Sen. Halake, it is so even if you look at me like that. I am the one who brought that law in 2015. The reason I want to become a Governor is that the laws we have done in this House, and I have brought a lot of laws from 2013 to date, are not being implemented by the Executive at both the national and county levels.

I assure young people and women in Nairobi County that this will be the headquarters of 30 per cent. They have the capacity and ability. They have gone to school and they have companies. We will enable them to form those companies.

I have said repeatedly that the Senate has been a stumbling block. When we brought that law, we said that every six months, every procuring entity shall give a report to the Public Procurement Regulatory Authority (PPRA) outlining the number of contracts and tenders they have given to young people, women and PWDs.

The Senate and National Assembly Committee that is charged with equalization of opportunities shall then bring that report and table in this House a list of shame of the county governments and the Government ministries at the national level that have failed to implement the provisions of 30 per cent. It is extremely important.

I thank the former Chief of Staff at State House. We went and had a meeting with him and he said they were incorporating it in performance contracting. That part of the performance contracting to be given to the accounting officers at the national level and

State agencies would include their performance when it comes to 30 per cent. However, it is not being done.

In this law, we further said that the actual account that shall be used by those companies, the mandatory signatory shall be that youth or that woman. What we have seen is that these big “tenderpreneurs” create fake companies and get a few young people to be in the list of shareholders. Those young people pretend to go and procure something. However, at the end of the day, it is them who are running the bank accounts and receiving the money. They are just using these young people. That is another abused provision.

The one I was referring to in Article 157(14) which is the law that I introduced says that—

“The Authority shall 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 this section.”

Mr. Speaker, kindly a few more minutes as I wind up.

The Speaker (Hon. Lusaka): Okay. Just try to wind up. Maybe five more minutes.

Sen. Sakaja: Thank you, Mr. Speaker, Sir. I was waiting for you to say less minutes because you gave Sen. (Dr.) Zani five minutes. Personally, I know you believe in bottom-up. Therefore, you will hear this.

Since we came to this House, we have never received this report. I have asked for it without fail from Sen. Shiyonga’s Committee on National Cohesion, Equal Opportunity and Regional Integration. I chaired it in the last House when it was a joint Committee of both Houses. It has never brought that report. We are doing a great disservice to our young people, our women and to PWD.

Mr. Speaker, Sir, there was a day I was at an establishment and a young person came and said, ‘your entire bill and that of your people is on me and here is Kshs100,000.’ I refused because I thought I am being bribed. I asked him why he would do so and he said that because of the 30 per cent rule he just dared to try doing a procurement and to date he is supplying the Ministry of Defence. Those success stories need to be shown.

When you ask young people how many have registered a company or have tried to tender, they say they have not because they heard it is hard. They also say they have not registered or even tried to register a company. I want to encourage our young people, wherever they are, it is easy to give up and not believe nor try. It just takes one step.

Nowadays business registration is very easy. You do not need to pay a lawyer such as Sen. Omogeni and his ilk who used to register businesses for a lot of money. These days, the templates are there. You can do it for some little money. If you are in Nairobi County, after August 9th, I will give you a chance to procure.

If you are in counties with forward-thinking governors like the incoming governor of Bungoma, I am sure they will get an opportunity to procure when Hon. Lusaka is the governor. Your young people in Kanduyi, Kimilili and Tongaren can actually do something with the Government. It is not just newspapers and flowers or bush clearing. They can

actually do roads. Either way, when you give contracts to the “big people”, they use young people to do the work. The people who know how to do those roads are actually our youth.

Mr. Speaker, Sir, contracts like garbage collection in Nairobi City County will be for young people. Contracts like building some roads in some of our estates will be for our young people. Cleaning up our areas will be for our young people. This is because when you give somebody with a big *kitambi*, he sits in his office and does nothing. He does not drive that vehicle or forklift. Instead, he gets young people who understand how to use that machinery.

Let us build enterprises. Let us build our Micro, Small and Medium Enterprises (MSMEs). That is one of the strong pillars that we believe in in Kenya Kwanza that we must do. If you look at the four pillars, we have agriculture, MSMEs, affordable housing and universal healthcare. When it comes to housing, who should do the doors and windows and plumbing works?

If you look at the project in Ngara, it is our young people who did it. However, we are still giving tenders to huge tenderpreneurs who exploit young people. This is one of the most important pieces of legislation we have in our country, but the most abused.

I would like to appeal to every leader in this country, especially in the Executive. No matter which political party or divide, the future of our country will be guaranteed when we ensure our young people and women are mainstreamed right into the centre of public procurement. It is not a reserve of a few. That is how we create equality of opportunities.

We cannot have cohesion or *umoja* that people are talking about without equalizing opportunities for all. No matter who you are and where you are from, you should have a chance or fair shot at life that you can actually do business with the Government. We expect that Kenyans will vote in leaders who are forward-thinking in that way.

The specific provision is 157(5) that states that an accounting officer of a procuring entity shall, when processing procurement, reserve a prescribed percentage of its procurement budget, which shall not be less than 30 per cent to the disadvantaged group and comply with the provisions of the Act and the regulations in respect of preferences and reservations.

The other important law which we passed in this House and was sponsored by Sen. Farhiya and I, is the Prompt Payment Bill. After you have given them the contracts and the tenders, pay them promptly.

I know of young people who suffered so much. For instance, when there was the UNCTAD meeting and then the Kenyatta International Convention Centre (KICC) fiasco, there is a lady who committed suicide. There are young people and women who are awarded contracts, but they are not paid.

When they are auctioned, they are worse off than before they were given tenders, in the first place. You would rather not have given them because when auctioneers visit them, they are taken further back than where they were before you gave them that tender.

I would like to appeal to our brothers and sisters in the National Assembly. Please process that Bill which was passed by the Senate. That is The Prompt Payment Bill. When that is done, I will be happy that my legislative work is done. We are now on this Bill and

we die The Prompt Payment Bill. For those not engaged in business, we also sponsored The Employment (Amendment) Bill.

All those are geared towards looking at economic empowerment for our people. We are in the era of economic empowerment. Let no one fool anyone that it is about anything else. It is about economic opportunities for each and every Kenyan starting from the lowest level; that is from the bottom to the top. It is not bottom versus up, it is bottom going up. We take them up from down. Once we do so, we are going to transform our country.

Mr. Speaker, Sir, the other provisions are important. Ideally, the state of a nation is known by the number of laws it has. That is how you know how people behave or misbehave. This Bill is big because we have become mischievous. This law is extensive. Ideally, you do not need so many rules. However, now that we have them, let us just have fidelity to them

Mr Speaker Sir, I support this Bill.

The Speaker (Hon. Lusaka): Sen. Omogeni, please proceed.

Sen. Omogeni: Thank you, Mr. Speaker, Sir, for giving me an opportunity to make my contribution in support of The Public Procurement and Asset Disposal Amendment (Amendment) Bill, 2021.

This Bill is very important. Before the introduction of this law in 2003 or thereabout, it was not easy to get opportunities, unless you had connections at the highest level of public entities. I remember before the introduction of this law, in the legal profession, we used to have lawyers who were perceived to be highly connected. Doing legal work in the parastatals was a preserve of a few law firms. However, this law opened up business for law firms within the public sector. Many law firms have benefitted from doing business with public entities like the National Social Security Fund (NSSF), National Hospital Insurance Fund (NHIF) and so on.

Mr. Speaker, Sir, with the coming into force of the devolved system of government in 2013, the hope of many professionals was that opportunities would extend to the counties. Many professionals would have opportunities to do business with counties, so that we create more employment opportunities to our youth.

If you look at various professionals such as auditors, lawyers, or surveyors, when they thrive in their businesses, it opens up opportunities for our youth. I am talking about the youth who go up to Form Four level, but they do not attain qualifications to proceed to our universities. They get absorbed into those offices to serve as clerks and messengers. This is only possible if we support professionals to do business with our public entities including county governments.

Anytime I see a law that tries to make the playing field fair for all professionals, I do nothing more than to support. That is why I am quite happy that the proposal is actually an attempt to strengthen the provisions in The Public Procurement and Asset Disposal Act. They will open more opportunities for the vulnerable in society, including our women, the youth and PWD.

Our hope is that as we pass these amendments, those who have been privileged to be chief executives of our public entities will make more opportunities available to these

vulnerable groups, so that they get opportunities to also do business with the Government and see the fruits of devolution.

Mr. Speaker, Sir, Kenyans will always find ways of going around things. Even when we have such a progressive law, you will still find there is away that they try to beat the system.

I have heard stories from my colleagues in the legal profession who respond to invitations from public entities, including county governments. For example, they may require a tender to be included in the panel of law firms that should provide services to our county governments, but you will never be instructed. You will find there is blue-eyed law firms that will always get work from the counties and paid promptly.

As we discuss about this Bill, we should propose an amendment so that it is rotational. We should put it in the law that you should give work to professionals on a rotational basis. For example, if you have 10 firms of surveyors procured to provide survey services to Nairobi City County Government by my good friend Sen. Sakaja, who wants to be governor of Nairobi City County, you should allow them to render services on a rotational basis. Today if you get work and give it to firm A, tomorrow you can give it to firm B. That way, all of them get an equal opportunity to do business with that public entity.

Mr. Speaker Sir, where the situation is appalling where we need serious intervention, is this requirement of each public entity giving 30 per cent of contracts to women, youth and Persons with Disability (PWDs). We get questions from the people we represent because they believe that it is Senators who should oversight county governments. I do not know what we will do.

Maybe we need to ask the Attorney-General (AG) to do aggressive public education forums in all counties. This will help our people to understand that the provisions of Article 185 of the Constitution, place the first obligation of oversight on our Members of County Assemblies (MCAs). They are the ones who should take their governors to task as to whether they have complied with this law of awarding 30 per cent of contracts to women, youths and PWDs.

Last week on Thursday, I was privileged to have a group of several women whom I had organized a training for in Tombe Girls in Nyamira County. When I mentioned the opportunities that are there for them to do business with the counties, they asked me to ask any of the women present to raise their hands if they had ever got an opportunity to do business with Nyamira county government. About eight women had registered companies and had applied many times to do business with Nyamira county government. However, they had never been given an opportunity.

The same thing happened to another group that I was meeting on Friday, at the Pentecostal Assemblies of God (PAG) church within the center of Nyamira County. The same thing; they never get these opportunities.

I appeal to our governors to be sensitive and even sympathetic to these groups of persons who are disadvantaged and vulnerable in society. Any time you empower women, you are actually eradicating poverty from many households. Any income a woman gets, at the end of the day, it is utilized towards uplifting either the education of their children or feeding families.

However, they are never given these opportunities. We may need to dig deeper into this law and see how it can be fully implemented and respected by many of our public entities.

Mr. Speaker Sir, I do not know why you cannot be sensitive to, for example, PWDs. These are people who are under privileged in society in terms of their ability to do what some of us who have no disabilities can do. We need to be sensitive to them, uphold and support them. If we do that, then they will appreciate that we acknowledge that as a sector that is a bit disabled, they need to be affirmed by our governments.

I am making this point to support the proposed amendments to Section 169, which is in Clause 34, that seeks to amend the payment of fees for those that are filling appeals for review.

Two years ago, we amended some sections of this Public Procurement and Asset Disposal (PPAD) Act and put a percentage. If you want to appeal and the subject contract was for a sum of Kshs2 million, you are then required to pay a percentage of that contract sum before your review is admitted. That can be damn expensive.

Therefore, this Public Procurement and Asset Disposal (Amendment) Bill is proposing in Clause 34, that Section 169 should be amended to give discretion to the waiving of fees for women, youths and PWDs. I am even proposing that the word 'may' that has been used, should be deleted and be substituted with the word 'shall'. This is so that we make it mandatory because discretion can also be abused.

Instead of living the discretion to the Appeals Review Board (ARB), we should a mandatory word and say if it a review being filed by PLWDs, women and the youths who have no employment, they should not pay any fees.

At times people can use financial influence. The people who have been in business for maybe 10 years or so can use their financial influence to deny this group of people the opportunity to do business. This fee should not be discretionary. We should use the word 'shall' so that it becomes mandatory.

I do not want to go over what Sen. Sakaja said on prompt payment but that is where we have a serious problem with procurement. I know of friends who got an opportunity to do business with government entities. They borrowed money from banks and did business but they have never been paid. Some have had their homes auctioned.

I have a very sad case in North Mugirango Constituency where somebody's matrimonial home has been placed up for auction. He did business with Nyamira county government and used that land as security. Money was advanced and he used that money to do business with the county government. Up to now, they have never been paid.

Mr. Speaker, Sir, that is not the way to treat our citizens, especially people who are trying to eke a living from this opportunity that has come up to do business with our county governments. It is not fair. They are not like some of the international companies. Companies that build our roads have support from their governments. They do not use their personal assets as security.

We have made all manner of attempts to address this problem, including the law that Sen. Sakaja made reference to the Prompt Payments Bill. Still, this is a big problem.

Pending Bills in our counties have become a huge problem. If the situation does not change, many people will not find it attractive to do business with counties.

Why should you do business with a county government and wait for your payment for six years? Why should you risk putting your property as security to do business with a government that will never pay? This is really being unfair to our young entrepreneurs and I hope some solution can be found to this problem.

I am happy with the proposed amendments to Section 41, which is Clause 7 of the Bill that wishes to address frivolous and vexatious appeals to ARB. There are Kenyans who will never accept to lose fairly. If they apply to be awarded some tender and they do not get it, it becomes a corruption allegation. They will always say somebody has influenced the process and unfairly denied them an opportunity, yet at times, they did not even pass the preliminary assessment or even the financials alone.

It is good to protect people who genuinely want to do business from these vexatious litigants. There are people who just believe in litigations. Even when they lose fairly, they will still find a way. This is a very progressive proposal. Where it is on merit and ARB has considered the appeal and comes to a conclusion that the appeal is frivolous and vexatious, then they can make a decision and strike out that appeal.

As Sen. Sakaja has put it this afternoon, there are a number of projects that have stalled because of the many appeals that have been filed to ARB.

This is progressive and I fully support. Then there is Clause 14 that proposes to amend section 54, to introduce the carrying out of market survey.

Mr. Speaker, Sir, I hear that in this country even a pen that costs Kshs50 in the market can be sold to government at Kshs500. I like this idea that we should task the head of procurement entity to carry out market survey and that market survey should be filed with the accounting officer so that if you are buying a pen at Kshs500, which costs Kshs50 in the market you should have some explanation why you have that wide deviation of Kshs50 up to Kshs500.

This is good, we want to protect public money. We do not want to create overnight millionaires. Let us have prices that are fair, that reflect the market price and not prices that clearly point to a collusion between the accounting officer and service provider for personal enrichment.

I can see my time is up, but I am also happy with what is proposed in Clause 19 of the Bill that seeks to amend Section 22 to make the sums that are quoted in the tender documents to be absolute so that this game of people putting a figure in the tender documents, but there is a window to change the figure maybe in collusion with the procuring entity, is done away with so that there is fair play.

In total, I support the Bill that is on the Floor. It is progressive but it needs to be improved. There are some things that are not clear about, like I do not understand why we should have more than one procurement profession. The accountants have one profession that deals with accountants. Lawyers have one profession that deals with lawyers. I believe it is the same with doctors. Therefore, I do not understand what is in Clause 2 that seeks to amend the principal Act by saying that other than the procurement professional body we

can have any other procurement or supply chain professional body recognized in Kenya. I find this to be fairly ambiguous.

There should be one professional body for procurement that is known and which has standard and known qualifications. If we say that there should be any other, I do not know what would be the different qualifications from the ones we know.

I support and thank you for giving me this opportunity to make my contributions.

Sen. (Dr.) Musuruve: Thank you, Mr. Speaker, Sir, for giving me this opportunity to support this Bill. I must truly say that I see this Bill coming in to ensure that there is effectiveness and efficiency in the way things are procured in organizations especially given that fact that the procurement department plays a very vital role in any organization.

It is one of the arteries in any organization and without the process being smooth, effective and transparent, then things would collapse in any organization. This Bill comes out to ensure there is objectivity, impartiality and organization in the manner in which entities are procured in organization given the fact that sometimes in some organizations the procurement process faces a lot of challenges and things are done haphazardly. However, when this Bill becomes law, it will ensure that there is order in the manner in which things are procured.

The issue of the director general is very important in this Bill because the director general will come in handy to ensure that issues of policies are there when it comes to procuring and that issues of strategies to be employed and issues of management are also followed. Even when it comes to budgets that are supposed to be allocated for procurement, then the director general will come in handy. The issue of director general will ensure that there is someone who is accountable with regard to how the procurement process is being managed.

Open leasing is very important. One, because it will be in the public domain. Being in the public domain, this will mean that the public are involved and are given a chance to look at the lease, and to even question whether they are actually involved. Even in the public domain the issues of persons with disabilities has come out strongly.

When it comes to procuring things, entities in the government, persons with disabilities are supposed to be advantaged but unfortunately they end up being disadvantaged. This is because one, sometimes they lack the money that is needed and two, sometimes they do not understand the process.

You will find that in as much as a tender is open and it has been advertised and it is said that persons with disabilities are encouraged to apply, you will find that the persons with disability also may not know the processes that need to be followed.

In this Bill, there is need to have a window for capacity building that is training. There is need to train women on what is needed of them; the processes they need to follow and the mechanisms of having their tenders accepted.

Probably in every organization there is need for capacity building for the vulnerable, for women and also the youth. When it comes to procurement process, it is supposed to be a win-win situation especially for women, persons with disabilities and the vulnerable.

I also want to comment on the issue of local contractors being brought on board. This is an issue that has been brought in one of our Bills in the Senate, whose proponent is Sen. Gideon Moi who talked about the Local Content Bill, that the procurement process should consider the locals instead of going for big multinational companies, giving them a chance and yet we also want our people to be employed.

Therefore, this Bill is going to be a win-win situation for us as a country in the sense that the locals will have an opportunity to be economically empowered. The youth, women and persons with disabilities will also have a chance because if this Bill is going to target local organizations that are registered in Kenya then it would mean that any multinational company wanting also to tender in Kenya must ensure that the locals are part of that organization and maybe three-quarter are also locals.

I support this Bill. This is a Bill that we must all support to ensure that the procurement process is going on well in all organizations because there is no organization that can survive without the procurement department. It is an important department which should be streamlined and which should be very impartial in the manner in which it operates.

I support this Bill.

The Speaker (Hon. Lusaka): Proceed, Sen. Halake.

Sen. Halake: Mr. Speaker, Sir. I rise to support the Public Procurement and Asset Disposal Amendment Bill 2021. As I have become accustomed to, whenever I look at Bills emanating from the National Assembly, I look at three things.

First, is the prosecution of devolved units. As much as this Bill has a lot of good things, I am worried that we have an opportunity to strengthen devolution through procurement which we are missing. Most of the amendments proposed are good; from the definitions that have been strengthened to ensure that inclusivity has been introduced.

When I look at it from my Senate lens, which is Article 96 of the Constitution as the House of Parliament to ensure that we protect county governments, and strengthen devolution. The fact that this is the third Senate since Independence, the Bill falls short in the sense that it is not amending to align the Act with the challenges that our devolved units are facing.

The number one thing we see in our devolved units is lack of absorption and delayed implementation of projects. When you look at why these projects have delayed – in my own county, the market that was started in 2013 is still under construction. The Isiolo Airport that was supposed to have guzzled close to Kshs3 billion is still only 1.4 kilometers long and still need a lot of work to be done on it. The Stadium that is supposed to have given our young people an opportunity to involve themselves in sport is still under construction.

When you drill down to what is causing all these delayed projects, the number one driver of these inefficiencies, waste of time and resources is the procurement process. The administrative and legal reforms that are much needed to ensure our devolved units get the implementation capacity they need, lies in this Bill.

This Bill is a National Assembly Bill and has not looked at some of the key bottlenecks in our devolved units. I do not know if this House would be kind to make

amendments to ensure that this lens of the devolved units and procurement is strengthened so that this opportunity of this legal reform is not lost by this House and this Bill is passed as is, missing that opportunity.

Issues around absorption, lengthy procurement processes, borrowing, some counties are borrowing to cover shortfalls. What is creating the waste is the lack of below optimal capacity at the same time the legal battles of procurement processes that is happening, that has been dealt with a little bit. I am happy about that because the frivolous people running to the courts have been addressed. These are some of the things we need to look at. Not just at the national level but also at the devolved unit so that we move in tandem both at the national level as well as at the devolved units.

Planning is the key driver of success in these things. I have not seen much by way of amendments in the planning section of this Bill as much as in other sections. We should not take this opportunity for legal reform to become superficial and miss the point of the key drivers of lack of inclusivity especially for women and youth in procurement and People with Disability. This House, we need to look at these issues and bring the amendments necessary to make this Bill much more robust and much more county facing.

[(The Speaker (Hon. Lusaka) left the Chair)]

[(The Temporary Speaker Sen. (Dr.) Lelegwe in the Chair)]

I would also like to address the link between this Bill and revenue allocation. This House always fights for revenue allocation to counties. The big chunk of revenue ideally goes to some of these projects. Are we making the link and ensuring that the procurement processes look and have a direct line of sight to the revenue we fight for and take to counties? There are issues around the time, the skill and manpower and capacity to plan effectively at the county level that need to be seen in this amendment Bill for it to be substantial as opposed to mostly dwelling on definitions.

I am sorry if I have not read all of it in detail because I came to the House a little late. Another thing we have not taken advantage of is the use of digital technology and E-procurement and amending this Bill so that we fight corruption, efficiencies and putting in place systems and processes that are internet based and are E-government driven so that we make our laws more topical, time bound and more *à la mode*; more of now than passed by events of the past.

There was mention in this Bill of tenders reserved for women, youth and people with Disability. However, I did not see much robust amendments made for youth, women and PWD participation. Other than some mention of tenders reserved for women, youth and people with Disability.

A few years ago the Public Procurement and Oversight Act had come up with some certain administrative and legal reforms where they asked the Principal Secretaries (PSs) to sit and form committees that will expedite these processes. We do not know if these things have been done and we need as this House to ensure that when Bills come to us from the National Assembly, the devolved units are dealt with and inclusivity and waste is dealt

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with and improvement in certain things such as fighting corruption, project implementation, timelines and things that are causing the problems in procurement sector are dealt with.

A few years ago, not last year but years ago – with COVID-19 time passed so fast, I feel like I am saying last year when it means three years ago – over Kshs100 billion which was returned to the National Treasury from Ministries which were not able to absorb the funds in that particular financial year. The same thing is happening at our counties. What is this Bill doing to ensure that absorption and project implementation and reforms, both administrative and legal are dealt with in this Bill, in all Sections?

I have seen many paragraphs deleting expressions such as things appearing, ‘subject to’. I do not know why I feel like substantial content or pain of our counties and our national Government, and substantial bottlenecks in our procurement processes and opportunities in E-government and E-procurement and in the internet-based solutions have not been built in this Bill. For that reason, while I support the Bill, some work needs to be done by this House which is mandated under Article 96 to ensure that devolved Governments are protected and that devolution starts working for the people.

Mr. Temporary Speaker, Sir, I do not want to belabor this because a lot of people have spoken to the good things in it, which is true. It has a lot of good things in it but I urge this House to look at Bills that come to this House and the reforms and amendments that come to this House from the lens of the mandate that was given to us by our constitution; which is to ensure that devolution is entrenched and counties and their governments are protected.

One of the better ways to do so it to ensure that the procurement processes which is a big driver of inefficiencies a big guzzler of our resources is looked at and amendments made in that sense. Maybe because I am the Vice Chairperson of the Committee for ICT I also look at things from that angle.

I look at opportunities that could be seized both for fighting corruption, saving resources, time and for even doing things much faster, better and within budget by using digital technology. I feel if we are amending a Bill at this late stage in 2022, perhaps that should feature prominently in this Bill.

With those few remarks Mr. Temporary Speaker, Sir, I do not wish to belabour it. I have looked at it from the lens of participation and inclusion of youth, women and people with disabilities, from the digital and e-procurement perspective.

Again, as a Senator, I have looked at it from the angle of devolution and devolved units. I think we need to do a bit more work to make sure that this amendment is fit for purpose.

I support.

The Temporary Speaker (Sen. (Dr.) Lelegwe): Hon. Senators, there are no more requests. I therefore, call upon the Mover to reply.

The Senate Majority Leader (Sen. Poghisio): Thank you very much, Mr. Temporary Speaker, Sir. I beg to reply. I like to recognise the Members who have made their contributions today.

I know that Sen. (Dr.) Zani seconded the Motion. We have had Sen. Halake, Sen. (Dr.) Musuruve, Sen. Omogeni and Sen. Sakaja and those others that I have not mentioned who may have made their contributions. I thank all of them.

It is important that from time to time a law has been put out is looked at again. I am sure that opportunities are coming again for us to look at it including the things that Sen. Halake has mentioned.

When a Bill comes round and this time it is an Amendment Bill, we look at how we can strengthen that. It is of course in the devolution that a lot of procurement is taking place these days in the devolved units. So, I do agree that in due course where there are gaps and further amendments to be made, we can do so.

Sen. Halake has brought out the other aspect on the use of Information and Communications Technology (ICT), which is of course part of these amendments. The fact that we need to make sure that ICT is not only institutionalized but also given emphasis, training thereof be given even to the people in the village to be able to know how to access information.

The Amendment Bill, which has come from the National Assembly has already been endorsed. I agree that we need to endorse it. Therefore, I urge Senators to endorse this Bill for us to pass it. This is so that it can go and raise the standards and the level of the services by the procuring entities and institutions and services to the people who are served by this Bill. These are the people who are involved in tenders, contracts and procurement.

Mr. Temporary Speaker, Sir, the one Act is Public Procurement and Assets Disposal. Sometimes, people are beaten by others in getting information because of corruption, whom you know and that has been the case many times. When you try and apply and then somebody tells you that you did not have this, or that and therefore you are disqualified. Yet there are others who know exactly what to get. That is where the disadvantages come. That is how the selection sometimes fails the test of integrity.

I agree that some of these things that we speak about we need to have a close look at what else we can do to improve this Amendment Bill,

I ask that we support and pass it. Since we are going to resume our sittings again on Wednesday, I do ask and beg to request that you defer the putting of the question to a later date pursuant to Standing Order 61(3).

I beg to reply.

The Temporary Speaker (Sen. (Dr.) Lelegwe): Hon. Senators, I therefore, defer putting of the question of Order No. 24 to a later date.

(Putting of the question on the Bill deferred)

Hon. Senators, Orders No. 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26, 27 stand deferred.

BILLS

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Second Reading

THE LANDLORD AND TENANT BILL
(NATIONAL ASSEMBLY BILL NO. 3 OF 2021)

(Bill deferred)
Second Reading

THE PERSONS WITH DISABILITIES (AMENDMENT)
BILL (SENATE BILLS NO. 29 OF 2020)

(Bill deferred)
Second Reading

THE ELECTIONS CAMPAIGN FINANCING
(AMENDMENT) BILL (SENATE BILLS NO. 51 OF 2021)

(Bill deferred)
Second Reading

THE EMPLOYMENT (AMENDMENT) BILL
(SENATE BILLS NO. 54 OF 2021)

(Bill deferred)
Second Reading

THE COTTON INDUSTRY DEVELOPMENT BILL
(SENATE BILLS NO. 55 OF 2021)

(Bill deferred)
Second Reading

THE SUGAR BILL
(NATIONAL ASSEMBLY BILLS
No. 68 OF 2019)

(Bill deferred)

MOTIONS

ADOPTION OF AUDIT REPORTS FOR COUNTY
EXECUTIVES FOR FYS 2018/2019, 2016/2017
AND 2017/2018 (VOLUMES I, II AND III)

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THAT, the Senate adopts the Report of the Sessional Committee on County Public Accounts and Investments on consideration of the Reports by the Auditor General on the Financial Statements of the following County Executives for the Financial Year 2018/2019- Embu; Homa-Bay; Kericho; Kilifi; Kirinyaga; Kisii; Kwale; Machakos; Mombasa; Nandi; Baringo; Bomet; Garissa; Kajiado; and West Pokot as contained in Volume 1 of the Report and the following County Executives- Isiolo; Kakamega; Kisumu; Laikipia; Mandera; Marsabit; Nakuru; Narok; Nyandarua; Samburu; Taita Taveta; Trans-Nzoia; Uasin Gishu; Vihiga; and Wajir, as contained in Volume 2 of the Report , Laid on the Table of the Senate on Thursday 2nd December, 2021.

(Motion deferred)

ADOPTION OF THE SPECIAL AUDIT REPORT ON UTILIZATION
OF COVID FUNDS BY 28 COUNTY GOVERNMENTS

THAT, the Senate adopts the Report of the Standing Committee on Health on the special audit report on utilization of COVID-19 funds by twenty-eight (28) county governments, laid on the Table of the Senate on Wednesday, 9th February, 2022.

(Motion deferred)

COMMITTEE OF THE WHOLE

THE INTERGOVERNMENTAL RELATIONS (AMENDMENT)
BILL (SENATE BILLS NO. 37 OF 2021)
(Committee of the Whole deferred)

COMMITTEE OF THE WHOLE

THE LAW OF SUCCESSION (AMENDMENT) BILL,
(SENATE BILLS NO. 15 OF 2021)
(Committee of the Whole deferred)

COMMITTEE OF THE WHOLE

THE PRESERVATION OF HUMAN DIGNITY AND PROTECTION
OF ECONOMIC AND SOCIAL RIGHTS BILL
(SENATE BILLS NO. 21 OF 2021)
(Committee of the Whole deferred)

COMMITTEE OF THE WHOLE

THE LIFESTYLE AUDIT BILL
(SENATE BILLS NO. 36 OF 2021)
(Committee of the Whole deferred)

COMMITTEE OF THE WHOLE

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THE SPECIAL NEEDS EDUCATION BILL
(SENATE BILLS NO. 44 OF 2021)

(Committee of the Whole deferred)

COMMITTEE OF THE WHOLE
THE MENTAL HEALTH (AMENDMENT) BILL
(SENATE BILLS NO. 28 OF 2020)

(Committee of the Whole deferred)

BILL

Second Reading

THE SACCO SOCIETIES (AMENDMENT) BILL
(NATIONAL ASSEMBLY BILLS NO. 55 OF 2021)

(Bill deferred)

COMMITTEE OF THE WHOLE
THE ELECTIONS (AMENDMENT) (NO. 3) BILL
(SENATE BILLS NO. 48 OF 2021)

(Committee of the Whole deferred)

COMMITTEE OF THE WHOLE
THE IRRIGATION (AMENDMENT) BILL
(NATIONAL ASSEMBLY BILLS NO. 12 OF 2021)

(Committee of the Whole deferred)

ADJOURNMENT

The Temporary Speaker (Sen. (Dr.) Lelegwe): Hon. Senators, there being no any other business on the Order Paper. The Senate, therefore, stands adjourned until Wednesday, 4th May, 2022 at 2.30 p.m.

The Senate rose at 4.37p.m.

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